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# Regulating Violence in Video Games: Virtually Everything

Alan Wilcox

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**By Alan Wilcox***

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## I. INTRODUCTION

Video games have an uncanny ability to stoke the fiery passions of both their advocates and detractors.[1] As video games have evolved to become more widespread and realistic, the enforcement of tighter restrictions on depictions of violence in video games, especially in those games sold to minors, has become a strong point of contention for children, parents, legislators, and the video game industry.[2] This tension is felt around the world and can produce vastly different responses depending on the attitudes and beliefs of those involved.[3] And even here in the United States, attitudes on video games can vary from decrying the indelible harm they supposedly cause, to touting the benefits to be gained by playing them.[4]

The purpose of this article is to sort through the background of, reasons for, and methods used in regulating violent video game content, to analyze the system currently used, and to suggest possible alternatives.[5] Neither the issue of whether or not the video game industry should be regulated in the first place, nor the Constitutional issues involved in any such regulation are addressed in this article.[6] Should any state overcome the First Amendment issues raised in singling out violent video games for regulation, that state shall be presented with the problem of devising a method for creating and

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1. *See infra* notes 21-42 and accompanying text.
2. *See infra* note 15-42 and accompanying text.
3. *See infra* note 80-140 and accompanying text.
4. *See infra* note 141-72 and accompanying text.
5. *See infra* note 15-185 and accompanying text.
6. *See infra* notes 1-185 and accompanying text.

imposing further regulation on the video game industry; methods for which are discussed in this article.[7]

Part II begins with a brief history on the origins of the video game industry and the beginnings of regulation of said industry.[8] Part II then progresses to the creation of the Entertainment Software Rating Board (ESRB), which is the modern, self-imposed regulatory body for the video game industry.[9] Part III expands the scope of the article to examine the various video game regulatory systems utilized in other countries throughout the world.[10] Part IV provides a summary of the available statistics on crime and video gamers, research on the effect of violent video games on behavior, and cases that draw comparisons between regulations on obscene materials and violent video game content.[11] Part V of this article discusses the virtues and difficulties with the potential regulatory schemes of parental responsibility, continued self-regulation, regulation by individual states, and a federal administrative agency.[12] Part VI discusses the potential future impact of an impending United States Supreme Court decision on the regulation of violence in video games and the future of the video game industry as it relates thereto.[13] Finally, Part VII brings this article to a close.[14]

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7. *See infra* notes 173-83 and accompanying text.
8. *See infra* notes 15-42 and accompanying text.
9. *See infra* notes 43-79 and accompanying text.
10. *See infra* notes 80-140 and accompanying text.
11. *See infra* notes 141-72 and accompanying text.
12. *See infra* notes 173-83 and accompanying text.
13. *See infra* notes 184-85 and accompanying text.
14. Unless otherwise indicated, the term "game" or "video game," as used in this comment, shall refer to interactive computer games distributed and playable through any media, whether physical or digital, and any associated necessary software and hardware. The term "gamer" shall refer to a person who plays video games on a regular basis. Finally, the term "PC" shall refer to multipurpose, individually owned personal computer systems, and the term "console" shall refer to specialized personal computer systems whose primary purpose is for running video game programs (e.g., the Sony PlayStation 3, the Microsoft Xbox 360, or the Nintendo Wii to name a few).

## II. PAST AND CURRENT RESTRICTIONS ON VIOLENCE IN VIDEO GAMES

### *A. The Origins of Video Game Regulation*

Before discussing the origin of video game regulation, one must first discuss the origin of video games.[15] While there is some debate as to whether it qualifies as a video game, the first visually displayed electronic game ever patented was the Cathode-Ray Tube Amusement Device, patented in 1947, which involved using knobs and screen overlays to direct a light, representing a missile, to its intended target.[16] Others insist that the first video game was the table tennis simulator *Tennis for Two*, created by William Higinbotham in 1958, using an oscilloscope to display the trajectory of a virtual ball upon being struck by an opposing player.[17] Another contender for

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15. While the focus of this comment is not to provide a complete history of the video game industry, nor to cite every controversial video game produced, it will touch on some of the larger historical events related to this topic. A more complete time-line of the history of video games from 1889 to 2001 may be found in Steve L. Kent's *The Ultimate History of Video Games: From Pong to Pokemon – The Story Behind the Craze That Touched Our Lives and Changed the World. See infra* note 18.

16. *See* D.S. Cohen, *Cathode-Ray Tube Amusement Device – The First Electronic Game*, ABOUT.COM, http://classicgames.about.com/od/classicvideogames101/p/CathodeDevice.htm (last visited Nov. 21, 2010); *see also* U.S. Patent No. 2,455,992 (filed Jan. 25, 1947). As this device was purely mechanical in operation, and does not use any computer programming, memory, or computer generated graphics, there are those that dispute its status as the first "video game." *See id.*

17. *See* Peter Nowak, *Video Games: Out of the Lab and Into the Living Room*, CBC NEWS (Oct. 17, 2008, 12:05 PM ET), http://www.cbc.ca/technology/story/2008/10/16/tech-consoles.html. Those that contest awarding the title of first video game to Higinbotham's creation do so because its oscilloscope display did not utilize a video signal. *See* Joe Gettler, *The First Video Game?: So, Was 'Tennis for Two' the First?*, BROOKHAVEN NATIONAL LABORATORY, http://www.bnl.gov/bnlweb/history/higinbotham4.asp (last visited Dec. 31, 2010). This same justification can also be used to discount the Nimrod computer, built to play the strategy game "Nim" by Ferranti International and first exhibited in 1951, and the Electronic Delay Storage Automatic Calculator (ESDAC), programmed in 1952 by A.S. Douglas to play OXO or Tic-Tac-Toe (also known as Naughts and Crosses), from the running for first video games and systems as well. *See id.*; *see also* David Winter, Introduction to the Story of Pong, PONG-STORY, http://www.pong-story.com/intro.htm (last visited Dec. 31, 2010);

the title of first video game is *Spacewar*, created by Steve Russell in 1962 while he was a student at the Massachusetts Institute of Technology.[18] And finally, despite its failure to live up to its commercial expectations, the undeniable first home video game console came in 1972 with the Magnavox Odyssey, created by Ralph Baer.[19] Three years later, in 1975, Atari, Inc. released a home version of its popular arcade game PONG and, thanks to the popularity and sales of this system the video game industry was truly born.[20]

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*and* David Winter, *Pong-Story: Who Did It First?*, PONG-STORY, http://www.pong-story.com/inventor.htm (last visited Dec. 31, 2010). Proponents of this argument assert that a video game must display its content through the conversion of electronic signals into images on a screen through a raster scan pattern, as they claim this is a requirement for fulfilling the "video" portion of the term "video game." *See id.* A raster scan pattern is a series of horizontal lines made up of individual pixels, created by an electron beam. *See* Gettler, *supra*; *see also* Raster, FREE ON-LINE DICTIONARY OF COMPUTING, http://foldoc.org/raster (last visited Dec. 31, 2010).

18 . *See* STEVEN L. KENT, THE ULTIMATE HISTORY OF VIDEO GAMES: FROM PONG TO POKEMON – THE STORY BEHIND THE CRAZE THAT TOUCHED OUR LIVES AND CHANGED THE WORLD 19-25 (Three Rivers Press 2001). *Spacewar* was programmed on a computer the size of a large automobile, called the PDP-1 (Programmable Data Processor-1), which had been donated to the institute by its creator, Digital Equipment Company, in the summer of 1961. *See id.* The game required two players, and pitted them against one another in a virtual spaceship duel with digital missiles near a sun. *See id.* Despite requiring nearly six months and 200 hours of work to complete the first version of the game, not to mention numerous additions made by others, *Spacewar* was never officially copyrighted or commercially exploited by its creators. *See id.*

19. *See* David Winter, *Pong-Story: Magnavox Odyssey, the First Video Game System*, PONG-STORY, http://www.pong-story.com/odyssey.htm#P1 (last visited Jan. 30, 2011); *and* Alpex Computer Corp. v. Nintendo Co. Ltd., 102 F.3d 1214, 1215 (Fed. Cir. 1996); *see generally* RALPH H. BAER, VIDEOGAMES: IN THE BEGINNING (Rolenta Press 2005) (relating the story of the origins of the Magnavox Odyssey, its downfall, and other projects created through the efforts of the author, Ralph Baer). Magnavox hampered sales of the Odyssey by creating television advertising for it that left viewers with the impression that the Odyssey would only work on Magnavox televisions; by charging one hundred dollars ($100) for the system, instead of the $19.95 originally envisioned by Baer; and by only selling its products in its franchised retail stores. *See* Winter, *supra*; *and see* Kent, *supra* note 18, at 41.

20. *See Atari Home Pong*, THE ATARI MUSEUM, http://www.atarimuseum.com/videogames/dedicated/homepong.html (last visited

Controversial violent content of note began appearing in video games shortly after the creation of the home video game industry, starting with Exidy's 1976 arcade game *Death Race*.[21] Based on a movie, *Death Race* involved the player scoring points in a set amount of time by running over humanoid stick figure "gremlins," who would produce an "ahhhk" sound and a cross-shaped gravestone upon being run over.[22] Public outcry against the game led to the cessation of sales of *Death Race* shortly after its release, and caused the television show *60 Minutes* to air a segment investigating the psychology of video game players.[23] Another game of ill repute that earned notoriety for its violent and sexual content was Mistique's 1983 game *Custer's Revenge*, the entire premise of which was to navigate the naked Custer through a hail of arrow fire to reach the opposing side and have sex with a Native American woman tied to a post.[24] While the creators of *Custer's Revenge* insisted that the sex was consensual, the scenario and its depiction sufficiently upset several groups to cause them to protest the game.[25] In 1992 Digital Pictures released the controversial game *Night Trap*, which featured the player observing a house full of scantily clad women, and then setting traps to save them from being attacked by vampires.[26] *Night Trap* became so controversial through the apparently mistaken belief by its opponents that the focus of the game was killing the women in

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Jan. 30, 2011). While Atari went into production predicting the sale of 50,000 units, it sold nearly 150,000 units in the Christmas season of of 1975 alone. *See id.*

21. *See* Lauren Gonzalez, *When Two Tribes Go to War: A History of Video Game Controversy – The Major Offenders*, GAMESPOT, http://www.gamespot.com/features/6090892/p-2.html (last visited Jan. 30, 2011). The game was originally going to be called *Pedestrian*, and the gremlins were to be people, but this was changed later in production. *See id.*

22. *See id.*

23. *See id.*; *see also* BRAD KING & JOHN BORLAND, DUNGEONS AND DREAMERS: THE RISE OF COMPUTER GAME CULTURE FROM GEEK TO CHIC (McGraw-Hill Osborne Media 2003) (describing through narrative the lives and struggles of several figures who were responsible for the creation of many popular games, such as *Ultima Online* and *Dungeons & Dragons*).

24. *See id.* at 3.

25. *See id.* The groups outraged included Women Against Pornography, the National Organization for Women, and the American Indian Community House. *See id.*

26. *See id.* at 4.

the house observed by the player, rather than saving them.[27] Yet another game released in 1992 was the now infamously violent and bloody fighting game *Mortal Kombat*, first as an arcade game and later, in 1993, on home consoles.[28] The level of violence in *Mortal Kombat* led to two different console versions being released in North America; an unedited version that contained all the blood and gore of the arcade version, released by Sega of America, Inc. (Sega), and a version that removed the most explicitly violent moves and replaced the blood with "sweat," released by Nintendo of America Inc. (Nintendo).[29] In the end, these games took center stage in the congressional hearings and debates that took place in 1993 and 1994 to discuss regulation of the video game industry.[30]

On December 3, 1993 Senators Joseph Lieberman and Herb Kohl led a joint congressional hearing on the then growing concerns over the level of violence in video games, as brought to the foreground by the recently released game *Mortal Kombat*.[31] Through a series of

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27. *See id.*; *see also* Kent, *supra* note 18, at 472-73 (discussing in more detail the misconception that led to *Night Trap*'s level of infamy).

28. *See* Gonzalez, *supra* note 21, at 5; and Lindsey Gruson, *Video Violence: It's Hot! It's Mortal! It's Kombat!; Teen-Agers Eagerly Await Electronic Carnage While Adults Debate Message Being Sent*, THE NEW YORK TIMES (Sept. 16, 1993), http://www.nytimes.com/1993/09/16/nyregion/video-violence-it-s-hot-it-s-mortal-it-s-kombat-teen-agers-eagerly-await.html.

29. *See* Gruson, *supra* note 28; *and The 25 Dumbest Moments in Gaming – Nintendo's Mortal Mistake*, GAMESPY, http://archive.gamespy.com/articles/june03/dumbestmoments/readers/index4.shtml (last visited Jan. 31, 2011). Some of the more gruesome attacks, labeled "Fatalit[ies]" by the game, involved acts such as tearing out one's opponent's still-beating heart and displaying it, ripping off an opponent's head and spinal chord, and burning an opponent until only their skeleton remained. Syd Lexia, *The MK Fatality Fest*, SYDLEXIA.COM (Apr. 9, 2005), http://www.sydlexia.com/fatalinstinct.htm.

30. *See* Chris Kohler, *This Day in Tech: July 29, 1994: Videogame Makers Propose Ratings Board to Congress*, WIRED.COM (July 29, 2009), http://www.wired.com/thisdayintech/2009/07/dayintech_0729/ [hereinafter *Day in Tech*].

31. *See id.*; *see also* Kent, *supra* note 18, at 470-80 (describing the congressional hearings and the debate surrounding them in more detail). The issue was brought to Senator Lieberman's attention by his chief of staff William Andresen shortly after *Mortal Kombat*'s release in 1993. *See* Chris Kohler, *GameLife: How Protests Against Games Cause them to Sell More Copies*, WIRED.COM (Oct. 30, 2007), http://www.wired.com/gamelife/2007/10/how-protests-ag/ [hereinafter *GameLife*]; *and see generally Lieberman Announces*

joint congressional hearings that bled over to 1994, Congress brought in experts and representatives of both Sega and Nintendo to explain the issue and describe the measures being taken to protect minors from inappropriate content.[32] These hearings led Senators Lieberman, Kohl, and Dorgan to introduce the Video Game Rating Act of 1994 (1994 Act) on February 3, 1994.[33] The 1994 Act, which would terminate if the video game industry succeeded in creating a satisfactory rating system within one year, sought to establish a federal commission that would create an industry-wide standard for video game ratings.[34] The 1994 Act indeed succeeded in goading the

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*Departure of Long-time Chief of Staff Andresen*, SENATOR JOSEPH LIEBERMAN (CT) (Jan. 16, 2003), http://lieberman.senate.gov/index.cfm/news-events/news/2003/1/lieberman-announces-departure-of-longtime-chief-of-staff-andresen (listing the years during which William Andresen was Senator Lieberman's chief of staff).

32. *See* Day in Tech, *supra* note 30; *and see* GameLife, *supra* note 31. The experts, which included people such as a representative from the National Coalition on Television Violence a university professor, claimed that violent video games were "training early killers,"were "sexist and racist," and were causing children to "perceive Asians, any Asians, as being extremely violent, as being dangerous, as being evil." *See* Day in Tech, *supra* note 30; *and see* GameLife, *supra* note 31. Meanwhile, Nintendo claimed that its games were suitable for all ages, and Sega pointed to its self-imposed rating system and warning label ("MA-13," or intended for mature audiences over thirteen years of age, in the case of *Mortal Kombat*) as evidence of their responsible business practices. *See* Day in Tech, *supra* note 30. As the hearings went on, however, the two competitors undermined their collective position by continually attacking each other with such animosity that Senator Lieberman later expressed shock over the conduct of the Nintendo and Sega executives. *See id.*

33. *See id.*; *and see* Video Game Rating Act, S. 1823, 103d Cong. (1994), *available at* http://thomas.loc.gov/cgi-bin/query/z?c103:S.1823:. A similar bill , called the Video Games Ratings Enforcement Act, was introduced in 2008 by Representatives Jim Matheson and Lee Terry, and would have required ESRB rating labels to be affixed to games and their descriptions displayed in stores, and prohibited the sale of M and AO rated games to people under the ages of seventeen and eighteen respectively, under threat violation of the Federal Trade Commission's rules against unfair or deceptive acts or practices and a fine of up to five thousand dollars per violation. See Video Games Ratings Enforcement Act, H.R. 5990, 110th Cong. (2008)

34. *See* Day in Tech, *supra* note 30; *and see* Video Game Rating Act, *supra* note 33, at § 4. Per the terms of the 1994 Act, an "Interactive Entertainment Rating Commission" was created to "coordinate with the video game industry in the development of a voluntary system for providing information concerning the contents of video games to purchasers and users," and, one year after the date of

video game industry into creating the ESRB, and it thereafter died in committee.[35]

Before expounding further upon the ESRB, it is worth mentioning at least one game that surprisingly went without mention during the congressional hearings of 1993 and 1994.[36] *Doom*, originally released for the PC by id Software on December 10, 1993, was a popular game of note that featured wanton violence.[37] *Doom* allowed the player to take on the role of a lone surviving marine who must fight his way through a hoard of demons (who die bloody deaths), with a variety of weapons, so as to prevent an invasion of Earth.[38] While *Doom* was heralded as a revolutionary game that set the standard for the first person shooter (FPS) game genre, it gained notoriety in 1999 when it became associated with the deplorable actions of the Columbine High School shooters Eric Harris and Dylan Klebold.[39] After the shooting, it was discovered that one of Harris' favorite games was *Doom*, that Harris' nickname "Reb" was inspired by one of the characters in *Doom*, and that before the shooting either Harris or Klebold was seen in a video with a sawed-

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enactment of the 1994 Act, to "evaluate whether any voluntary standards proposed by the video game industry are adequate to warn purchasers and users about the violence or sexually explicit content of video games" and "determine whether the voluntary industry response is sufficient to adequately warn parents and users of the violence or sex content of video games." Video Game Rating Act, *supra* note 33, at § 4.

35. *See* Day in Tech, *supra* note 30; *and see infra* notes 42-46 and accompanying text.

36. *See supra* notes 31-35 and accompanying text; *and see* Gonzalez, *supra* note 21, at 7.

37. *See* Gonzalez, *supra* note 21, at 7; *and see* Molly Wood, *Tech Trends Watch: Doom 3: A Short History of Shooting Stuff*, CNET (Aug. 2, 2004), http://www.cnet.com/4520-6022_1-5148371-1.html. The popularity of Doom was such that by the spring of 1994 it was the third most popular software application and, according to id Software, became "one of the most downloaded pieces of software of all time." *See* Wood, *supra*.

38. *See Doom (video game)*, WIKIPEDIA (last modified Feb. 5, 2011), http://en.wikipedia.org/wiki/Doom_%28video_game%29.

39. *See* The GameSpy Staff, *GameSpy's Top 50 Games of All Time*, GAMESPY.COM, http://archive.gamespy.com/articles/july01/top501aspe/index4.shtm (last visited Feb. 6, 2011); *and see* Gonzalez, *supra* note 21, at 7. Columbine High School, in Littleton, Colorado, was where Harris and Klebold killed twelve fellow students, a teacher, and themselves on April 20, 1999. *See* Gonzalez, *supra* note 21, at 7.

off shotgun named "Arlene," a reference to *Doom*, in his lap.[40] This connection between *Doom*, other violent media, and the shooting caused several families of the victims of the shooting to file suit against several entertainment companies for wrongful death, but their suit was later dismissed for failing to state a claim upon which relief could be granted.[41] Despite *Doom* acting as an inspiration for the

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40. *See id.*; *and see* Lynn Bartels & Carla Crowder, *Fatal Friendship: How Two Suburban Boys Traded Baseball and Bowling for Murder and Madness*, ROCKY MOUNTAIN NEWS (Aug. 22, 1999), http://denver.rockymountainnews.com/shooting/0822fatal.shtml.

41. *See* Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002). The following entertainment companies were listed as defendants in the suit: Acclaim Entertainment, Inc., Activision, Inc., Apogee Software, Inc., Atari Corporation, Capcom Entertainment, Inc., Eidos Interactive, id Software, Inc., Island Pictures, Infogrames, Inc. f/k/a GT Interactive Software Corp., Interplay Entertainment Corp., Midway Home Entertainment, New Line Cinema, Nintendo of America, Meow Media, Inc. d/b/a www.persiankitty.com, Network Authentication Systems, Inc. d/b/a www.adultkey.com and www.porntech.com, Palm Pictures, Polygram, Sega of America, Inc., Sony Computer Entertainment America, Inc., SquareSoft, Inc. d/b/a Square USA, Inc., Time Warner, Inc., and Virgin Entertainment Group, Inc. *See id.*

The claims against Island Pictures, New Line Cinema, Palm Pictures, Polygram, and Time Warner, Inc., for negligence and strict liability centered around the production and distribution of the film *The Basketball Diaries*, which features a scene in which the protagonist kills his teacher and several classmates with a shotgun. *See id.* at 1268-69.

The claims against Acclaim Entertainment, Inc. (*Mortal Kombat* and *Mortal Kombat II*), Activision, Inc. (*Mech Warrior*, *Mech Warrior 2*, *Nightmare Creatures*, and *Wolfenstein*), Apogee Software, Inc. (*Doom* and *Wolfenstein*), Atari Corporation (*Doom*), Capcom Entertainment, Inc. (*Resident Evil*), EIDOS Interactive (*Final Fantasy*), id Software, Inc. (*Doom* and *Quake*), Infogrames, Inc. f/k/a GT Interactive Software Corp. (*Doom*), Interplay Entertainment Corp. (*Redneck Rampage*), Midway Home Entertainment (*Doom* and *Quake*), Nintendo of America (*Nightmare Creatures*), Sega of America, Inc. (*Quake*), Sony Computer Entertainment America (*Final Fantasy*), Square Soft, Inc. d/b/a Square USA, Inc. (*Final Fantasy*) and Virgin Entertainment Group, Inc. (*Resident Evil*) for producing and/or distributing the above indicated video games, which were purportedly violent and frequently played by Harris and Klebold, stated that the above games made violence enjoyable and disconnected from consequence, trained Harris and Klebold how to aim and shoot a gun, and thereby caused them to act out such violence. *See id.* at 1269.

Finally, the claims against Meow Media, Inc. d/b/a www.persiankitty.com and Network Authentication Systems, Inc. d/b/a www.adultkey.com and www.porntech.com for negligence, strict liability, and Racketeer Influenced and Corrupt Organizations activity were resolved later, separately. *See id.* at 1269-70.

modern FPS game genre, its connection to a national tragedy gives it a place beside the controversial video games that contributed to the creation of the ESRB.[42]

### *B. The ESRB*

In 1994 the trade association Entertainment Software Association (ESA) was formed under its original title, the Interactive Digital Software Association, to serve the business and public affairs needs of computer and video game publishers, including combating piracy, providing business and consumer research, building relationships with world governments, and assisting in the protection of the intellectual property rights of its member companies.[43] The ESA in

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42. *See supra* notes 21-41 and accompanying text; *and see generally* Gonzalez, *supra* note 21, at 7 (listing *Doom* as one of the "Major Offenders" in a history of controversial video games). For the sake of the edification of the readers of this comment, FPS is only one of several terms in the video gamer vernacular. Perhaps the most common are "Fighting," "FPS," "MMO" (or Massively Multiplayer Online game, sometimes abbreviated "MMOG" and usually connected with another term; e.g. "MMORPG"), "RPG" (or Role-playing Game), and "RTS" (or Real-Time Strategy). For a somewhat more complete list of video game genres, video game related terms, and their descriptions please see http://en.wikipedia.org/wiki/Video_game_genres or http://www.respecttheratings.com/gaming101.html.

43. *See The Entertainment Software Association – About the ESA*, THE ENTERTAINMENT SOFTWARE ASSOCIATION, http://www.theesa.com/about/index.asp (last visited Dec. 18, 2010); *see also Entertainment Software Association*, WIKIPEDIA, http://en.wikipedia.org/wiki/Entertainment_Software_Association (last visited Dec. 18, 2010). In addition to its worldwide anti-piracy program, video game sales and player research, lobbying governments, and filing suit against individuals and regulations on behalf of its member companies, the ESA also owns and operates the popular and widely attended Electronic Entertainment Expo (commonly known as "E3"). *See The Entertainment Software Association – ESA Members*, THE ENTERTAINMENT SOFTWARE ASSOCIATION, http://www.theesa.com/about/members.asp (last visited Dec. 18, 2010). The following is a list of the member companies of the ESA as of December 18, 2010: 505 Games, Capcom USA, Inc., Crave Entertainment, Deep Silver, Disney Interactive Studios, Inc., Eidos Interactive Ltd., Electronic Arts Inc., Epic Games, Inc., Her Interactive, Inc., Ignition Entertainment, Konami Digital Entertainment, Microsoft Corporation, MTV Games, Namco Bandai Games America Inc., Natsume Inc., Nexon America, Inc., Nintendo of America Inc., NVIDIA, O-Games, Inc., Perfect World Entertainment, Playlogic Entertainment, Inc., Realtime Worlds, Slang, SEGA of America, Inc., Seven45 Studios, Sony Computer Entertainment America Inc., Sony Online Entertainment, Inc., SouthPeak Interactive Corporation, Square Enix, Inc., Take-Two Interactive Software, Inc.,

turn formed the ESRB in 1994 to create a detailed rating system for video games, to aid consumers in deciding which games might be appropriate for their children and other family members.[44] The ESRB's video game rating system includes six recommended minimum age levels and more than thirty different content descriptors, which provide consumers with information not only as to the suggested minimum age level for players, but information as to the various kinds of objectionable material to be found in each video game.[45] Although use of the ESRB rating system is voluntary, nearly

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Tecmo Koei America Corporation, THQ, Inc., Trion Worlds, Inc., Ubisoft Entertainment, Inc., Warner Bros. Interactive Entertainment Inc., and XSEED Games. *See id.*

44. *See* About the ESRB – Frequently Asked Questions, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/faq.jsp#1 (last visited Dec. 18, 2010). According to research conducted by the ESRB, parent consumers of video games wanted a more detailed rating system than that used for movies; one that contained both an age-based rating system and concise and impartial information about the kind of potentially objectionable material to be found in each game. *See id.*

45. *See id.* The recommended minimum age levels include: (1) "EC," or Early Childhood, for games that contain content suitable for people ages three and older, and no material that would be objectionable to parents; (2) "E," or Everyone, for games that contain content suitable for people ages six and older due to minimal cartoon, fantasy, or mild violence, and/or infrequent use of mild language; (3) "E10+," or Everyone Ten and Older, for games that contain content suitable for people ages ten and older due to cartoon, fantasy, or mild violence, mild language, and/or minimal suggestive themes; (4) "T," or Teen, for games that contain content suitable for people ages thirteen and older due to violence, suggestive themes, crude humor, minimal blood, simulated gambling, and/or infrequent use of strong language; (5) "M," or Mature, for games that contain content suitable for people ages seventeen and older due to intense violence, blood and gore, sexual content, and/or strong language; (6) "AO," or Adults Only, for games that contain content suitable for people ages eighteen and older due to prolonged scenes of intense violence and/or graphic sexual content and nudity. *See* ESRB Ratings – Ratings Guide, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_guide.jsp (last visited December 20, 2010). The rating system also includes "RP," or Rating Pending, for games that have been submitted for rating to the ESRB but have not yet been assigned a rating as of the time of the creation of the advertising including this rating. *See id.*

The ESRB content descriptors are intended to provide an additional tool for consumers to determine if a game is suitable for their family members and include: (1) Alcohol Reference, for games that contain reference to and/or depictions of alcoholic beverages; (2) Animated Blood, for games that contain discolored and/or unrealistic depictions of blood; (3) Blood, for games that contain depictions of

all video games sold in retail stores in the United States and Canada use the ESRB rating system.[46] The ESRB regularly rates over one

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blood; (4) Blood and Gore, for games that contain depictions of blood and the mutilation of body parts; (5) Cartoon Violence, for games that contain cartoon-like situations and characters involving violence, including where a character is unharmed after the inflicted violence; (6) Comic Mischief, for games that contain depictions or dialogue that involve slapstick or suggestive humor; (7) Crude Humor, for games that contain depictions or dialogue involving vulgar antics, including "bathroom" humor; (8) Drug Reference, for games that contain references to and/or depictions of illegal drugs; (9) Fantasy Violence, for games that contain human or non-human characters in violent situations that are easily distinguishable from real life; (10) Intense Violence, for games that contain graphic and realistic depictions of violence, including extreme and/or realistic blood, gore, weapons, or depictions of human injury and death; (11) Language, for games that contain mild to moderate use of profanity; (12) Lyrics, for games that contain mild references to alcohol or drug use, profanity, sexuality, or violence in music; (13) Mature Humor, for games that contain depictions or dialogue involving "adult" humor, including sexual references; (14) Nudity, for games that contain graphic or prolonged depictions of nudity; (15) Partial Nudity, for games that contain brief and/or mild depictions of nudity; (16) Real Gambling, for games that contain a system for players to gamble, including wagering real cash or currency; (17) Sexual Content, for games that contain non-explicit depictions of sexual behavior, possibly including partial nudity; (18) Sexual Themes, for games that contain references to sex or sexuality; (19) Sexual Violence, for games that contain depictions of rape or other violent sexual acts; (20) Simulated Gambling, for games that contain a system for players to gamble without wagering real cash or currency; (21) Strong Language, for games that contain explicit and/or frequent use of profanity; (22) Strong Lyrics, for games that contain explicit and/or frequent references to alcohol or drug use, profanity, sex, or violence in music; (23) Strong Sexual Content, for games that contain explicit and/or frequent depictions of sexual behavior, possibly including nudity; (24) Suggestive Themes, for games that contain mild provocative references or materials; (25) Tobacco Reference, for games that contain references to and/or images of tobacco products; (26) Use of Drugs, for games that contain the consumption or use of illegal drugs; (27) Use of Alcohol, for games that contain the consumption of alcoholic beverages; (28) Use of Tobacco, for games that contain the consumption of tobacco products; (29) Violence, for games that contain scenes involving aggressive conflict, potentially including bloodless dismemberment; and (30) Violent References, for games that contain references to violent acts. *See id.* Additionally, these content descriptors may be preceded by the term "Mild," in which case such content is in low frequency, intensity, or severity. *See id.*

46. *See* About the ESRB – Frequently Asked Questions, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/faq.jsp#1 (last visited Dec. 21, 2010).

thousand games each year, with a total of 1,791 ratings having been assigned in 2009.[47]

The ESRB game rating process begins during the final stages of development of a video game, before its release to the public, with submission of a detailed ESRB questionnaire by a game publisher.[48] Additionally, publishers must provide the ESRB with a DVD of all the objectionable material described in the questionnaire, including typical game play, missions, objectives, cutscenes, and the most extreme instances of material that falls under each of the ESRB's rating content descriptors.[49] Submissions are then checked for completeness, including potentially having ESRB staff members play an alpha or beta version of the game.[50] The submitted questionnaire,

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47. *See id.* According to the ESRB, of those games rated in 2009, approximately 60% were rated E, 16% were rated E10+, 18% were rated T, and 6% were rated M, including instances where a publisher revised and resubmitted a game for the purpose of potentially receiving a different rating than that originally assigned. *See Rating Category Breakdown*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/about/categories.jsp (last visited Dec. 21, 2010).

48. *See Ratings Process*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_process.jsp (last visited Dec. 21, 2010). Submitted questionnaires are required to specify all objectionable content that will be included in the game, including the most extreme content present in the game under the ESRB content descriptor categories (such as violence, sexuality, and alcohol or drug use or reference), the game's context (such as setting, storyline, and objectives), and the relative frequency of objectionable material. *See* Frequently Asked Questions – About the Rating Process, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/faq.jsp#15 (last visited Dec. 21, 2010). These submissions are frequently accompanied by relevant information related to the objectionable material, such as lyrics sheets and scripts. *See id.*

49. *See Ratings Process*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_process.jsp (last visited Dec. 21, 2010). Submitted materials must also disclose any content that is not readily playable but that will be included in the game code on the final game disc. *See id.*; *see also infra* 70-78.

50. *See Ratings Process*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_process.jsp (last visited Dec. 21, 2010). Alpha version testing involves simulated or actual operational testing of video game software by potential users, or an independent test team at the developers' site, involving parties outside the development organization, and is often utilized as a form of internal quality testing for off-the-shelf software. *See Software Testing Certification ISTQB, ASTQB, CTFL: Standard Glossary of Terms Used in Software Testing*, AMERICAN SOFTWARE TESTING QUALIFICATIONS BOARD, INC. (Apr. 1, 2010), http://www.astqb.org/educational-resources/glossary.php#A. Beta version

materials, and DVD are then reviewed by at least three trained ESRB game raters.[51] Each rater will independently assign a rating and series of content descriptors to the game, and will then converse with the other raters to reach a consensus as to the final rating and content descriptors to be recommended for the game.[52] Upon receiving a recommended rating and series of content descriptors ESRB staff members review the recommendations, compare them with previous

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testing involves operational testing by potential and/or existing users at external sites to determine if a component or system satisfies user needs, and is often used as a form of external testing of software and acquiring feedback from the market. *See id.*

51. *See Ratings Process*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_process.jsp (last visited Dec. 21, 2010). Game raters are adults who typically have experience with children either through prior work experience, education, or as parents or caregivers. *See* Frequently Asked Questions – About the Rating Process, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/faq.jsp#14 (last visited Dec. 21, 2010). They rate games on a full-time basis, and are assisted by part-time raters when necessary. *See id.* Raters are not required to have special skill as video game players, but are required to play the final release versions of games when not rating, time permitting. *See id.* The identities of raters are kept confidential and they are not allowed to have any ties to the computer or video game industry, so as to prevent improper influence on ratings. *See id.*

Raters are not required to actually play the games they rate because lengthy play time required to complete many games (often upwards of fifty hours) would make this impractical, variability in game play experience based on player choice would disallow assurance that a rater's play experience would be representative of the most extreme content present in the game, and development schedules might not allow game publishers enough time to provide a fully tested and working version of the game to ESRB raters before release. *See* Frequently Asked Questions – About the Rating Process, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/faq.jsp#17 (last visited Dec. 21, 2010). Additionally, ESRB staff, including raters, review released versions of games, particularly those that generate consumer inquiries, to ensure that game publishers provided accurate and complete rating materials. *See id.* The ESRB may then take various enforcement actions, including sanctions, should it be discovered that the publisher did not fully disclose all objectionable game content. *See Enforcement*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/enforcement.jsp (last visited Dec. 22, 2010); *see also infra* notes 70-78.

52. *See Ratings Process*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_process.jsp (last visited Dec. 21, 2010). In reaching a consensus raters may review previously rated games and consider consistency with previous ratings and precedent. *See id.*

ratings where necessary, with a focus on maintaining consistency, and then issue a certificate with the official rating and content descriptors to the game's publisher.[53] A rating summary is then created shortly thereafter, which furnishes additional details and key factors that went into the assigned rating and content descriptors.[54] A game publisher may then accept the assigned rating and content descriptors, or revise the game's content and resubmit it to the ESRB, in which case the rating process is repeated from the beginning.[55] Game publishers may also appeal an assigned rating or content descriptor to an appeals board made up of publishers, retailers, and other professionals.[56] Unless requested by the publisher, a game's rating, content descriptors, and rating summary are posted to the ESRB website thirty days after assignment of said rating.[57] Upon completion of the rated game, publishers send final copies to the ESRB for packaging review and potential later review of final game content.[58] The ESRB also imposes restrictions on advertising and publications for games that utilize its rating system.59

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53. *See id.* ESRB ratings do not apply to online interactions, user-generated content, and downloadable music, and a warning stating as much is required for any games that can be played online with others, that enable exposure to user-generated content, or that allow users to download songs. *See* Frequently Asked Questions – About the Rating Process, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/faq.jsp#13a (last visited Dec. 24, 2010). However, downloadable content produced by a game publisher to expand an ESRB rated game is automatically assigned the same rating as the original game, unless its content exceeds that rating. *See id.* Should such downloadable content exceed its affiliated game's rating it must be submitted to the ESRB and a new rating assigned to the downloadable content. *See id.*

54. *See Ratings Process*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_process.jsp (last visited Dec. 21, 2010). Rating summaries are not included with the game itself, but may be accessed via the video game rating search feature of the ESRB homepage, http://www.esrb.org/index-js.jsp, a free application for the Apple iPhone and Google Android mobile devices, or downloadable ESRB rating search application. *See ESRB Rating Summaries*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratingsummaries/ (last visited Dec. 21, 2010).

55. *See Ratings Process*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_process.jsp (last visited Dec. 21, 2010).

56. *See id.* The members of this appeals board are not identified. *See id.*

57. *See id.*

58. *See id.* The ESRB Advertising Code of Conduct dictates the requirements for and limitations on ratings labels on game packaging and advertisements for

All game publishers utilizing the ESRB rating system are required to follow a series of guidelines for various forms of promotional materials.[60] These promotional materials include all materials produced and distributed by a company for promotion of interactive entertainment software.[61] The only materials specifically excluded from these restrictions are editorial content that the publisher did not produce, sponsor, underwrite, or pay a third party to create, and advertisements and promotions directed solely towards those in the video game industry.[62] The principle restrictions for

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games, including the size and location of the age rating included on the front cover of game packaging and that the content descriptors are to be included on the back cover. *See Game Ratings & Descriptor Guide*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Dec. 22, 2010); *see also Enforcement*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/enforcement.jsp (last visited Dec. 22, 2010); *and see Frequently Asked Questions About ESRB*, BEST BUY, http://www.bestbuy.com/site/null/ESRB+FAQs/pcmcat87900050011.c?id=pcmcat87900050011 (last visited Dec. 22, 2010).

59. *See Principles and Guidelines for Responsible Advertising Practices*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/principles_guidelines.jsp (last visited Dec. 22, 2010). Publishers are legally bound to follow these industry-adopted principles and guidelines. *See Enforcement*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/enforcement.jsp (last visited Dec. 22, 2010).

60. *See Principles and Guidelines for Responsible Advertising Practices*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/principles_guidelines.jsp (last visited Dec. 22, 2010). Publishers are also required to ensure that their co-publishers, licensees, agents, and other third parties involved in the development, distribution, or placement of promotional materials follow these guidelines. *See id.* Review of compliance with these guidelines is conducted by the ESRB's Advertising Review Council, who may consider both the spirit of the guidelines as well as the literal text when determining compliance. *See id.*

61. *See id.* In particular, such promotional materials include all commercial messages and/or marketing materials related to the promotion, consumer testing, or sale of a product or service (such as packaging, advertising, promotional materials, newsletters, cross-promotions, demos, trailers, videos, billboards, and audio-visual materials) that are directed at consumers in the United States or Canada through any means or medium now known or later discovered. *See id.* Additionally, it does not matter whether or not a company subject to these restrictions paid for such promotional materials themselves. *See id.*

62. *See id.* The ESRB considers editorial content to include, without limitation, game reviews, news stories, and television series and specials. *See id.* Additionally, game publishers may not encourage third parties to create such

game promotional materials imposed by the ESRB require that advertisements accurately portray the content, character, and rating of the game, that they do not glamorize or exploit the game's ESRB rating, that they do not contain content that is likely to offend or confuse the public, and that they do not specifically target people below the recommended minimum age.[63] In addition to these basic principles, the ESRB recommends that game publishers avoid the following specific categories in their promotional materials and advertisements: (1) Violence, (2) Sex, (3) Alcohol and Drugs, (4) Offensive Verbal or Bodily Expression, and (5) Insensitivity to Religious Beliefs or Physical/Mental Disabilities.[64] ESRB staff

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promotional materials through barter or other consideration of value, as well as through monetary compensation. *See id.*

63. *See id.*

64. *See id.* The recommendations against depictions of violence are broken down into the following: (1) Graphic and/or excessive depictions of violence (such as guns or weapons pointed at the heads of characters or the player, the infliction of fatal injuries or grievous injuries, or kicks to the groin); (2) Graphic and/or violent depictions of the use of weapons (such as prolonged and/or excessive gunfire); (3) Graphic and/or excessive depictions of blood and/or gore (such as blood spurting from wounds); (4) Allusions or depictions of acts of verbal or physical abuse toward children; (5) Allusions or depictions of violent or degrading behavior towards women; (6) Allusions or depictions of torture or other violent acts toward animals; (7) Allusions or depictions of torture, mutilation, or sadism; (8) Violence towards a political or public figure; and (9) Allusions or depictions of acts of arson or fire play (such as creatures or people on fire, or weapon or bomb making). *See id.*

The recommendations against depictions of sex are broken down into the following: (1) Allusions or depictions of sexual violence; (2) Allusions or depictions of necrophilia or any other sexual acts; (3) Graphic and/or excessive depictions of nudity or sexual situations (such as overtly sexualized depictions of a character's body parts, partial or full nudity, or depictions of sex or sexual references); and 4. Ridicule, reference to, or portrayals of individuals with sexually transmitted diseases). *See id.*

The recommendations against depictions of alcohol and drugs are broken down into the following: (1) References to or depictions of illegal drugs, their use, or any accompanying paraphernalia; and (2) Glamorizing, encouraging, and/or depicting the consumption of alcohol or illegal drugs (such as underage drinking or substance abuse, or socially irresponsible behavior due to alcohol or drug consumption). *See id.*

The recommendations against depictions of offensive verbal or bodily expression are broken down into the following: (1) Crude and/or offensive language (such as profanity, offensive song lyrics, or hate speech); and (2) Offensive depictions or ridicule of basic bodily functions. *See id.*

members regularly monitor television, print, and online media for compliance with these guidelines and have the power to enforce compliance.[65] The ESRB also works with video game retailers, through its ESRB Retail Council (ERC), and website managers, through its ESRB Website Council (EWC), to ensure that the proper ratings are displayed wherever ESRB rated games are sold or advertised.[66] The ERC, established in 2005 to facilitate communication between the ESRB and video game retailers, requires its members to use their best efforts to support ESRB ratings education and enforcement.[67] The EWC works with many of the top

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The recommendations against depictions of insensitivity to religious beliefs or physical/mental disabilities are broken down into the following: (1) Sacrilege (such as desecration or disrespectful treatment of a person, place, thing, or idea held sacred by some); and (2) Degradation or ridicule of disabled individuals. *See id.*

65. *See Enforcement*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/enforcement.jsp (last visited Dec. 22, 2010). Compliance with each ESRB guideline is weighed on a case-by-case basis, with consideration granted for the demographic profile and intended audience for each product, its associated promotional materials, and the medium those materials are presented in. *See Principles and Guidelines for Responsible Advertising Practices*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/principles_guidelines.jsp (last visited Dec. 22, 2010). In all cases, however, the ESRB Advertising Review Council will assess advertising from the likely perspective of the general public, not simply those who might purchase or play the game. *See id.*

66. *See Enforcement*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/enforcement.jsp (last visited Dec. 22, 2010). Although the ESRB's legal and regulatory authority only extends to video game publishers, through the ERC and EWC it strives to make rating information more widely available to consumers. *See id; see also infra* notes 67-68 and accompanying text.

67. *See ESRB Retail Council*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/retailers/retail_council.jsp#piechart (last visited Dec. 24, 2010). In particular, the ERC members code requires that member retailers: (1) Not sell or rent M-rated games to people under the age of seventeen without the permission of their parents or guardians; (2) Not sell or rent AO-rated games to minors; (3) Display ESRB rating information signage; (4) Train employees on ESRB ratings and game sales policies; (5) Participate in at least two "mystery shop" audits each year (consisting of a minimum of one hundred retail stores being tested by having an underage consumer attempt to buy or rent an M-rated game, and by measuring the number of stores that display proper signage) to measure compliance with this code (the results of which are posted in aggregate on the ESRB website); (6) Resolve complaints from customers regarding the improper sale of M and AO rated video games to people under the respective recommended

gaming enthusiast websites to ensure that rating information is presented to consumers and that users must assert their age before viewing M-rated video game material.[68] Finally, if the ESRB discovers that a game publisher did not fully disclose all information pertinent to the assignment of a rating it is empowered to revoke the assigned rating, impose sanctions, or require corrective actions.[69]

Throughout the years since its inception, the numerous restrictions imposed by the ESRB have led to several changes and conflicts in the video game industry.[70] Following the creation of the ESRB rating system, every single member of the ERC enacted a policy stating that they will not sell AO rated games.[71] Moreover, the

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age minimums for each, and provide a full refund or an exchange for an age-appropriate game; (7) Provide ESRB ratings in promotional materials, wherever feasible (such as circulars, websites, and advertisements); and (8) Share their most effective practices with other ERC members. *See id.* According to the November 2010 audit results ERC council members followed ESRB sales policies 84% of the time overall and 90% of the time when weighted by market share, and ERC council members followed ESRB ratings signage policies 84% of the time overall and 87% of the time when weighted by market share. *See id.* The ERC's council members consist of following companies: Best Buy, Blockbuster Video, GameStop, Sears/Kmart, Target, and Walmart. *See id.*

68. *See Enforcement*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/enforcement.jsp (last visited Dec. 24, 2010). The EWC also has a member code of conduct that is similar to the ESRB's policy regarding video game publication materials. *See id.*; *see also supra* notes 60-64 and accompanying text.

69. *See Enforcement*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/enforcement.jsp (last visited Dec. 24, 2010). Pertinent rating information includes information that affected or could have affected the assignment of a rating or content descriptor. *See id.* Imposed sanctions may include monetary fines or, where necessary, a suspension of rating services provided to the publisher. *See id.* Corrective actions may include requiring publishers to ensure that all game packaging and promotional materials are labeled with the correct rating and/or content descriptors, re-labeling of merchandise, or a product recall. *See id.*; *see also supra* 75-78 and accompanying text.

70. *See supra* notes 48-69 and accompanying text; *and see infra* notes 71-78 and accompanying text.

71. *See* ESRB Retail Council, *supra* note 67; *and see Best Buy – Investor Relations – Frequently Asked Questions – What is Best Buy's M-rated entertainment policy?*, BEST BUY, http://phx.corporate-ir.net/phoenix.zhtml?c=83192&p=IROL-FAQ (last visited Feb. 11, 2011) (stating Best Buy does not carry adult-only games); *and see Investor Relations – Press Release – Blockbuster (R) Brings GameRush (TM) Video Game Store-In-Store Program to 77 Southern California Blockbuster Stores*, BLOCKBUSTER (Sept.

creators of popular modern game consoles, Microsoft Corporation (Microsoft), Nintendo, and Sony Computer Entertainment Inc. (Sony) also created similar policies to disallow the production of AO rated games for their console systems.[72] As a result, virtually no AO rated games are released in the United States.[73] Additionally, game

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14, 2004), http://investor.blockbuster.com/phoenix.zhtml?c=99383&p=irol-newsArticle&ID=613610&highlight= (stating that Blockbuster does not carry Adult Only games or Rating Pending games); *and see* Business Wire, *GameStop Corp. Removes "Grand Theft Auto: San Andreas" From Stores*, BNET – THE CBS INTERACTIVE BUSINESS NETWORK (July 21, 2005), http://findarticles.com/p/articles/mi_m0EIN/is_2005_July_21/ai_n14812104/ (stating that it is GameStop's corporate policy not to sell Adults Only rated games); *and see* Dana Bash, *Kmart to Card Buyers of Violent Video Games*, CNN TECH (Sept. 7, 2000), http://articles.cnn.com/2000-09-07/tech/kmart.video.games_1_violent-video-entertainment-software-rating-board-kmart-officials?_s=PM:TECH (stating that Kmart does not sell video games with an AO rating); *and see Policies Regarding the Sale of Certain Products at Target*, TARGET, http://sites.target.com/site/en/corporate/page.jsp?contentId=PRD03-004391 (last visited Feb. 11, 2011) (stating that Target does not carry "adult only" merchandise); *and see Walmart.com – Help – Terms of Use – Video, Movie, TV Program and Computer Game Ratings*, WALMART, http://www.walmart.com/cp/Terms-of-Use/538449#42034 (last visited Feb. 11, 2011) (stating Walmart.com does not sell games rated AO).

72. *See* Jim Reilly, *Microsoft Blocking Kinect Sex Games*, IGN – XBOX 360 (Dec. 17, 2010), http://xbox360.ign.com/articles/114/1140836p1.html (citing a Microsoft spokesperson as stating, "Xbox is a family friendly games and entertainment console and does not allow Adults Only (AO) content to be certified for use on its platform, and would not condone this type of game for Kinect."); *and see Nintendo Customer Service – Nintendo Buyer's Guide*, NINTENDO, http://www.nintendo.com/consumer/buyers_guide.jsp#ratings (last visited Feb. 11, 2011) (stating, "Please note that Nintendo does not sell or license games that carry the ESRB rating 'AO' (Adults Only)."); *and see* Joao Diniz Sanches, *Sony Won't Allow Manhunt 2 to be Published on PSP*, POCKET GAMER (June 21, 2007), http://www.pocketgamer.co.uk/feature.asp?c=3395 (stating that Sony has a corporate policy that forbids the release of AO-rated games on its system). Microsoft's latest console system is the Xbox 360. *See generally* XBOX.COM, http://www.xbox.com/en-US/ (last visited Feb. 11, 2011). Nintendo's latest systems are the Wii and the DS (including the DS Lite, DSi, DSi XL, and 3DS). *See generally* NINTENDO, http://www.nintendo.com/ (last visited Feb. 11, 2011). Sony's latest systems are the PlayStation Portable and the PlayStation 3. *See generally* SONY, http://www.sony.com/index.php (last visited Feb. 11, 2011).

73. *Compare* Search Results for All AO (Adults Only) Rated Games, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/search.jsp (last visited Feb. 11, 2011) (select "AO (Adults Only)" from the "Search By Rating" pull down menu; then click the

developers typically seek to avoid being assigned an AO rating, for fear of being unable to sell their games in retail stores or release them on popular consoles.[74] Of note amongst such games is GTA: San Andreas, created by Rockstar Games (Rockstar) in 1998.[75] Due to the so-called "Hot Coffee" modification software (Mod) created by third-parties for the PC version of GTA: San Andreas, which unlocked an otherwise hidden sex-based mini-game buried in the game's code, the game's rating was changed after release from M to AO.[76] The resulting fallout caused the game to be pulled from store shelves and for Rockstar to offer retailers the option of relabeling or

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"Search" button) [hereinafter *AO Search*] (listing all games rated AO by the ESRB), *with* Search Results for All Games Rated by the ESRB, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/search.jsp (last visited Feb. 11, 2011) (simply click the "Search" button without selecting any search parameters) [hereinafter *All Games Search*] (listing all games rated by the ESRB). As of February 11, 2011 only twenty-four games have ever been assigned an AO rating by the ESRB, out of a total of 20,425 rated games; thus making up only approximately 0.1% of the total number of games rated. *See* AO Search, *supra*; *and see* All Games Search, *supra*. Of those games rated AO, only two were ever released on consoles: *Thrill Kill*, for the Sony PlayStation, and *Grand Theft Auto: San Andreas* (GTA: San Andreas), for the Sony PlayStation 2 and the Microsoft Xbox. *See* AO Search, *supra*. All other AO rated games were released on PC or other media. *See id.*

74. *See* Emma Boyes, *GDC '08: Game Devs 'Terrified' of Sex*, GAMESPOT (Feb. 20, 2008), http://www.gamespot.com/xbox360/rpg/masseffect/news_6186392.html?login=true (describing the rating as the "AO kiss of death"); *see also supra* notes 71-72 and accompanying text (relating the restrictions imposed on the sale of AO rated games by retailers and video game console producers).

75. *See* Gonzalez, *supra* note 21, at 10.

76. *See* Tor Thorsen, *San Andreas Rated AO, Take-Two Suspends Production*, GAMESPOT (July 20, 2005) http://www.gamespot.com/news/6129500.html. While the game's developer, Take-Two Interactive, initially claimed that the Mod was entirely created by unrelated third-parties, it was later discovered that it could be accessed on console versions of the game (which the Mod could not be used on), thus proving that it was a hidden part of the original game disc. *See id.* Another example of a game that had its rating changed after its release is Bethesda Softworks' *The Elder Scrolls IV: Oblivion*, which had its rating increased from T to M when it was discovered that a downloadable third-party update for the PC version of the game could unlock the ability for players to play the game with a topless version of female characters. *See* James Brightman, *Breaking: ESRB Changes Oblivion's Rating to "M"*, GAMEDAILY (May 3, 2006), http://www.gamedaily.com/articles/features/breaking-esrb-changes-oblivions-rating-to-m/68893/?biz=1.

returning the game for an updated version that blocked the Mod.[77] Despite these problems, however, parents generally find the ESRB's ratings to be helpful, accurate, and well enforced.[78] Of course, as other countries throughout the world have different standards by which they rate and regulate video games, certain games have been both more and less heavily regulated in those countries than in the United States.[79]

## III. RESTRICTIONS IMPOSED IN OTHER COUNTRIES

Restrictions on the violence depicted in video games and on violent video games extend beyond the borders of the United States, and vary in extremity across the globe.[80] While the European Union

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77. *See* Thorsen, *supra* note 76. In particular, Best Buy, Circuit City, EB Games, GameFly, GameStop, Sears, Target, and Walmart ended up removing the AO-rated versions of GTA: San Andreas from their shelves. *See id.*; *and see* Sid Shuman, *GameStop Stops GTA: San Andreas*, GAMES.NET, http://www.games.net/article/feature/102821/gamestop-stops-gta-san-andreas/ (last visited Feb. 11, 2011). This incident also caused the ESRB to change its policies to "require all game publishers to submit any pertinent content shipped in final product even if is not intended to ever be accessed during game play, or remove it from the final disc." *See* Thorson, *supra* note 76.

78. *See* Consumer Research, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/about/awareness.jsp (last visited Feb. 11, 2011). According to ESRB parental awareness, use, and satisfaction surveys 98% of parents find the rating system to either be "very helpful" (76%) or "somewhat helpful" (22%) for selecting games for their children. *See id.* Similarly, 98% of parents surveyed felt either "very confident" (57%) or "somewhat confident" (41%) that the information provided by the ESRB regarding the content of their games purchased was accurate and reflected their views on appropriate levels of content for their children. *See id.* A survey of parents conducted by the Henry J. Kaiser Family Foundation in June of 2007 also found that the ESRB's rating system was deemed the most useful rating system amongst the rating systems available for television, movies, music, and games. *See id.* So-called mystery shopper audits conducted by the Federal Trade Commission in 2009 also found that 80% of individuals under seventeen years of age were turned away when attempting to purchase M-rated games, which surpassed the compliance rates for "R-rated" film viewing (72%), "R-rated" DVD purchases (46%), and "PA-labeled" CDs (28%). *See id.*; *see also supra* note 67.

79. *See infra* notes 83-140 and accompanying text.

80. *See infra* notes 83-140 and accompanying text. For an interesting side-by-side comparison of the various ratings assigned to a few select video games by different rating systems around the world see

(EU) has generally attempted to unify its video game rating and regulation under a system similar to that of the ESRB, other countries, like Australia and Iran, restrict objectionable content more stringently.[81] This diversity in video game violence regulation provides both a global perspective on the issue and suggests ways in which similar changes to regulation in the United States might fare.[82]

### *A. The European Union*

#### 1. PEGI

While the ESRB's regulations on video games extend as far beyond the borders of United States as Canada, the EU takes a different stance on restricting depictions of violence and the sale of violent video games than that held by the ESRB and the United States.[83] Most EU member countries use a single video game rating and regulation system known as Pan European Game Information, or

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http://images.smh.com.au/file/2010/12/09/2088183/International_Games_Comparison.pdf.

81. *See infra* notes 83-140 and accompanying text. As the purpose of this section is to provide potential methods or reasons for modifying or retaining current United States video game regulation through an overview of the international perspective, it will primarily address the regulations and systems imposed by those countries that have some form of structured video game regulation in place, and will only briefly touch upon a few, but not all, country-specific idiosyncrasies as examples of the variation that exists throughout the world. Also, some aspects of this section were limited by a combination of language barriers and unavailability of information.

82. *See infra* notes 83-140 and accompanying text. The terms "classification" and "rating" shall be used interchangeably herein.

83. *See Retail Partnership Programs*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/retailers/index.jsp (last visited Dec. 31, 2010). Through the ERC's partnership with the Retail Council of Canada, the Entertainment Software Association of Canada, and the members of those groups the ESRB's restrictions on the sale of games with M and AO rated content to certain age groups (people age seventeen and older for M-rated games and people age eighteen and older for AO-rated games) and the requirement that retailers display information and signage about such ESRB ratings was extended to Canada. *See id.*; *see also Advocacy & Policy – National: Consumer Protection – Commitment to Parents*, RETAIL COUNCIL OF CANADA (Nov. 12, 2008), http://www.retailcouncil.org/advocacy/national/issues/cp/ctp/.

"PEGI."[84] PEGI was established in 2003 to form a unified EU video game rating system, rather than the varied national systems in place before its inception, and to provide EU parents with assistance in making informed decisions about their video game purchases and those of their children.[85] Like the ESRB, PEGI utilizes a series of both recommended age levels and content descriptors in its ratings.[86] Unlike the ESRB however, PEGI's recommended age levels allow violent content and scenes involving nudity to be included in video games rated for children and age groups several years younger than would be allowed by the ESRB.[87] Similarly, while the ESRB utilizes

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84. *See ABOUT PEGI – What is PEGI?*, PEGI – PAN EUROPEAN GAME INFORMATION, http://www.pegi.info/en/index/id/28/ (last visited Jan. 3, 2011). More specifically, PEGI has been formally adopted by the following thirty nations: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. *See id.* PEGI was created and is owned by the Interactive Software Federation of Europe based in Belgium, which delegated day-to-day management of PEGI to the nonprofit organization PEGI S.A. *See* ABOUT PEGI – Owner & Administrator, PEGI – PAN EUROPEAN GAME INFORMATION, http://www.pegi.info/en/index/id/1183/ (last visited Jan. 3, 2011). The duties of PEGI are divided between the Netherlands Institute for the Classification of Audiovisual Media, which verifies that PEGI 3 and 7 rated games meet PEGI criteria for those ratings, trains PEGI staff, archives games rated by PEGI, and issues PEGI licenses; and the Video Standards Council, based in the United Kingdom, which verifies that PEGI 12, 16, and 18 rated games meet PEGI criteria for those ratings and to create and oversee the enforcement of the Code of Practice for the video game industry. *See id.*; *see also infra* notes 85-86.

85. *See* ABOUT PEGI – What is PEGI?, *supra* note 84. This purpose corresponds with the purpose of the ESRB. *See* Frequently Asked Questions – About the Rating Process, *supra* note 53.

86. *See ABOUT PEGI – What Do the Labels Mean?*, PAN EUROPEAN GAME INFORMATION, http://www.pegi.info/en/index/id/33/ (last visited Jan. 3, 2011); *see also supra* note 45 and accompanying text. Unlike the ESRB, PEGI breaks down its recommended age levels into PEGI 3, 7, 12, 16, and 18. *See id.* As with the ESRB, these ratings do not take into account the difficulty, level of skill required to play, or quality of the games being rated. *See Frequently Asked Questions*, PAN EUROPEAN GAME INFORMATION, http://www.pegi.info/en/index/id/26 (last visited Jan. 15, 2011); *see also supra* note 45 and accompanying text.

87. *See* ABOUT PEGI – What Do the Labels Mean?, *supra* note 86; *see also supra* note 45 and accompanying text. Video games rated "PEGI 3" are considered to have content that is entirely appropriate for all ages, though they may contain cartoon-like violence in a comical context. *See* ABOUT PEGI – What Do the

more than thirty content descriptors, PEGI uses eight; though these eight descriptors also include unique graphics as well as text indicating their associated objectionable content.[88] On the other hand, PEGI also provides website game rating and certification services in addition to its standard video game rating service.[89] Although use of the PEGI rating system, much like the ESRB, is purely voluntary, many video game publishers mandate that their games be rated by PEGI before being sold in Europe.[90] Despite the

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Labels Mean?, *supra* note 86. Video games rated "PEGI 7" contain content that would have been rated PEGI 3 had it not included some possibly frightening scenes or sounds, and may also contain some scenes of partial nudity so long as they are not in a sexual context. *See id.* Video games rated "PEGI 12" may contain scenes of graphic violence towards fantastic characters, non-graphic violence towards animal or human characters, nudity of a slightly more graphic nature than that in a PEGI 7 game, and mild inappropriate language that does not include sexual expletives. *See id.* Video game rating "PEGI 16" is applied to those games that contain depictions of violence or sexual activity that closely resembles reality, more extreme inappropriate language than that in a PEGI 12 game, the concept of tobacco or drug use, or the depiction of criminal activities. *See id.* Video games rated "PEGI 18" contain scenes of "gross violence" (generally defined as content that would make the viewer feel a sense of revulsion) and other unspecified kinds of violence. *See id.*

88. *See id.*; *see also supra* note 45 and accompanying text. PEGI uses the following content descriptors in rating video games: Bad Language, Discrimination (for depictions of it or material that might encourage it), Drugs (for depictions of or references to drug use), Fear (when potentially frightening for young children), Gambling (if it encourages or teaches gambling), Sex (for sexual references or depictions of nudity and/or sexual behavior), Violence, and Online Gameplay (when the game can be played online with others). *See* ABOUT PEGI – What Do the Labels Mean?, *supra* note 86.

89. *See ABOUT PEGI – PEGI OK Label*, PAN EUROPEAN GAME INFORMATION, http://www.pegi.info/en/index/id/1382/ (last visited Jan. 3, 2011). The "PEGI OK" label on a website indicates that the small internet-based game on that website has been rated as being suitable for people of all ages and that it does not contain any content that would cause it to be rated higher than PEGI 3. *See id.* In order to obtain such a label the purveyor of the game must assert to PEGI that the game does not contain any content that would require a more formal assessment and rating. *See id.* A game must instead, however, be formally rated by PEGI if it contains violence, sexual activity or sexual innuendo, nudity, bad language, gambling, promotion or use of drugs, promotion of alcohol or tobacco, or scary scenes. *See id.* Such an internet-based game must also be rated by PEGI if it can be downloaded onto the player's PC or if a fee is charged to play the game. *See id.*

90. *See Frequently Asked Questions*, PAN EUROPEAN GAME INFORMATION, http://www.pegi.info/en/index/id/26 (last visited Jan. 15, 2011); *see also supra* note

spread of PEGI across the EU however, some EU member countries have chosen to supplement PEGI, or ignore it altogether.[91]

2. The United Kingdom

Currently, the United Kingdom is transitioning from a system of video game ratings imposed by law through the British Board of Film Classification (BBFC), to solely utilizing PEGI as its national video game rating system.[92] With the passing of Digital Economy Act 2010, PEGI will become the official system for rating video games in the United Kingdom and will be reinforced by statutory penalties for the sale of games rated PEGI 12, PEGI 16, and PEGI 18 to underage persons once it is fully enacted by the Secretary of State.[93] Until then

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43-47 and accompanying text. Most notably, the major console video game publishers Microsoft, Nintendo, and Sony, as well as the main American and EU PC video game publishers, require their games to be rated by PEGI before being sold in the EU. *See* Frequently Asked Questions, *supra*. The United Kingdom, however, used another system for rating video games until as recently as 2009, when it decided to exclusively use PEGI for rating video games. *See infra* notes 92-97 and accompanying text. In addition, Germany uses its own rating system instead of PEGI. *See infra* notes 98-109 and accompanying text.

91. *See infra* notes 92-109 and accompanying text. The EU countries with video game rating systems in place that are in some way different from purely using PEGI discussed herein shall be the United Kingdom and Germany. *See infra* notes 92-109 and accompanying text. While these do not represent all the variations on video game rating systems available across the EU, they are demonstrative of the spectrum of deviation some EU countries take from the pure PEGI system. *See infra* notes 92-109 and accompanying text.

92. *See* Alex Sassoon Coby, *Digital Britain: PEGI to Rate UK Videogames*, CNET UK (June 16, 2009), http://crave.cnet.co.uk/gamesgear/digital-britain-pegi-to-rate-uk-videogames-49302653/; *and see generally Video Games*, BRITISH BOARD OF FILM CLASSIFICATION, http://www.bbfc.co.uk/customers/video-games (last visited Feb. 12, 2011) [hereinafter *BBFC Video Games*] (detailing the BBFC video game rating system).

93. *See* Digital Economy Act 2010, 2010, c. 24, §§ 40-41, 47(3) (U.K.) *available at* http://www.legislation.gov.uk/ukpga/2010/24/section/40; *and see generally* Video Recordings Act 1984, 1984, c. 39, §§ 1-23 (U.K.) *available at* http://www.legislation.gov.uk/ukpga/1984/39/section/1 (providing the statutory language upon which Digital Economy Act 2010 is based); *see generally New System of Video Games Classification Will Help Protect Children – PEGI System Adopted for All UK Games*, DEPARTMENT FOR CULTURE, MEDIA AND SPORT ARCHIVE (June 16, 2009), http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/reference_l

however, the current system, involving PEGI rating all games released in the United Kingdom, and, through legislation enacted as recently as 2010, the BBFC having the power to supersede those ratings on certain games, to supply its own rating and label, and to prevent the sale of such games to minors if they contain "criminal," "violent," or "horrific" behavior; illegal drugs; or human sexual activity, remains in place.[94] As such, the BBFC currently remains empowered with the authority to assign ratings to those video games that contain such offensive content, and to impose restrictions backed by criminal and civil penalties on the sale of such games in the United Kingdom.[95] It is, however, up to individual game distributors

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ibrary/media_releases/6215.aspx (providing a summary of the changes implemented by Digital Economy Act 2010). It was originally thought that the sections of Digital Economy Act 2010 dealing with video games would become fully enacted on April 1, 2011, but recent government estimates have it occurring in July of 2011 at the earliest. VIDEO STANDARDS COUNCIL, http://www.videostandards.org.uk/ (last visited Feb. 12, 2011) (click "Video Games Update" on the left-hand side of the screen).

94. *See* Michael Mjanes, *UK May Drop European Game Rating System*, DAVIS LLP VIDEO GAME LAW BLOG (Feb. 21, 2008, 19:09:00 EST), http://www.davis.ca/en/blog/Video-Game-Law/2008/02/21/UK-May-Drop-European-Game-Rating-System (describing the hybridized nature of the current United Kingdom game rating system); *and see* Video Recordings Act 2010, 2010, c.1, §§ 1-2 (U.K.); *and see generally* Video Recordings Act 1984, *supra* note 93 (providing the statutory language upon which Video Recordings Act 2010 is based); *and see* Video Games Bill, 2005, Bill [90] (U.K.). In 2009 Parliament realized that it had not followed proper procedure in notifying the European Commission about its creation of the 1984 Act, and as such it sought to properly reenact the 1984 Act in its entirety, and with all amendments (such as the Video Games Bill), through Video Recordings Act 2010. *See Loophole Over DVD Age Rating Law*, BBC NEWS (Aug. 25, 2009, 02:10 UK), http://news.bbc.co.uk/2/hi/uk_news/8219438.stm.

95. *See supra* notes 92-94 and accompanying text; *and see* BBFC Video Games, *supra* note 92. More specifically, the 1984 Act grants the BBFC authority to rate and restrict video games that, in its opinion, "have the potential to cause harm to viewers or, through their behavior, to society, by the manner in which the work deals with – (a) criminal behavior; (b) illegal drugs; (c) violent behavior or incidents; (d) horrific behavior or incidents; or (e) human sexual activities." *See* Video Games Bill, *supra* note 94. The 1984 Act then enforces these ratings through the threatened imposition of fines of up to £20,000, up to two years of imprisonment, or both upon the sale or attempted sale of a rated game to someone under the rated age minimum, or the sale or attempted sale of a game that has not been rated by the BBFC and contains potentially harmful content (as described above). *See* Video Recordings Act 1984, *supra* note 93.

and developers to determine if their video games fall under these categories and to submit them to the BBFC for rating.[96] For those that are rated, the BBFC rating system resembles that used by PEGI, but although it includes descriptions of the offending content in assigned ratings it does not have a set list of content descriptors.[97]

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96. *See* BBFC Video Games, *supra* note 92.

97. *See* Classification – Guidelines, BRITISH BOARD OF FILM CLASSIFICATION, http://www.bbfc.co.uk/classification/guidelines/ (last visited Jan. 15, 2011); *see also supra* note 87 (outlining the PEGI rating system). The BBFC breaks its rating system down into the following categories: "U," "PG," "12," "12A," "15," "18," and "R18." *See* Classification – Guidelines, *supra*. This same rating system is used for all "video works" (such as film, television, and video games) supplied on any device capable of storing data electronically. *See* Classification – The BBFC & UK Law, http://www.bbfc.co.uk/classification/the-bbfc-uk-law (last visited Jan. 15, 2011).

Content rated "U," or Universal, is considered suitable for anyone over the age of four years old, and includes no or clearly disapproved of discriminatory language; no more than infrequent or innocuous illegal drug use (unless for an educational purpose or anti-drug message); no more than mild or brief frightening scenes, which should have reassuring outcomes; no potentially dangerous imitable behavior or emphasis on realistic or readily available weapons; at most infrequent use of very mild offensive language; no more than occasional nudity, which must not be presented in a sexual context; at most mild sexual behavior (such as kissing) and references (such as to 'making love'); and no more than mild violence or occasional mild threats or menace. *See* Classification – Guidelines, *supra*.

Content rated "PG," or Parental Guidance, should not contain any content that is disturbing for anyone of approximately eight years of age or older, and may incorporate no discriminatory language or behavior, unless clearly disapproved of or in an educational or historical context; no more than innocuous references to illegal drug use (unless accompanied by a suitable anti-drug reference); no prolonged or intense frightening scenes; no potentially dangerous imitable behavior or glamorization of realistic or readily available weapons; no more than mild offensive language; nudity without a sexual context; at most discreet and infrequent implied sexual activity, or mild sexual references or innuendo; no approval of unacceptable behavior (such as domestic violence); and no more than moderate violence, in which case it must be without detail and justified by its historic, comedic, or fantastic context. *See id.*

Content rated "12" is considered generally acceptable for anyone age twelve and over, and may include no discriminatory language that is endorsed by the work as a whole, or aggressive discriminatory language (unless clearly condemned); at most infrequent illegal drug use that is neither glamorized nor instructional; at most moderate threatening or disturbing scenes, so long as they are not frequent or sustained; no dangerous behavior with imitable detail or without consequence, nor any glamorization of easily accessible weapons; no more than infrequent strong language (such as use of the word "fuck"); no more than brief and discreet nudity

### 3. Germany

The German video game rating process is complex and involves the collaboration of several governmental and nongovernmental organizations.[98] Although the official rating process begins with a game being submitted, some video game publishers choose to edit

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in a sexual context; no more than brief and discreet sexual activity or references; mature themes; and no more than moderate violence that avoids focus on detail, injuries, or blood, or discreetly implied sexual violence with a strong contextual justification. *See id.* The "12A" rating is only used for films and utilizes the same rating criteria as rated 12 content. *See id.*

Content rated "15" may not be viewed in a theater, purchased, or rented by a person under the age of fifteen, and such content may include discriminatory language or behavior, so long as it is not endorsed by the work as a whole; depictions of drug use that do not promote or encourage such activity; non-sadistic or sexualized threats or menace; no dangerous behavior with imitable detail or without consequence, nor any glamorization of easily accessible weapons; frequent use of strong language or infrequent use of the strongest of language (such as "cunt") if justified in context; nudity in a sexual context, so long as it is not detailed, and there are no restrictions on non-sexual nudity; depictions of sexual activities, so long as they are not detailed and not primarily intended to sexually arouse; and strong depictions of violence that do not dwell on the infliction of pain or injury, so long as they are not strong depictions of sadistic or sexual violence. *See id.*

Content rated "18" may not be viewed in a theater, purchased, or rented by a person under the age of eighteen, and such content is generally unrestricted, with exception to illegal materials, content created through the commission of a criminal offense, materials that pose a risk to individuals or society (such as detailed portrayals of violent or dangerous behavior or illegal drug use), and sexual materials restricted to "R18" ratings. *See id.* "R18" ratings are reserved for materials that may only be sold in licensed sex shops and include depictions of strong sexual content or fetishes, but that may not contain illegal content, obscene depictions (as defined by Obscene Publications Act 1959), material likely to encourage sexually abusive activity, sexualized inflictions of pain or harm, depictions of real or feigned lack of consent, physical restraint that would prevent any indication of a withdrawal of consent, and humiliation or abuse that is not clearly part of a consenting role-playing game. *See id.*

98. *See generally* Tellurian, *German Game Ratings 101*, CHRONOLUDIC (Aug. 18, 2010), http://www.chronoludic.com/2010/08/german-game-ratings-101/ (providing a summary of the complexities of the German video game rating system). All abbreviations used in this section will correspond to their German language equivalents, so as to provide those seeking further information about the abbreviated terms and organizations described herein with a greater chance of locating such information. All such abbreviations are listed in the Index of Acronyms and Terms at the end of this comment for ease of reference.

their games before submission, in hopes of eliminating content that the German rating process would deem sufficient to warrant an increase in the eventual assigned age rating, or an outright ban.[99] The official rating process begins with a game publisher submitting the finalized version of its game to the Entertainment Software Self-Regulation Body (USK) for classification.[100] The USK then tests the technical functionality of the game and the completeness of any documentation submitted as part of the classification application before submitting the game to its game testers, who then play the game in its entirety.[101] USK game testers prepare a neutral written

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99. *See USK: Welcome to the USK*, USK, http://www.usk.de/en/ (last visited Feb. 18, 2011) (type in "dt. version" under "Search for title" and click the button labeled "suchen") (listing 115 games rated by the USK that have an edited German version).

100. *See General Policy Statement of the German Entertainment Software Self-Regulation Body (USK)*, USK, 13-14, 16-17 (Feb. 1, 2011), http://www.usk.de/fileadmin/documents/Publisher_Bereich/2011-01-31_USK_Grundsaetze_EN.pdf [hereinafter *USK Policy Statement*]. The USK is a non-profit limited company that was formed in 1994 by the German video game production, manufacture, and distribution industry associations the Federal Association of Interactive Entertainment Software (BIU) and the Federal Association of Computer Game Developers (G.A.M.E.) for the purpose of classifying video game content to be sold in Germany. *See USK: About Us*, USK, http://www.usk.de/en/the-usk/about-us/ (last visited Feb. 18, 2011). The fourteen member USK Advisory Council, which governs and directs the USK classification process, is made up of two representatives of the video game industry, two members of the Supreme Youth Protection Authorities of the Federal States (OLJB), one representative of the Supreme Federal Youth Protection Authorities, two representatives of independent children and youth social services providers, one representative of the Department for Media Harmful to Young Persons (BPjM), two representatives of churches and legally recognized religious communities, one media education representative, one youth protection expert, one representative of the Commission for the Protection of Minors in the Media, and one legal expert. *See* USK Policy Statement, *supra*, at 5-6. These Advisory Council members are appointed for three year terms by the OLJB, in conjunction with the BIU and the G.A.M.E. *See id.* at 6.

101. *See USK: How Age Rating Symbols Are Developed at the USK*, USK, http://www.usk.de/en/classification/classification-procedure/ (last visited Feb. 18, 2011). USK game testers are appointed by the USK Advisory Council, and thereupon trained and employed by the USK. *See* USK Policy Statement, *supra* note 100, at 5, 10. The only prerequisites for being appointed as a game tester are that the individual in question possess the necessary professional confidence and personal maturity to prepare and conduct reliable game presentations, and that the

report and a presentation of game play sequences, which they then present to a classification committee consisting of four youth protection experts and a permanent representative of the OLJB (Representative), who chairs the committee.[102] The youth protection experts use the information presented to recommend one of five age ratings for the game, to recommend not rating the game, to recommend obtaining an official expert opinion from the BPjM regarding whether to add the game to the index of media deemed unsuitable for young persons (Index), or to recommend an age rating that is contingent upon certain changes being made to the game.[103]

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individual not be employed by a commercial company operating within the video game industry. *See id.* at 10.

102. *See* USK: How Age Rating Symbols Are Developed at the USK, *supra* note 101; *and see* USK Policy Statement, *supra* note 100, at 8, 11. Youth protection experts are appointed by the USK Advisory Council, pursuant to a joint recommendation made by the OLJB, the BIU, and the G.A.M.E. *See* USK Policy Statement, *supra* note 100, at 9. Prerequisites for being appointed as a youth protection expert include sufficient occupational experience and training to ensure that age rating recommendations are based on specialized knowledge and good judgment, experience dealing with children and youths, comprehensive media competence, and that the individual in question not be employed by a commercial company operating within the video game industry. *See id.* The presentation consists of the introduction of technical data, the certification application documents, and "other circumstances essential for the classification process," which includes previous USK classification processes for the game in question, the game tester's presentation, and any explanations for content given by the applicant or other authorized parties. *See id.* at 14. The rating process is skewed towards avoiding the developmental impairment or causing harm to children who might be particularly susceptible, rather than towards the average child. *See id.* at 23. According to the USK, fifty such youth protection experts and two permanent representatives of the OLJB have been appointed for the classification process. *See* USK: How Age Rating Symbols Are Developed at the USK, *supra* note 101.

103. *See id.*; *and see* USK Policy Statement, *supra* note 100, at 15-16. The assignment and enforcement of the German video game age rating process is authorized by Article 14 of the Youth Protection Act. *See* Jugendschutzgesetz [Youth Protection Act], July 23, 2002 BGBl. I at 2730, § 14 (F.R.G.), as amended, *available at* http://www.usk.de/fileadmin/documents/Publisher_Bereich/JuSchG_EN.pdf. The five possible age ratings that may be assigned are (1) approved without age restriction, or "USK 0"; (2) approved for children aged six and above, or "USK 6"; (3) approved for children aged twelve and above, or "USK 12"; (4) approved for children aged sixteen and above, or "USK 16"; and (5) not suitable for young persons aged under eighteen, or "USK 18". *See USK: The Five Ratings and What*

*They Mean*, USK, http://www.usk.de/en/classification/age-rating-symbols/ (last visited Feb. 18, 2011).

USK 0 rated games must not contain depictions of violence or situations that produce sustained anxiety, and often involve child appropriate game tasks and a friendly atmosphere. *See* Approved Without Age Restriction, USK, http://www.usk.de/en/classification/age-rating-symbols/approved-without-age-restriction-in-accordance-with-art-14-german-children-and-young-persons-protection-act-juschg/ (last visited Feb. 18, 2011).

USK 6 rated games must not contain subject matter that would subject a six-year-old to unreasonable stress, lasting anxiety, emotional burdens, or undue acoustic or visual excitement, and generally feature faster paced tasks that require basic hand-eye coordination. *See* Approved for Children Aged Six and Above, USK, http://www.usk.de/en/classification/age-rating-symbols/approved-for-children-aged-6-and-above-in-accordance-with-art-14-german-children-and-young-persons-protection-act-juschg/ (last visited Feb. 18, 2011).

USK 12 rated games may feature scenes of conflict that are clearly recognizable as fictional and violent images that are fantastic or incapable of occurring in everyday life, and while darker or more threatening themes may be allowed they must not dominate the overall game. *See* Approved for Children Aged Twelve and Above, USK, http://www.usk.de/en/classification/age-rating-symbols/approved-for-children-aged-12-and-above-in-accordance-with-art-14-german-children-and-young-persons-protection-act-juschg/ (last visited Feb. 18, 2011).

USK 16 rated games may not contain a storyline or game play features that "impart any kind of socially damaging messages or role models," and frequently feature some form of violent content such as armed combat. *See* Approved for Children Aged Sixteen and Above, USK, http://www.usk.de/en/classification/age-rating-symbols/approved-for-children-aged-16-and-above-in-accordance-with-art-14-german-children-and-young-persons-protection-act-juschg/ (last visited Feb. 18, 2011).

USK 18 rated games frequently involve a dark or menacing atmosphere and violence, but must not contain (1) scenes that legitimize everyday violence that resemble reality, (2) scenes that suggest vigilantism is acceptable, (3) graphic or detailed acts of violence against humanoid characters, (4) violent tasks as a predominant game element, (5) scenes that suggest completion of the game through the elimination of non-combatant characters, or (6) scenes that trivialize war or the consequences of violence. *See* Not Approved for Young Persons Aged Under Eighteen, USK, http://www.usk.de/en/classification/age-rating-symbols/not-approved-for-young-persons-aged-under-18-in-accordance-with-art-14-german-children-and-young-persons-protection-act-juschg/ (last visited Feb. 18, 2011). USK 18 games must also not include any content that is prohibited by German law, such as excessive representations of violence, racism, warmongering, and pornography. *See id.*

When a conditional rating is assigned a rating is also assigned for if the applicant fails to satisfy the conditions for a lower rating. *See* USK Policy Statement, supra note 100, at 15-16. Modifications for the sake of German rating

Upon receiving the recommended age rating from the youth protection experts, the Representative may either accept the recommended rating and have the USK send notice of the rating assigned to the applicant, or veto it.[104] The applicant then has two weeks from receiving notice of its game's assigned rating to accept or appeal the rating.[105] Once accepted, the age rating assigned to the game by the USK classification process serves as a sovereign administrative act, with legal consequences for those who fail to abide by it.[106] Video games which the USK elects not to rate, but which have not been added to the Index, cannot be sold to minors or via mail order, but may be advertised and shown openly in retail stores.[107] Should the BPjM be consulted on a game and they

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assignment have included things such as nominally changing the enemy soldiers in *Half-Life* into robots, and the color of their blood from red to green; requiring the background story of the *Command & Conquer* series of games to be changed to claim that all combatants were robots; and removing all gore from *Fallout 3* (a game which featured the ability to target and shoot specific body parts of an enemy), to name a few. *See* Tellurian, *supra* note 98.

104. *See* USK: How Age Rating Symbols are Developed at the USK, *supra* note 101; *and see* USK Policy Statement, *supra* note 100, at 16. The USK guarantees that, starting from the time it confirms receipt of all necessary documents, its rating process will be fully conducted within fifteen working days, or within seven days if the applicant applies for its fast-track procedure. *See* USK Policy Statement, *supra* note 100, at 14, 16.

105. *See* USK Policy Statement, *supra* note 100, at 18. An assigned classification becomes effective once an applicant fails to appeal and waives in writing their right to legal remedy regarding it. *See id.* The appellate process essentially restarts the classification process, with the applicant being allowed to make statements to the classification committee during the presentation process. *See id.* at 18-19; *and see supra* note 102 and accompanying text. Such appellate process shall be concluded within two weeks of the submission of an appeal by the applicant. *See* USK Policy Statement, *supra* note 100, at 19. Within five days following receipt of the results of an appeal, an applicant may submit a second appeal, which once again restarts the classification process. *See id.* at 19-20. This second appeal shall be concluded within ten days of submission and is final. *See id.* at 20.

106. *See* USK: How Age Rating Symbols are Developed at the USK, *supra* note 101. Such consequences include sales regulations that impose fines of up to fifty thousand euros (€50,000) on retailers who fail to comply with a game's age rating. *See id.*; *and see* Youth Protection Act, *supra* note 103, at § 28.

107. *See* Von Boris, *Dead Rising is Not Banned (Yet)*, DREISECHZIG.NET (July 19, 2006), http://www.dreisechzig.net/wp/archives/566. As an example of the problems that arise from a game failing to attain a rating, the USK's election to not rate the popular Xbox 360 games *Gears of War* and *Gears of War 2* led to

determine that it meets the criteria for being added to the Index, the game may only be sold to adults under-the-counter and may not be openly advertised, thus discouraging game publishers from releasing such games in Germany.[108] As a result of the restrictions imposed by the German rating system, members of the German populace who desire to play unrated or unedited video games simply circumvent the

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Microsoft declining to release them at all in Germany. *See* Laura Jenner & Tor Thorsen, *Gears 2 Avoiding Germany, Possibly Japan*, GAMESPOT UK (Oct. 22, 2008), http://www.gamespot.com/xbox360/action/gearsofwar2/news_6199807.html; *and see* Alexander Sliwinski, *Gears of War 2 Not Releasing in Germany, Japan*, JOYSTIQ (Oct. 22, 2008), http://www.joystiq.com/2008/10/22/gears-of-war-2-banned-in-germany-japan/.

108. *See id.*; *and see* Tellurian, *supra* note 98. The following types of games are likely to be added to the Index, or "Indexed": (1) Games containing items designated in the Articles 86 (Nazi or Communist propaganda), 130 (discrimination), 130a (inciting crime), 131 (glorifying violence), 184 (pornography), 184a (pornography involving violence or bestiality), 184b (child pornography), or 184c (pornography involving a minor) of the German Penal Code; (2) Games that glorify war; (3) Games that feature humans or humanoid characters dying or being exposed to serious, undignified physical or mental suffering; (4) Games that primarily feature particularly realistic, cruel, or horrific violence; (5) Games that portray children in a sexualized manner; or (6) Games that are "obviously likely to cause serious endangerment of the development of children and young people or their progress to becoming an autonomous and integrated member of society." *See* USK Policy Statement, *supra* note 100, at 23-24; *and see* Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl. I] 3322, as amended, §§ 86, 130, 130a, 131, 184, 184a, 184b, 184c, *available at* http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html; *and see German Political Parties*, GERMAN CULTURE, http://www.germanculture.com.ua/library/facts/bl_parties.htm (last visited Feb. 20, 2011). Should a game violate any of the above listed Penal Code sections, its sale is also illegal, and such a game may be subject to court-ordered confiscation. *See List of Banned Video Games - Germany*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_banned_video_games#Germany (last visited Feb. 20, 2011). For clarification purposes, pornography is defined by the German High Court as "a presentation of sexuality that is not connected to any kind of psychologically motivated human relationship and which glorifies sexual satisfaction as the only reason for human existence, often accompanied by grossly depicted genitals." *See General Information*, BUNDESPRÜFSTELLE, http://www.bundespruefstelle.de/bpjm/information-in-english.html (last visited Feb. 20, 2011). The list of Indexed games is far too lengthy to include herein. *See generally Computer Games on the Index List*, INTERCAFE (Jan. 2007), http://www.cybercafe-software.com/indexlist.html (listing the titles of Indexed video games as of January 2007).

rating system by importing such games from countries outside of Germany, such as German-speaking Austria.[109]

### *B. Asia*

Asia contains a vast array of exceedingly diverse countries and cultures that have taken dramatically varied stances on the regulation of violence in video games.[110] One example of this diversity is Iran, which takes a somewhat structured approach to video game regulation that is more restrictive and vague than the ESRB.[111] China, on the other hand, has no formal video game regulation, so its policies are much more piecemeal.[112] While Japan has a system not unlike that of the ESRB, but that is still unique in its own ways.[113]

#### 1. Iran

The Entertainment Software Rating Association (ESRA) was created in 2007 by the self-regulatory organization Iran National Foundation of Computer Games (INFCS) to improve and promote Iranian-Islamic identity and culture through the assigning of video game age and content ratings.[114] In assigning an age rating and content descriptors to games ESRA considers the following four game characteristics: (1) Physical, (2) Intellectual or mental, (3)

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109. *See* Tellurian, *supra* note 98; *and see* Joe Martin, *EA Slams Germany for Censorship*, BIT-GAMER (Aug. 25, 2009), http://www.bit-tech.net/news/gaming/2009/08/25/ea-slams-germany-for-censorship/1.

110. *See infra* notes 114-28 and accompanying text; *see also List of Banned Video Games*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_banned_video_games (last visited Feb. 25, 2011) (listing video games that have been banned by various countries around the world, followed by short descriptions as to why they were banned).

111. *See infra* notes 114-18 and accompanying text.

112. *See infra* notes 119-23 and accompanying text.

113. *See infra* notes 124-28 and accompanying text.

114. *See ESRA (Entertainment Software Rating Association)*, IRAN NATIONAL FOUNDATION OF COMPUTER GAMES, http://www.ircg.ir/sn/pages/id/23/pt/full/lang/en (last visited Feb. 20, 2011); *and see About US*, IRAN NATIONAL FOUNDATION OF COMPUTER GAMES, http://ircg.ir/index.php?sn=aboutUs&pt=&&lang=en (last visited Feb. 20, 2011).

Emotional, and (4) Social.[115] ESRA age ratings are then broken down into six groups: (1) "ESRA +3," for children age three and above; (2) "ESRA +7," for children age seven and above; (3) "ESRA +12," for adolescents age twelve and above; (4) "ESRA +15," for adolescents age fifteen and above; (5) "ESRA +18," for single adults age eighteen and above; and (6) "ESRA +25," for married adults age twenty-five and above.[116] Games may also be assigned any of the following seven ESRA content descriptors: (1) Violence, (2) Tobacco and drug, (3) Sexual stimuli, (4) Fear, (5) Religious values violation, (6) Social norms violation, and (7) Hopelessness.[117] Some games may also be deemed "forbidden" or "prohibited."[118]

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115. *See* ESRA (Entertainment Software Rating Association), *supra* note 114. No explanation of the video game rating process is presented on the ESRA website. *See id.*

116. *See id.* According to Dr. Behrouz Minaei, managing director of the INFCS, the ESRA +25 age rating was necessary because "there is a difference between an eighteen-year-old Muslim and a twenty-five-year-old [Muslim]... [the latter] is more than likely married and some games are more suitable towards married people." *See* Eugene Harnan, *Islamic System Will Rate Video Games*, THE NATIONAL (Nov. 30, 2010), http://www.thenational.ae/news/uae-news/technology/islamic-system-will-rate-video-games.

117. *See* ESRA (Entertainment Software Rating Association), *supra* note 114. The content descriptor "Violence" is defined as behavior that harms someone or something, and includes destroying or disorganizing property. *See id.* The content descriptor "Tobacco and drug" is defined as depictions of drug use. *See id.* The content descriptor "Sexual stimuli" is defined as depictions of sexual diversity or "...sexuality out[side] of social norms...." *See id.* The content descriptor "Fear" is defined as scenes that evoke unjustified feelings of insecurity that can lead to chronic stress or conservative behavior in social situations. *See id.* The content descriptor "Religious values violation" is defined as depictions that are not in accord with Islamic religious principles, particularly violations of basic tenets (such as depictions of heaven or hell) and sacrilegious acts in holy places. *See id.* The content descriptor "Social norms violation" is defined as the use of vulgar language or depictions of behavior outside of the social norm. *See id.* Finally, the content descriptor "Hopelessness" is defined as game content that evokes feelings of having to choose between doing or not doing something which would make the player feel sinful. *See id.*

118. *See Foreigner Games*, IRAN NATIONAL FOUNDATION OF COMPUTER GAMES, http://ircg.ir/index.php?sn=foreignerGames&pt=list&&lang=en (last visited Feb. 20, 2011).

2. China

As software piracy is rampant in China, video game publishers are reticent to release games in China, and online games that require players to pay a fee or subscription to play are far more common.[119] This disinclination by publishers is compounded by the fact that China has banned all video game consoles.[120] As such, many of the restrictions placed on video games relate to online games, their content, and limiting the time that people can play them.[121] These restrictions are coupled with China's policies on censorship of media, including video game advertising, to preclude further content from the Chinese video game market.[122] In the end though, rather than

119. *See generally* USTR 2010 Special 301 Rep., at 19-23 (listing China on a priority watch list of countries that infringe intellectual property rights), *available at* http://www.ustr.gov/webfm_send/1906; *and see* Frank Yu, *The China Angle: The Impact of China Gaming Companies*, GAMASUTRA (Mar. 22, 2010), http://www.gamasutra.com/view/news/27746/The_China_Angle_The_Impact_Of_China_Gaming_Companies.php.

120. *See* Yu, *supra* note 119. There is, however, no regulatory body that oversees the ban, so a gray market has developed for banned consoles, their pirated knock-off versions, and their games. *See* Brian Ashcroft, *Why are Consoles Banned in China?*, KOTAKU (July 15, 2010), http://kotaku.com/#!5587577/why-are-consoles-banned-in-china.

121. *See Censorship on Imported Online Games Strengthened*, PEOPLE'S DAILY ONLINE (May 31, 2004), http://english.people.com.cn/200405/31/eng20040531_144921.html; *and see China Imposes Online Gaming Curbs*, BBC NEWS (Aug. 25, 2005), http://news.bbc.co.uk/2/hi/technology/4183340.stm; *and see* Brendan Sinclair, *China's Online Game Regulations Relaxed*, GAMESPOT (Jan. 20, 2006), http://www.gamespot.com/pc/rpg/worldofwarcraft/news.html?sid=6142777. In 2004 the Chinese Ministry of Culture established online game content screening policies that would prohibit the importation of online games that violate basic principles of the Chinese Constitution; threaten national unity, sovereignty, or territorial integrity; divulge state secrets; threaten state security; damage the nation's glory; disturb social order; or infringe on the legitimate rights of others. *See* Censorship on Imported Online Games Strengthened, *supra*. In 2005 the government set in motion restrictions on the time people could spend playing online games by requiring the imposition of in-game penalties on players who play for longer than three hours at a time without a minimum five hour break in between sessions. *See* China Imposes Online Gaming Curbs, *supra*. These proposed restrictions were later relaxed in 2006 to exempt adults from the imposed breaks. *See* Sinclair, *supra*.

122. *See* Kenji Minemura, *China Bans Reporting on 18 Subjects*, THE ASAHI SHIMBUN (Mar. 26, 2010),

restricting violent games, the Chinese government tends to restrict games that feature unfavorable depictions of the Chinese government and its policies.[123]

3. Japan

Japan utilizes two video game rating systems in tandem; the Ethics Organization of Computer Software (EOCS) rates adult PC games, and the Computer Entertainment Rating Organization (CERO) assigns age ratings and content descriptors to all other video games.[124] The EOCS separates the games it rates into two categories,

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http://www.asahi.com/english/TKY201003250329.html; *and see* Shang Koo, *The China Angle: Rumors and Regulations*, GAMASUTRA (Apr. 17, 2007), http://www.gamasutra.com/php-bin/news_index.php?story=13523; *and see* Ali Owaisi, *China Bans Sex and Violence in Video Game Advertising*, DAVIS LLP – VIDEO GAME LAW BLOG (July 12, 2010, 12:34:00 EDT), http://www.davis.ca/en/blog/Video-Game-Law/2010/07/12/China-bans-sex-and-violence-in-video-game-advertising. Such censorship policies include reports of government corruption, banning video game content on Chinese television broadcasts, and empowering local officials to require website owners to remove so-called vulgar content in online game promotions, amongst many others. *See* Minemura, *supra*; *and see* Koo, *supra*; *and see* Owaisi, *supra*.

123. *See List of Banned Video Games*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_banned_video_games#People.27s_Republic_of_China (last visited Feb. 20, 2011). Games that have been banned by the Chinese government include *Command & Conquer Generals: Zero Hour Expansion*, for "smearing the image of China and the Chinese army," *Football Manager 2005*, for recognizing Tibet as an independent country, *Hearts of Iron*, for portraying Manchuria, West Xinjiang, and Tibet as independent countries and Taiwan as controlled by Japan, and *Project IGI2: Covert Strike*, for supposedly tarnishing China and the Chinese army's image. *See id.*; *and see Swedish Video Game Banned for Harming China's Sovereignty*, CHINA DAILY (May 29, 2004), http://www.chinadaily.com.cn/english/doc/2004-05/29/content_334845.htm.

124. *See* Christophor Rick, *Generation: Gamerz CERO – Japan's Computer Entertainment Rating Organization System Explained*, GAMERS DAILY NEWS, http://www.gamersdailynews.com/article-1072-Generation-Gamerz-CERO-Japans-Computer-Entertainment-Rating-Organization-System-Explained.html (last visited Feb. 21, 2011); *and see* Heidi Kemps Zero-chan, *Rating the Games*, GAMESPY (Sept. 19, 2005), http://www.gamespy.com/articles/652/652162p1.html. Specifically, EOCS rates PC games that fall into the "dating sim," "visual novel," and "eroge" sub-genres, all of which focus on sexual content awarded through game play. *Video Game Content Rating System*, WIKIPEDIA, http://en.wikipedia.org/wiki/Video_game_content_rating_system#Ethics_Organization_of_Computer_Software (last visited Feb. 21, 2011); *and see generally* Shingo,

those only suitable for people age fifteen and older and those only suitable for people age eighteen and older, but both ratings apply to games that have explicit adult oriented content.[125] The EOCS also ensures that such games adhere to Japanese restrictions against depictions of genitalia and characters described as minors engaging in sexual acts.[126] CERO's rating system, on the other hand, assigns the games it rates one of five lettered age ratings, A, B, C, D, and Z, and affixes any of nine content descriptor icons that it deems appropriate.[127] Moreover, games rated Z by CERO cannot be

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*Newtypology: Toward a Classification of Eroge Subgenres*, HEISEI DEMOCRACY (Sept. 8, 2005), http://heiseidemocracy.com/2005/09/08/newtypology-toward-a-classification-of-eroge-subgenres/ (defining the various sub-genres of Japanese adult games).

125. *See Japanese Game Ratings*, IGN ENTERTAINMENT, http://www.ign.com/cero.html (last visited Feb. 21, 2001).

126. *See* Zero-chan, *supra* note 124.

127. *See* Japanese Game Ratings, *supra* note 125. Games rated "A" are deemed suitable for all ages, with nothing that would be deemed offensive by a majority of parents or that would be harmful to children. *See* Rick, *supra* note 124. Games rated "B" are deemed suitable for people ages twelve and older. *See id.* Games rated "C" are deemed suitable for people ages fifteen and older, and might include violence or sexually suggestive situations. *See id.* Games rated "D" are deemed suitable for people ages seventeen and older. *See id.* Finally, games rated "Z" are deemed suitable only for people age eighteen and older, contain explicit content, and may not be sold to people younger than age eighteen. *See id.*; *and see* Japanese Game Ratings, *supra* note 125. The nine content descriptors icons are for crime, drinking and smoking, drugs, fright, gambling, language, romance, and sexuality. *See* Japanese Game Ratings, *supra* note 125. The crime content descriptor indicates that the associated game contains depictions of or interactions with criminal activity. *See id.* The drinking and smoking content descriptor indicates that the associated game contains depictions of or references to drinking alcohol or smoking cigarettes or cigars. *See id.* The drugs content descriptor indicates that the associated game contains depictions of or references to the use of illegal narcotics. *See id.* The fright content descriptor indicates that the associated game contains scenes that might frighten children, and as such it is periodically not included on higher rated games (even those in the horror genre). *See id.* The gambling content descriptor indicates that the associated game contains depictions of or interactions with gambling activities. *See id.* The language content descriptor indicates that the associated game contains profane, derogatory, or bigoted language. *See id.* The romance content descriptor indicates that the associated game contains expressions of romantic love, such as kissing, dating, and other expressions of romantic desire or relations. *See id.* The sexuality content descriptor indicates that the associated game contains expressions of sexual activity, such as suggestive outfits, exposure of underwear, nudity, suggestive

publicly advertised in Japan, are displayed separately from other games in stores, and require one to prove that one is eighteen or older prior to purchase.[128]

### *C. Mexico, South America, and Africa*

Mexico and the countries that make up South America and Africa were grouped together due primarily to their almost universal lack of video game regulation.[129] Brazil and South Africa, however, stand out as two of the few countries in this group that do have systems in place for regulating or rating video game content.[130] The Brazilian video game rating system involves the Department of Justice, Rating,

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behavior, immoral thoughts, and other sexual content. *See id.* Ratings are generally generated by the rating selected by at least two of three video game evaluators assigned to each game, who make their selections by comparing game content to various content descriptors and their associated ratings. *See* Kevin Gifford, *All About Japan's Anti-Violence Game Rating System*, 1UP (Mar. 10, 2010), http://www.1up.com/news/japan-anti-violence-game-rating-system. The evaluators are average people who are not associated with the video game industry and who go through approximately thirty hours of training in how to rate video games according to the CERO system. *See id.*

128. *See* Gifford, *supra* note 127; *and see* Jason Dobson, *New CERO Rating System Picks 'Z' Titles*, GAMASUTRA (May 31, 2006), http://www.gamasutra.com/view/news/9538/New_CERO_Rating_System_Picks_Z_Titles.php.

129. *See generally* Jeff Brand, *A Comparative Analysis of Ratings, Classification and Censorship in Selected Countries Around the World*, AUSTRALIAN GOVERNMENT ATTORNEY GENERAL'S DEPARTMENT, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~80000CPB+-+A+Comparative+Analysis+of+Ratings,+Classification+and+Censorship+Around+~+Commissioned+Research256794.pdf/$file/80000CPB+-+A+Comparative+Analysis+of+Ratings,+Classification+and+Censorship+Around+~+Commissioned+Research256794.pdf [hereinafter *Ratings Analysis*] (summarizing the various rating systems for media available in several countries).

130. *See generally Jogos Eletrônicos*, MINISTÉRIO DA JUSTIÇA, http://portal.mj.gov.br/data/Pages/MJ6C4030FEITEMID5033B70EDCD34139B7AF8E3A5322CDE2PTBRNN.htm (last visited Feb. 22, 2011) (providing an overview of the goals and purpose of Brazil's National Department of Justice game rating system in Portuguese); *and see generally Classification*, FILM AND PUBLICATION BOARD, http://www.fpb.gov.za/index.php?option=com_content&view=article&id=123&Itemid=110 (last visited Feb. 22, 2011) (describing generally the, among others, game classification activities of the South African Film and Publication Board).

Titles, and Qualification (DJCTQ) assigning of one of six age ratings, L, 10, 12, 14, 16, and 18, and a content descriptor listing the theme and any objectionable content present in the game, with a focus on violent content, sexual content or nudity, and drug content.[131] Whereas in South Africa, the Film and Publication Board (FPB) affixes one of four game descriptors, PG, 13, 16, and 18, and any number of seven available content descriptors, Drugs, Imitable Acts/Criminal Techniques, Language, Nudity, Prejudice, Sexual Conduct, and Violence, to the games it rates.[132]

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131. *See Department of Justice, Rating, Titles and Qualification*, WIKIPEDIA, http://en.wikipedia.org/wiki/DJCTQ (last visited Feb. 22, 2011); *and see generally Manual da Nova Classificação Indicativa*, MINISTÉRIO DA JUSTIÇA, http://portal.mj.gov.br/data/Pages/MJ6BC270E8ITEMID66914BCA346A4350800CB04EBF2D6BD7PTBRNN.htm (last visited Feb. 22, 2011) (click on the colored icon labeled " Manual da Nova Classificação Indicativa" on the lower right-hand side of the page and open or download the document) [hereinafter *Manual da Nova*] (describing the Brazilian film and video game classification system in Portuguese). Unfortunately, a translated description of the Brazilian film and video game rating system conducted by the DJCTQ is not readily available. The above Manual da Nova, however, provides a description of the process behind the development of the Brazilian rating system, the ratings it assigns, and how it determines them. *See* Manual da Nova, *supra*. Unfortunately, due to translation difficulties and the need for brevity the entire contents of that document cannot be described herein. For the sake of comparison with other rating systems provided in this comment, some information will be provided herein and is more easily accessible in English via the Wikipedia citation supra. *See* Department of Justice, Rating, Titles and Qualification, *supra*. Brazilian video game age ratings are broken down into the following categories: (1) "L" or "Livre," for games that contain no objectionable content and can be viewed by people of all ages; (2) "10," for games that have content not recommended for people under the age of ten; (3) "12," for games that have content not recommended for people under the age of twelve; (4) "14," for games that have content not recommended for people under the age of fourteen; (5) "16," for games that have content not recommended for people under the age of sixteen; and (6) "18," for games that have content not recommended for people under the age of eighteen. *See id.*; *and see* Manual da Nova, *supra*, at 33-41. The Manual da Nova also lists the factors for assigning content descriptors such as those for violent content, sexual content, scenes involving drugs, embarrassing situations, and language. See Manual da Nova, supra, at 18-26. Also of note is the fact that the presence of certain kinds of positive content in a game can be used to counter-balance and reduce the rating that would have otherwise been assigned. *See id.* at 42-43.

132. *See Downloads – Classification Guidelines*, FILM AND PUBLICATION BOARD, http://www.fpb.gov.za/index.php?option=com_docman&task=cat_view&gid=50&I

### *D. Australia*

The Australian Classification Board (CB), a statutory body established by Classification (Publications, Films and Computer Games) Act 1995, must classify content such as video games before it may legally be presented to the public.[133] The classification process involves the CB following the general guidelines of the

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temid=103 (last visited Feb. 22, 2011) (click the "August 2009 – final Classification Guidelines" hyperlink); *and see generally Display Games and Publications*, FILM AND PUBLICATION BOARD, http://www.fpb.gov.za/index.php?option=com_content&view=article&id=129&Itemid=131 (last visited Feb. 22, 2011) (describing some of the restrictions on the display of video games to people younger than are rated to view such content). The FPB was established by statute in 1996 to rate films, video games, and pornographic publications. *See Age Rating*, NINTENDO SOUTH AFRICA, http://www.nintendo.co.za/NOE/en_ZA/service/age_rating_954.html (last visited Feb. 22, 2011) (click the hyperlink labeled "The FPB rating system"); *and see* Classification, *supra* note 130. Ratings are generally assigned by a group of three examiners who use a series of publicly-approved guidelines to determine the appropriate age rating and content descriptors for each game. *See FAQ – Who decides on how a film should be classified?*, FILM AND PUBLICATION BOARD, http://www.fpb.gov.za/index.php?view=items&cid=1%3Afaqs&id=8%3AWho+decides+on+how+a+film+should+be+classified%3F+&option=com_quickfaq&Itemid=105 (last visited Feb. 22, 2011). A "PG" rating indicates that the associated game contains nothing that would be harmful or disturbing to children of any age. *See* Downloads – Classification Guidelines, *supra*, at 15. Games rated "13" may not be purchased, rented, or played in a public arcade by persons under the age of thirteen. *See id.* Games rated "16" may not be purchased, rented, or played in a public arcade by persons under the age of sixteen. *See id.* at 16. And finally, games rated "18" may not be purchased, rented, or played in a public arcade by persons under the age of eighteen and have virtually no restrictions on their permissible content. *See id.*

133. *See Classification Board*, CLASSIFICATION WEBSITE, http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ClassificationBoard_ClassificationBoard (last visited Feb. 24, 2011); *see also* Classification (Publications, Films and Computer Games) Act 1995, 1995, Act No. 7 of 1995 (Austl.) (current version at Act No. 127 of 2010) [hereinafter *Classification Act*], *available at* http://www.comlaw.gov.au/Details/C2011C00026. The Classification Act also established both the National Classification Code, which outlines the principles behind and structure of the assignable game classification groups, and the Classification Review Board, which reviews contested classification decisions of the CB. *See* Classification Act, *supra*, at §§ 5, 9, 42-44B, 72; *and see* National Classification Code (May 2005), 2004, *available at* http://www.comlaw.gov.au/Details/F2005L01284.

National Classification Code, as expanded and clarified by the Guidelines for the Classification of Films and Computer Games, to determine the appropriate classification symbol and consumer advice for each game by a majority vote of those members who have seen the game in question.[134] Each CB decision results in the assignment of one of four classification symbols, "G," "PG," "M," and "MA 15+," and specific consumer advice to each game, or Refused Classification, or "RC," status.[135] Although variable by Australian

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134. *See* Classification Board, *supra* note 133; *and see* Classification Act, *supra* note 133, at §§ 9, 12, 57-58; *see also* National Classification Code, *supra* note 133; *see also* Guidelines for the Classification of Films and Computer Games, 2008, *available at* http://www.comlaw.gov.au/Details/F2008C00126/. The Classification Act states that only those CB members who have actually seen a demonstration of the computer game being classified may vote on its classification. *See* Classification Act, *supra* note 133, at § 58(7).

135. *See What We Do*, CLASSIFICATION WEBSITE, http://www.classification.gov.au/www/cob/classification.nsf/Page/Classification_in_AustraliaWhat_we_do (last visited Feb. 25, 2011); *see also* Classification Act, *supra* note [2 ABOVE], at § 7(3), 17, 20. A game may be assigned RC status for any of the following reasons: (1) it depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence, or revolting or abhorrent phenomena in a way that offends standards of morality, decency, and propriety generally accepted by reasonable adults to the extent that it should not be classified; (2) it describes or depicts a person who is or appears to be under eighteen years of age in a way that is likely offend a reasonable adult (whether the person is engaged in sexual activity or not); (3) it promotes, incites, or instructs criminal or violent activity; or (4) it is unsuitable for a minor to see or play. *See* National Classification Code, *supra* note 133, at 4. A game may be classified MA 15+ if it does not incorporate content sufficient to merit RC status, and it depicts, expresses, or otherwise deals with sex, violence, or coarse language in a manner that is unsuitable for viewing or playing by persons under the age of fifteen. *See id.* A game may be classified M if it does not incorporate content sufficient to merit RC status or an MA 15+ classification, and it cannot be recommended for viewing or playing by persons who are under the age of fifteen. *See id.* A game may be classified PG if it does not incorporate content sufficient to merit RC status or MA 15+ or M classification, and it cannot be recommended for viewing or playing by persons who are under the age of fifteen without the guidance of their parents or guardians. *See id.* And finally, all other games may be classified G. *See id.* Offensive content in this context is defined as "[m]aterial which causes outrage or extreme disgust." *See* Guidelines for the Classification of Films and Computer Games, *supra* note 134. The six classifiable elements of consumer advice for a game are: (1) drug use, (2) language, (3) nudity, (4) sex, (5) themes, and (6) violence. *See id.* Accompanying consumer advice is required for all but G

state or territorial legislation, generally games classified MA 15+ may not be sold, rented, or displayed to people under the age of fifteen unless they are accompanied by a parent or guardian, while games with RC status are universally banned, as unclassified games may not be advertised, sold, rented, displayed, or imported anywhere in the country.[136] Should a dispute arise over a rating, the CB's decision may be reviewed by the Classification Review Board (CRB).[137] In addition, there is currently a strong movement underway towards adding the "R 18+" classification, which is already available as for films, as a classification option for video games by as early as July of 2011, so as to allow adults access to content that would otherwise go unrated.[138] Unfortunately, the

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classified games, which may include consumer advice at the option of the CB. *See id.*; *see also* Classification Act, *supra* note 133, at § 20.

136. *See Compliance for Sale or Hire of Computer Games*, CLASSIFICATION WEBSITE, http://www.classification.gov.au/www/cob/classification.nsf/Page/HowtoComplywithClassificationLaws_ComplianceforSaleorHireofComputerGames (last visited Feb. 25, 2011); *and see Compliance for Advertising Computer Games*, CLASSIFICATION WEBSITE, http://www.classification.gov.au/www/cob/classification.nsf/Page/HowtoComplywithClassificationLaws_ComplianceforAdvertisingComputerGames (last visited Feb. 25, 2011). The CB may, however, reclassify a previously classified or RC status game after a minimum two year statutory waiting period, upon request by the Minister for Home Affairs or its own initiative. *See* Classification Act, *supra* note 133, at §§ 38-41.

137. *See Classification Review Board*, CLASSIFICATION WEBSITE, http://www.classification.gov.au/www/cob/classification.nsf/Page/Classificationin Australia_Whoweare_ReviewBoard_ReviewBoard (last visited Feb. 25, 2011); *see also* Classification Act, *supra* note 133, at §§ 42-44B (providing the statutory structure for the creation and operation of the CRB). A video game's publisher, classification applicant, or anyone aggrieved by its classification decision may request review of that decision by the CRB. *See* Classification Act, *supra* note 133, at § 42. Should the request be deemed by the CRB to not be frivolous, vexatious, or made in bad faith the CRB shall review the classification decision using the same classification methods used by the CB. *See id.* at §§ 42A-44.

138. *See* Laura Parker, *O'Connor Pushes for July R18+ Deadline*, GAMESPOT AU (Feb. 17, 2011), http://www.gamespot.com/news/6299917.html. Brendan O'Connor, the current Australian Minister for Home Affairs, is pushing for a vote in July on the addition of an R18+ classification for games, and asserts that

> ... in the end, the Commonwealth's position is that we need an R18+ classification for video games in this country. This is a sound argument insofar as doing the right thing and protecting minors; it is also a reasonable argument as it allows for adults to

addition of an R18+ CB classification for video games requires unanimous agreement by all Australian state, federal, and territory Attorneys General.[139] One exception to the national unity of the CB system is the South Australian Classification Council (SACC), which can step in to override CB classification decisions for South Australia if the SACC or Attorney General so decide.[140]

## IV. THE IMPACT OF VIOLENCE AND COMPARING VIOLENCE TO SEX

This section of the comment seeks to shed light on information that may assist others in forming a rational opinion regarding the regulation of violence in video games, and to compare that information to some of the past arguments made in favor of video

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> access material that is accessible by other adults in other countries; and it fits in with evolving changes in technology. So, [R18+ for games] is good public policy, and that's what I'll continue to say to people.

*See id.* Similarly, according to a nationwide survey conducted in 2010, approximately 80% of the 2,226 people surveyed supported the introduction of an R18+ classification for video games. *See* Randolph Ramsay, *Aussie Govt to Support R18+*, GAMESPOT AU (Dec. 4, 2010), http://www.gamespot.com/news/6284849.html. If added to the list of possible video game classifications, the R18+ game classification will likely resemble or match the current R18+ classification for films, which is restricted to adults only and allows: (1) virtually any theme, (2) violence, (3) the implication of sexual violence, (4) the realistic simulation of sexual activities, (5) virtually unrestricted use of language, (6) drug use, and (7) nudity. *See* Guidelines for the Classification of Films and Computer Games, *supra* note 134.

139. *See* Laura Parker, *Aussie R18+ Decision Impossible in March*, GAMESPOT AU (Feb. 15, 2011), http://www.gamespot.com/news/6299099.html?tag=other-user-related-content%3B1; *see also* Classification Act, *supra* note 133, at § 6 (requiring unanimity for amendment of the National Classification Code).

140. *See About the SA Classification Council*, SOUTH AUSTRALIAN ATTORNEY-GENERAL'S DEPARTMENT, http://www.agd.sa.gov.au/about_us/saclass_council.php (last visited Feb. 25, 2011). Additionally, until as recently as 2006, New Zealand used its own content classification system, the Office of Film and Literature Classification, but it has since joined the rest of Australia in using the CB's classification system. *See Frequently Asked Questions – What Happened to the Office of Film and Literature Classification (OFLC)?*, CLASSIFICATION WEBSITE, http://www.classification.gov.au/www/cob/classification.nsf/Page/FrequentlyAskedQuestions_FrequentlyAskedQuestions#c12 (last visited Feb. 25, 2011).

game regulation.[141] In general, violent crime rates have decreased nearly continuously for the last twenty years, as video games came to be found in most households in the United States.[142] Moreover, according to the scientific research currently available it is unclear as to what the relationship is between violent video game exposure and the commission of violent crimes.[143] And finally, although the argument has been made several times in courts around the country, analogizing the imposition of additional restrictions on violence in video games with restrictions currently placed on depictions of sexual material does not seem to hold water.[144]

### *A. Crime and Video Gamer Statistics*

According to Federal Bureau of Investigation (FBI) statistics on violent crime in the United States for the year of 2009, an estimated 1,318,398 violent crimes occurred and approximately 458,291 arrests were made for such crimes.[145] Of those arrests for violent crimes,

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141. *See infra* notes 145-72 and accompanying text.

142. *See Industry Facts – Games and Violence*, THE ENTERTAINMENT SOFTWARE ASSOCIATION, http://www.theesa.com/facts/violence.asp (last visited Jan. 16, 2011); *and compare infra* note 147 and accompanying text *with infra* note 149 and accompanying text. This is contrary to what one would expect to find if video games caused violent behavior.

143. *See infra* notes 153-67 and accompanying text.

144. *See infra* notes 168-72 and accompanying text.

145. *See Violent Crime – Crime in the United States 2009*, THE FEDERAL BUREAU OF INVESTIGATION – UNIFORM CRIME REPORTS, http://www2.fbi.gov/ucr/cius2009/offenses/violent_crime/index.html (last updated Sept. 2010); *and see Table 38 – Crime in the United States 2009*, THE FEDERAL BUREAU OF INVESTIGATION – UNIFORM CRIME REPORTS, http://www2.fbi.gov/ucr/cius2009/data/table_38.html (last updated Sept. 2010). Violent crime in this instance is defined as murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault. *See* Violent Crime – Crime in the United States 2009, *supra*. If multiple offenses were committed in a single event that event is categorized by its most serious offense, with offenses ranked in the following order, from most serious to least serious: (1) murder and non-negligent manslaughter, (2) forcible rape, (3) robbery, and (4) aggravated assault. *See id.* The FBI's Uniform Crime Reports Program does not collect information on the number of persons who were convicted, prosecuted, or imprisoned. *See Arrests – Crime in the United States 2009*, THE FEDERAL BUREAU OF INVESTIGATION – UNIFORM CRIME REPORTS, http://www2.fbi.gov/ucr/cius2009/arrests/index.html (last updated Sept. 2010). In addition, arrest data counts each instance an individual is arrested, not the number of individuals arrested, so the number of

approximately 68,074 were arrests of minors; equating to approximately 14.9% of the total for that year.[146] When compared to previous years, the FBI's crime statistics indicate a general downward trend of violent crime in the country.[147]

According to the ESA's annual report on the video game industry, 67% of households in the United States play computer or video

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individuals arrested may be fewer than then number of arrests listed above. *See id.* The above number of arrests for violent crimes equates to approximately 4.27% of the 10,741,157 total combined arrests made for the following crimes rated by the FBI: Murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, arson, other assaults, forgery and counterfeiting, fraud, embezzlement, stolen property (buying, receiving, possessing), vandalism, weapons (carrying, possessing, etc.), prostitution and commercialized vice, sex offenses (except forcible rape and prostitution), drug abuse violations, gambling, offenses against the family and children, driving under the influence, liquor laws, drunkenness, disorderly conduct, vagrancy, all other offenses (except traffic), suspicion, curfew and loitering law violations, and runaways. *See* Table 38 – Crime in the United States 2009, *supra.*

146. *See* Table 38 – Crime in the United States 2009, *supra* note 145. The remaining 390,217 arrests, equating to approximately 89.1% of the total number of arrests made in 2009, were of adults. *See id.* "Minors," as well as any references to "juveniles" or "children" made herein, is defined as persons under the age of eighteen, unless stated otherwise, and regardless of the actual age of majority for any particular state. *See id.* In 2009 1,515,586 arrests of minors were conducted, of which the 68,074 arrests for violent crimes committed by minors made up approximately 4.49%. *See id.* Thus, the proportion of arrests of minors for violent crimes as compared to the total number of arrests of minors (4.49%) was comparable to the proportion of arrests of adults for violent crimes, as compared to the total number of arrests of adults (4.27%) in 2009. *Compare id. with supra* note 145.

147. *See Uniform Crime Reporting Statistics*, THE FEDERAL BUREAU OF INVESTIGATION, http://www.ucrdatatool.gov/Search/Crime/State/TrendsInOneVar.cfm (select "United States – Total" in column "a;" then select "Violent crime rate" in column "b;" then select "1990" after "From:" in column "c" and select "2009" after "To:" in column "c;" then select the "Get Table" button) (last updated Mar. 29, 2010). The reported number of violent crimes, defined as murder, non-negligent manslaughter, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson, per 100,000 population has dropped from 729.6 in 1990 to 429.4 in 2009, with the rate dropping at an average of 14.86 per year. *See* Uniform Crime Reporting Statistics, *supra*; *and UCR Offense Definitions*, THE FEDERAL BUREAU OF INVESTIGATION, http://www.ucrdatatool.gov/offenses.cfm (last updated Jan. 23, 2009).

games as of 2010.[148] These same statistics describe the average gamer as approximately thirty-four years of age, with twelve years of game playing experience.[149] In fact, in 2010 only about 25% of gamers were under the age of eighteen.[150] As far as game ratings go, only approximately 17.4% of the total number of games sold in 2009 were rated M, while 48% were rate E.[151] Finally, as 93% of the time parents with minor children and a console or PC used to play video games are present at the time of game sale or rental, they are readily able to exercise their power as arbiters of the content their children view, which perhaps explains why 64% of said parents believe that video games are a positive part of the lives of their children.[152]

### *B. Research Into the Impact of Violent Video Games*

While there has been extensive research on the influence of violent media, such as violent video games, on young people, much of this research has been contradictory and inconclusive at best.[153]

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148. *See 2010 Essential Facts About the Computer and Video Game Industry*, THE ENTERTAINMENT SOFTWARE ASSOCIATION, http://www.theesa.com/facts/pdfs/ESA_Essential_Facts_2010.PDF (last visited Jan. 16, 2010). Moreover, the number of computer and video game units sold has continued to grow since 1996, until the total number of units sold in 2009 were more than triple that sold in 1996 (from 73.3 million units in 1996 to 273.5 million units in 2009). *See id.* at 11.

149. *See id.* at 2, 4.

150. *See id.* at 2. This percentage is even beaten out by the percentage of gamers over the age of fifty (26%). *See id.*

151. *See id.* at 7. The remaining portions of the total were made up of E10+ rated games, at 12.1% of the total, and T rated games, at 22.3%. *See id.*

152. *See id.* at 5.

153. *See, e.g.*, Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. ADOLESCENCE 113 (2004) *available at* http://inst.eecs.berkeley.edu/~cs10/fa09/dis/02/extra/update_violence.pdf; Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 PSYCHOL. SCI. 353 (2001) *available at* http://www.psychology.iastate.edu/faculty/caa/abstracts/2000-2004/01ab.pdf; Lillian Bensley & Juliet Van Eenwyk, *Videogames and Real Life Aggression: A Review of the Literature*, 29 J. ADOLESCENT HEALTH 244 (2001); Kevin D. Browne & Catherine Hamilton-Giachristis, *The Influence of Violent Media on Children and Adolescents: A Public-Health Approach*, 365 LANCET 702 (2005); Christopher J. Ferguson, *The School Shooting/Violent Video Game Link: Causal Relationship or*

Although some researchers have claimed to have proof of a causal relationship between exposure to violent video games and violent or aggressive behavior, such claims are inevitably contested and disputed.[154] A useful overview of the inconclusive nature of the prior research available on the effects of violent video games may be found in the 2005 meta-analysis review of such research conducted by Raymond Boyle and Matthew Hibberd.[155] In their review, Boyle and Hibberd described the difficulty in isolating violent video games as a causal factor in violent behavior, the failure by researchers to examine varied population demographics, and the distinct lack of original research as factors that contribute to the disparate results

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*Moral Panic?*, 5 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 25 (2008) *available at* http://www.gameinsociety.com/public/The_school_shooting_-_violent_video_game_link.pdf; Douglas A. Gentile et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 27 J. ADOLESCENCE 5 (2004).

154. *See* Anderson & Bushman, *supra* note 153 (claiming to have found conclusive evidence that violent video games cause heightened aggression, and thereby pose a threat to public health); *and see* JONATHAN L. FREEDMAN, EVALUATING THE RESEARCH ON VIOLENT VIDEO GAMES (Univ. of Chi. 2001) *available at* http://culturalpolicy.uchicago.edu/papers/2001-video-games/freedman.html (disputing the assertions of and methodology used by Anderson and Bushman). Some researchers even go so far as to advocate that video games can have beneficial effects, such as increasing visual acuity and mental processing speed through playing action video games. *See* Matthew W.G. Dye, C. Shawn Green & Daphne Bavelier, *Increasing Speed of Processing with Action Video Games*, 18 CURRENT DIRECTIONS IN PSYCHOL. SCI. 321 (2009) *available at* http://vision.psych.umn.edu/users/csgreen/Publications/publications.html.

155. RAYMOND BOYLE & MATTHEW HIBBERD, REVIEW OF RESEARCH ON THE IMPACT OF VIOLENT COMPUTER GAMES ON YOUNG PEOPLE (Stirling Media Research Institute 2005) *available at* http://videogames.procon.org/sourcefiles/Reviewofresearch.pdf [hereinafter *Research Review*] (updating and building upon a 2001 review of the effect of violent video games published by the United Kingdom Home Office with additional, more recent, key research on the subject). A meta-analysis is a comparative statistical technique for determining whether a set of results is consistent across multiple studies, often correcting for the bias favoring the publishing of articles that find relationships between select variables. *See* Art Markman, *The Broad View of Research on Video Games and Aggression*, PSYCHOLOGY TODAY (Mar. 29, 2010), http://www.psychologytoday.com/blog/ulterior-motives/201003/the-broad-view-research-video-games-and-aggression.

produced in this field of research.[156] Problems in researching the effect of violent video games crop up almost immediately with the inability of researchers to agree on key basic definitions, such as what exactly is "violence" or "aggression."[157] This is coupled with another basic problem: the inability to directly study the harm caused by violent video games due to ethical concerns for the research subjects.[158] Results may also be skewed by gathering data from experimental or research laboratory settings, as such settings fail to replicate the conditions under which most gamers play video games.[159] Added to these methodological problems is the distinct lack of research done on the effect violent video games have on adults, despite the majority of gamers being adults, and a generally

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156. *See id.* at 4-5, 16-17. Moreover, there have been very few longitudinal studies on the effect of violent video games on behavior. *See id.* at 35; *but see infra* notes 162-63 and accompanying text (acting as an example of one of the few longitudinal studies available).

157. *See* Research Review, *supra* note 155, at 12. For example, in their 2001 meta-analytic review of scientific research related to the effect of violent video games on aggression, Craig A. Anderson and Brad J. Bushman partially define aggression as "behavior intended to harm another individual who is motivated to avoid that harm." *See* Anderson & Bushman, *supra* note 153, at 354. Others choose to use the colloquial definition of words such as aggression, and instead describe their methods used to measure such emotional concepts. *See* Christopher J. Ferguson et al., *Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation*, 35 CRIM. JUST. & BEHAV. 311 (2008) *available at* http://videogames.procon.org/sourcefiles/Fergusonscripts.pdf. As noted by Mark Griffiths, a professor at Nottingham Trent University, the definitions of terms like "violent" or "aggressive" by some researchers would exclude the violent antics of numerous television cartoons like *Tom and Jerry*, which arguably possesses the same potential for harm as any animated video game. *See* Mark Griffiths, *Violent Video Games and Aggression: A Review of the Literature*, 4 AGGRESSION & VIOLENT BEHAV. 203, 210 (1999).

158. *See* Freedman, *supra* note 154; *see also* Research Review, *supra* note 155, at 33.

159. *See* Freedman, *supra* note 154; *see also* Research Review, *supra* note 155, at 15-16. Freedman argues that a heightened arousal or aggression response may simply be noted in experimental studies because, of the games selected, the violent video game is more exciting. *See* Freedman, *supra* note 154. Additionally, elements of the experimental setting may suggest to the subjects that certain responses are expected, and thereby increase the frequency of those responses. *See id.*

exclusive focus on research conducted in the United States.[160] In the words of Jonathan L. Freedman, a professor of psychology at the University of Toronto, regarding research into the effect of violent video games, "I cannot think of another important issue for which scientists have been willing to reach conclusions on such a small body of research."[161]

Another meta-analysis study released in 2010, conducted by Craig A. Anderson and several others, addressed some of the problems discussed by Boyle and Hibberd.[162] Most notably, the 2010 Anderson Study utilized a large number of more recent studies, including longitudinal studies and Japanese studies.[163] In the end, the 2010 Anderson Study concluded that playing violent video games is an indubitable causal risk factor for increased aggressive behavior and decreased pro-social behavior.[164] However, criticism quickly arose over the methods used in and reliability of the 2010 Anderson

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160. *See* Research Review, *supra* note 155, at 11, 15-16; *see also* 2010 Essential Facts About the Computer and Video Game Industry, *supra* note 149-50 and accompanying text; *and see generally* Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. ADOLESCENCE 113 (2004) (focusing on research gathered in the United States). Recent research further suggests that modern gamer demographics consist of people who have been only recently introduced to video games, and people who have grown up playing video games. *See* JAMES NEWMAN, VIDEOGAMES 50 (Routledge 2004). Furthermore, much of the Northern American research relies on laboratory-based experiments, rather than real-world conditions, and often involve students, not necessarily gamers. *See* Research Review, *supra* note 155, at 15-16; *and see supra* note 159 and accompanying text. Such studies also generally fail to consider how or why people play violent video games as factors in their research. *See* JEFFREY GOLDSTEIN, DOES PLAYING VIOLENT VIDEO GAMES CAUSE AGGRESSIVE BEHAVIOR? (Univ. of Chi. 2001) *available at* http://culturalpolicy.uchicago.edu/papers/2001-video-games/goldstein.html.

161. *See* Freedman, *supra* note 154.

162. *See* Craig A. Anderson et al., *Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review*, 136 PSYCHOL. BULL. 151 (2010) *available at* http://www.psychology.iastate.edu/faculty/caa/abstracts/2010-2014/10ASISBSRS.pdf [hereinafter *2010 Anderson Study*].

163. *See id.* at 156-160. The 2010 Anderson Study also included one study from Singapore and one study from China in its analysis. *See id.* at 153 n.3.

164. *See id.* at 151, 171. Specifically, Anderson et al. claimed that their evidence "strongly suggests that exposure to violent video games is a causal risk factor for increased aggressive behavior, aggressive cognition, and aggressive affect and for decreased empathy and prosocial behavior." *See id.* at 151.

Study.[165] Such criticism included a purported bias in the studies selected, whether the claimed effect of violent video games on behavior is significant, and that the meta-analysis methods used were flawed.[166]

In the end, even the latest research leads back to the conclusion that the effect that violent video games have on people is unclear, and thus this research is decidedly unhelpful in determining with certainty whether violent video games need to be more heavily regulated.[167]

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165. *See* Christopher J. Ferguson & John Kilburn, *Much Ado About Nothing: The Misestimation and Overinterpretation of Violent Video Game Effects in Eastern and Western Nations: Comment on Anderson et al. (2010)*, 136 PSYCHOL. BULL. 174 (2010) *available at* http://www.tamiu.edu/~cferguson/Much%20Ado.pdf [hereinafter *Ferguson Comment*]. It should be noted that the Ferguson Comment appeared in the very same periodical as the 2010 Anderson Study itself. *Compare* 2010 Anderson Study, *supra* note 162, *with* Ferguson & Kilburn, *supra*.

166. *See* Ferguson & Kilburn, *supra* note 165. In particular, the 2010 Anderson Study repeatedly cites and refers to studies conducted by Anderson et al. or their colleagues to support its conclusions, and a rather found only a weak relationship between the effect of violent video games on aggressive behavior (r = .15). *See id.* at 174-75. Additionally, Anderson et al.'s explanation for the discrepancy between crime rates and longitudinal study results in Japan and the United States does not stand up to their own acknowledgment of the fact that there is significant crossover between the video game market in Japan and the United States. *See* 2010 Anderson Study, *supra* note 162, at 153. This crossover, however, applies to both video games in particular and culture in general, as Japanese culture is increasingly heavily influenced by American culture and American culture is more strongly influenced by Japanese products and culture (such as through the rise in popularity of Japanese anime in the United States). Another minor point that the author of this comment took note of (as a Japanese speaker) is that, in locating the studies they would use for the Japanese portion of their meta-analysis, Anderson et al. used the Japanese search terms "*terebigemu*" (TV game), "*konpuutaagemu*" (computer game), and "*bideogemu*" (video game), which, aside from the fact that the proper romanization (or *rōmaji*) of "game" in Japanese is "*geemu*" and for computer is either "*konpyuuta*" or "*konpyuutaa*," they failed to use the more generic search term "*geemu*" (which can be used colloquially to refer to games of all types) by itself. *See* 2010 Anderson Study, *supra* note 162, at 157.

167. *Compare* Boyle & Hibberd, *supra* note 155, at 30-31, *with* Ferguson & Kilburn, *supra* note 165, at 4 (suggesting that the inconclusive or insignificant research available on the effect of violent video games, and the spin put on it by those seeking to be published, may be harmful).

### *C. Sex and Violence*

Proponents of increased video game regulation, particularly of violent video games, often analogize proposed regulations to restrictions on obscene materials.[168] The test for determining whether certain materials are obscene, and thus fall outside the protections of the First Amendment, was defined by the United States Supreme Court in *Miller* as follows: (1) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[169] As a result, some states periodically attempted to craft restrictions on violent video games that followed the *Miller* obscenity test, and when those restrictions were contested those states claimed that the exposure of minors to violent game content may be regulated under the "variable obscenity" or "obscenity as to minors" standard first lain out by the Supreme Court in *Ginsberg*.[170] This "variable obscenity" or "obscenity as to minors"

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168. *See, e.g.*, James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992); Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954 (8th Cir. 2003); Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009).

169. *See* Miller v. California, 413 U.S. 15, 23-24 (1973) (citing Roth v. United States, 354 U.S. 476, 485 (1957)); *and see Miller*, 413 U.S. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)). The Supreme Court in *Miller* also stated that obscenity is restricted to materials that depict or describe sexual conduct. *See Miller*, 413 U.S. at 24. As previously explained, this comment does not address the inherent First Amendment issues surrounding restrictions on violent video games. For an overview of the First Amendment issues related to video game regulation see Renee Newman Knake, *From Research Conclusions to Real Change: Understanding the First Amendment's (Non)Response to the Negative Effects of Media on Children by Looking to the Example of Violent Video Game Regulations*, 63 SMU L. REV. 1197 (2010).

170. *See* Ginsberg v. New York, 390 U.S. 629 (1968). *See, e.g.*, *Kendrick*, 244 F3d at 576-79; *Interactive Digital Software Ass'n*, 329 F3d at 959-60; *Video Software Dealers Ass'n*, 556 F3d at 953, 957-61. One of the problems with this state argument, aside from the First Amendment issues, is that in Ginsberg it was essentially conceded that the materials in question ("girlie magazines") were harmful to minors and obscene, whereas the opponents of state regulations against

standard allows courts to enforce restrictions on the sale of products to minors, even when such restrictions would be unenforceable against adults, and simply requires that the court be able to say that it was not irrational for the state legislature to have found that the materials condemned by statute are harmful to minors.[171] This argument has yet to work in any court, however, because courts consistently insist that obscenity applies solely to sexual content, and that Ginsberg created a sub-set of obscenity, rather than creating a new exception to First Amendment protections.[172] As such, at least for now, violent video game content remains firmly distinguishable from obscene sexual content.

## V. REVIEWING THE REGULATORY OPTIONS

There are perhaps four methods available for regulating violent video games. These methods are described below and are arranged from most restrictive to least restrictive. While each method may not be equally viable with the next, they each have their advantages and disadvantages.

### *A. Parental Responsibility*

The least restrictive method for regulating violent video games is to have no restrictions at all in place, aside from those people choose to impose on themselves and their families. In a sense, this was the original regulatory scheme for video games, before the advent of the ESRB. Under this scheme it would be entirely up to parents to monitor and restrict the content available to their children. Obviously, this puts a heightened level of responsibility on parents to be both informed about their purchases and those of their children, and to enforce their opinions on the sorts of content that are suitable

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violent video games do not make the same concession. *See Ginsberg*, 390 U.S. at 635.

171. *See Ginsberg*, 390 U.S. at 640-43.

172. *See, e.g., Kendrick*, 244 F3d at 576-79; *Interactive Digital Software Ass'n*, 329 F3d at 959-60; *Video Software Dealers Ass'n*, 556 F3d at 953, 957-61. Such cases are then generally dismissed, remanded, or reversed for failing to meet the First Amendment's strict scrutiny standard for content based restrictions on speech. *See Kendrick*, 244 F3d at 580; *Interactive Digital Software Ass'n*, 329 F3d at 960; *Video Software Dealers Ass'n*, 556 F3d at 967.

for their children. While such an imposition might seem to make this option highly unlikely, this regulatory scheme could become the desired method of the future as the modern generations of people who have grown up as gamers begin to have families of their own. Gamer parents will potentially be far more well informed of the types of games available, the content present in such games, and the effect various types of games can have on children than are the generations of parents who grew up without video games. As such, gamer parents would be in a better position to make informed decisions regarding the potentially violent video game content their children are exposed to. As this becomes so, other regulatory schemes may become less necessary. This is not to say that a regulatory scheme focused on parental responsibility could not be readily combined with select other measures for regulating violent video game content, as it would be as flexible as the populace that comprised its regulatory body. As most households have some sort of video game system and nearly all video game purchases already made under the supervision of parents, things are already underway to make this a viable option.[173] In the end, the principle behind this parental responsibility method was aptly stated by the Supreme Court in Ginsberg v. New York, 390 U.S. 629 (1968) when it said, ". . . constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[174]

### *B. Self-Regulation*

Self-regulation is the current system used for video games. Despite its rocky past, the self-regulatory system under the ESRB, has become one of the most successful of its kind, with enforcement and awareness of its ratings rising above its contemporary regulatory bodies in the film and music industries.[175] There is certainly something to be said for following the principle of "If it isn't broken, don't fix it" regarding changes to the current system. While some might argue that the ESRB is indeed broken, the generally high levels of use of and satisfaction with the ESRB suggest that it is an effective

173. *See supra* note 152 and accompanying text.
174. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968).
175. *See supra* notes 35, 67, 78 and accompanying text.

system for regulating video games.[176] Indeed, when compared to the video game regulatory systems of other countries, one might consider the United States lucky to have not ended up with a more convoluted or restrictive system than the ESRB.[177]

### *C. State Law*

Regulation of violent video games through the enactment of legislation in various states has been attempted several times in recent years. While these attempts have largely failed, it is a system that could still be pursued nonetheless.[178] Indeed, the various game rating systems used around the world evince the fact that different groups of people can have radically different ideas on what is and is not appropriate content for children to be exposed to.[179] Similarly, just as the populations around the world have varying cultures and opinions on video game regulation, so to might the states. If states were allowed to pass their own regulatory schemes for restricting violent video game content the people of each state could decide how best to protect the values they support. If proper research were conducted prior to enacting such legislation, each state's regulatory scheme could be tailored to the beliefs of its citizens. Additionally, as the United States Supreme Court has acknowledged that the state has a valid interest in protecting the welfare of the children present in it, support could potentially be found for the enforcement of such a regulatory scheme.[180] Such a system would not be without its flaws however. If states began enforcing different laws on video game ratings and restrictions on sale or advertising the video game industry

176. *See* Consumer Research, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/about/awareness.jsp (last visited Feb. 11, 2011).

177. Indeed, one imagines that had legislators at the time (with their vast knowledge of and experience with the video game industry) been given the opportunity to craft a video game regulatory system we might have had a system as complex as Germany's and as unbiased and transparent as Iran's. *See supra* notes 98-109, 114-18 and accompanying text.

178. *See supra* notes 168-72 and accompanying text.

179. For example, Germany likely regards the regulation of video game violence in the United States to be lax at best, while Americans might view German lenience towards sexual content in games to be outrageous, and even Australians do not want the current system used in Australia. *See supra* notes 45, 98-109, 133-40 and accompanying text.

180. *See* Ginsberg v. New York, 390 U.S. 629, 640-41 (1968).

could grind to a halt as production companies and publishers were overwhelmed by the discrepancies between jurisdictions. What was welcomed in one state could be banned in another, and it would be nearly impossible to enforce any sort of rating system. A gray market would quickly form as people in more restrictive states sought to obtain games from a less restrictive neighbor. Additionally, video game companies would be encouraged to start shopping for the state with the most lax enforcement laws, and games might not be made available in every state due to difficulties or costs involved in complying with a restrictive system. Even if state restrictions remained confined and targeted solely towards violent video games, however, as different regulations cropped up across different states, companies that produce video games would be in a dire situation, as their cost of compliance with inconsistent systems would be multiplied exponentially.

### *D. Administrative Regulation*

Another possible future for video game regulation lies in administrative regulation. If sentiment towards greater regulation of the video game industry, and violent video games in particular, continues to grow a potential option for legislators is to create a national rating system and a federal administrative agency, perhaps under the Federal Trade Commission or the Federal Communications Commission, that would oversee its day-to-day procedure and enforcement. Such an administrative body could even grow to provide a universal rating system for all forms of media, and thereby reduce consumer confusion.[181] Furthermore, a single administrative system could avoid the problems discussed above with disparate regulation enacted by various states. Such an agency would provide game developers with the clarity of a single, universal system with a fully transparent and regulated rating system. While the ESRB currently provides a unified system for game ratings, it is not

181. In fact, the Federal Communications Commission has considered the creation of such a universal rating system before. *See* Brendan Sinclair, *FCC Examining Semi-Universal Rating System*, GAMESPOT (Aug. 28, 2009), http://www.gamespot.com/news/6216474.html?tag=other-user-related-content%3B1.

enforced by law and participation is technically not mandatory.[182] An administrative regulatory agency for video game content could also work more readily and with more clout to lobby other nations to adopt or bring their systems in line with that used in the United States. Greater unification of rating systems would provide easier access to international markets for game production companies and would provide stronger enforcement of ratings and restrictions as alternative means for obtaining otherwise unavailable or restricted games would become more limited.[183] Unfortunately, an administrative agency would likely have difficulty remaining agile and adaptable enough to meet the demands of the fast-paced and ever-changing video game industry, and legislators would be hard pressed to devise a rating system that would accurately reflect the beliefs and desires of the American populace.

## VI. LOOKING AHEAD

On November 2, 2010 the United States Supreme Court heard oral arguments for Schwarzenegger v. Entm't Merchs. Ass'n, 130 S. Ct. 2398 (2010) (originally Video Software Dealers Ass'n v. Schwarzenegger) regarding the extent to which video games should be provided First Amendment protections.[184] While it has yet to rule on the case, should the Supreme Court decide that the vague restrictions imposed on so-called violent video games by the state of California are constitutional under the obscenity principles first discussed in Ginsberg v. New York, 390 U.S. 629 (1968) it could

182. *See supra* notes 46, 67-68.

183. If, for example, Germany were to use the PEGI game rating system German citizens would be less inclined to circumvent the law by importing from other countries. *See supra* note 109 and accompanying text. In addition, if a game were banned by PEGI German citizens would have a much harder time finding a source outside of the EU to import that game from.

184. *See Schwarzenegger v. EMA*, MEDIA COALITION (last visited Feb. 25, 2011), http://www.mediacoalition.org/VSDA-v.-Schwarzenegger-; *and see* Oral Argument for Schwarzenegger v. Entm't Merchs. Ass'n, 130 S. Ct. 2398 (2010), No. 08-1448 (S. Ct. Nov. 2, 2010) *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf. California enacted a change to California Civil Code sections 1746-1746.5 imposing restrictions and rating label requirements on the sale and rental of "violent video games" (as defined in the act) to minors. *See* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009).

cause a major upset throughout the country, as the video game industry would be left unsure as the the kinds of content that may be restricted by the various state laws that would be sure to follow in California's footsteps.[185] Furthermore, other industries would be justifiably concerned as to where these restrictions would stop if states truly can restrict any content they deem "obscene," in the name of protecting children. In such an instance, the above suggestions for alternative video game rating systems might become more attractive, particularly that of an administrative agency. As the Supreme Court is not likely to cause such an upset however, likely the greatest threat to the current status quo for the video game regulation system under the ESRB is that sentiments in favor of more restrictive video game regulation continue to grow, or a conclusive and significant causal link is found between exposure to violent video games and violent or aggressive behavior.

## VII. CONCLUSION

Violent video games, regardless of one's opinion of them, have indubitably shaped the video game industry. It was violent video games that prompted the creation of the current self-regulatory system in the first place, and it is quite likely that they will inspire further controversy in the future.

### Index of Acronyms and Terms

1994 Act: Video Game Rating Act of 1994
BBFC: British Board of Film Classification (UK)
BIU: Federal Association of Interactive Entertainment Software (Germany)
BPjM: Department for Media Harmful to Young Persons (Germany)
CB: Classification Board (Australia)
CERO: Computer Entertainment Rating Organization (Japan)
Console: Specialized personal computer systems whose primary purpose is for running video game programs (e.g. the

185. See Petition for Writ of Certiorari, Schwarzenegger v. Entm't Merchs. Ass'n, 130 S. Ct. 2398 (2010), No. 08-1448 (June 2, 2009); *and see supra* notes 170-72 and accompanying text.

Sony PlayStation 3, the Microsoft Xbox 360, or the Nintendo Wii to name a few)
CRB: Classification Review Board (Australia)
DJCTQ: Department of Justice, Rating, Titles, and Qualification (Brazil)
EOCS: Ethics Organization of Computer Software (Japan)
ERC: ESRB Retail Council
ESA: Entertainment Software Association
ESRA: Entertainment Software Rating Association (Iran)
ESRB: Entertainment Software Rating Board
EU: European Union
EWC: ESRB Website Council
FBI: Federal Bureau of Investigation
Fighting: In the context of referring to a game or game genre, such games will feature two or more combatants that are often player controlled and facing one another from a third-person, side-view perspective.
FPB: Film and Publication Board (South Africa)
FPS: First Person Shooter game
G.A.M.E.:Federal Association of Computer Game Developers (Germany)
Gamer: A person who plays video games on a regular basis
GTA: Grand Theft Auto
Index: List of games, the sale of which has been restricted by the BPjM
Indexed: The act of being added to the Index
INFCS: Iran National Foundation of Computer Games (Iran)
Microsoft:Microsoft Corporation
MMO: Massively Multiplayer Online game
Mod: Video game software modification
Nintendo:Nintendo of America, Inc.
OLJB: Supreme Youth Protection Authorities of the Federal States (Germany)
PC: Personal Computer
PEGI: Pan European Game Information (EU)
Rockstar: Rockstar Games
RPG: Role-Playing Game
RTS: Real-Time Strategy Game
SACC: South Australian Classification Council (Australia)
Sega: Sega of America, Inc.

Sony: Sony Computer Entertainment Inc. (and its subsidiaries)
USK: Entertainment Software Self-Regulation Body (Germany)