

# **AN ANALYSIS OF THE VIDEO GAME REGULATION HARMONIZATION EFFORT IN THE EUROPEAN UNION AND ITS TRANS-ATLANTIC CHILLING EFFECT ON CONSTITUTIONALLY PROTECTED EXPRESSION**

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## **INTRODUCTION**

Video games have become a prominent pastime for both children and adults in the United States (U.S.) and across the European Union (EU). [1] Today, individuals are spending more time and money on electronic entertainment than ever before. [2] Studies conducted by the National Institute on Media and the Family (NIMF) highlight the significant amount of time that U.S. youth spend with video games. [3] In its 2005 Video Game Report Card, NIMF found that eighty-seven percent of all eight to seventeen year old children in the United States played video games. [4] The following year, in the Eleventh Annual MediaWise Video Game Report Card, NIMF reported that forty-two percent of U.S. children play video games for at least one hour per day, with twenty-two percent playing for two or more hours per day. [5] Although the average age of U.S. video game players has risen to the late twenties, almost half of the most avid players are between six and seventeen years old. [6] A similar study in the EU reported that European gamers dedicate a significant portion of their free time to video games, although less than their U.S. cohorts. [7] A study in Germany, the nation with the most time dedicated to video game playing within the EU, showed that a typical German video game player spends an average of forty-one minutes per day on video games. [8]

In addition to similar video game consumption habits, violent, pre-meditated murders by video game players have stunned both the United States and Germany. [9] As a result, legislators in both countries have taken action in attempts to restrict minors' access to violent video games. [10] The results have widely differed between the two countries, with the United States electing to treat video games as protected speech under the First Amendment, while Germany has focused on content censorship. [11] Germany's video game restrictions, which are much more burdensome than U.S. regulations, are seen as strict even when compared to the standards of other European nations. [12] This is of special importance since Germany took over the six-month rotating presidency of the EU in early January 2007. [13] Germany is using its position to lead a clampdown on violent video games across the EU. [14] Germany's initiative bolsters previous calls for more control of video game violence by the European Commission. [15] The potential censorship presents a problem as many video games are created in the United States and then released internationally. [16] Censorship in Germany, and more importantly across the EU, could create a chilling effect on video game expression in the United States. [17]

This Note provides a summary of the U.S. approach on regulating minors' access to violent video games, and the Constitutional barriers to such restrictions. Part I provides a description of the current U.S. system of video game ratings and content control, and focuses on the modern video game rulings that have afforded full First Amendment protection to their violent content. Part II discusses aspects of Germany's video game regulations, highlighting its emphasis on content censorship as compared to regulations in the United States. Finally, Part III analyzes Germany's over-protective video game regulations and censorship, and argues against the propagation of such restrictions throughout the EU. As a potential resolution, this Note suggests that the EU harmonize its current content ratings system throughout its member States in order to prevent drastic regulatory differences with the United States.

## **I. BACKGROUND**

Each year seems to set a new record for total spending on video game software, hardware, and accessories. [18] In 2006, sales rose nineteen percent over the previous year, up to 12.5 billion dollars in the United States alone. [19] The rise in sales was driven in part by an increase in video game realism. [20] In the nearly fifty years since the advent of video games, manufacturers have continued to dramatically improve the quality of player immersion in the gaming experience. [21] Modern gaming systems, such as the Microsoft Xbox 360 and the Sony Playstation 3, offer

ultra-realistic graphics, sounds and life-like simulations. [22] The newest offering of video game hardware, the Nintendo Wii, interprets the player's real-life motions into onscreen actions that are mimicked by the video game characters. [23] Every generation of improved hardware brings with it a new wave of video games, which like other modern media outlets, show increasingly shocking displays of violence. [24] This increase in realism and immersion has not gone unnoticed by lawmakers, especially given the recent incidents of violence by heavy consumers of violent video games. [25]

#### *A. Video Game Violence and Its Effect on Children*

In the late 1990s, a rash of school killings, perpetrated by “heavy consumers of violent video games,” made national headlines on a regular basis. [26] In October 1997, Luke Woodham killed his mother at home, fatally shot two students at his high school, and injured seven others. [27] Less than two months later, Michael Carneal opened fire on a prayer group at school, killing three and wounding five. [28] In March of 1998, Mitchell Johnson and Andrew Golden, both under the age of fifteen, triggered a fire alarm at their junior high school and fired on students as they evacuated, killing five and injuring ten. [29] Kip Kinkel murdered his parents on May 20, 1998 before opening fire in his school's cafeteria, killing two students and wounding twenty-two people. [30] On April 20, 1999 Eric Harris and Dylan Klebold assaulted Columbine High School in Colorado. [31] The attack resulted in the deaths of twelve students and a teacher, injured twenty-three others, and culminated in the suicides of both Harris and Klebold. [32]

While school shootings are more and more frequently foiled by parent vigilance and law enforcement activities, they have not been rendered a non-concern. [33] On March 21, 2005 an attack occurred at Red Lake High School in Red Lake, Minnesota. [34] Jeffrey Weise, a sixteen-year-old student at the school, killed nine people, seven of them in a rampage through the school. [35] Witnesses to the shooting claimed that Weise was “grinning” and attempting “headshots” as done in many first person shooter video games before ending the massacre with his suicide. [36] Finally, the worst, and most recent, school shooting in history occurred at Virginia Tech University on April 16, 2007. On that tragic day, Cho Seung-hui killed 32 people and injured 29 others before turning his gun on himself. [37] Many reasons have been offered for this rash of school shootings, including peer harassment, easy access to firearms, movies, and violent video games. [38]

While there were certainly a myriad of possible reasons for each student's violent outburst, the primary commonality that the aforementioned school shooters shared was a penchant for playing extremely violent video games. [39] In fact, these students were described as “fanatical and excessive consumers of violent ... video games,” who's game playing far exceeded the average youth's exposure to such media. [40] Many of the games that the school assailants played were those in which the player is rewarded for shooting and killing other players, as well as enemies. [41] In noting this connection, several studies have been conducted in an effort to determine the role that violent video games play in contributing to youth violence in general and to school shootings in particular. [42] Although the evidence is not concrete, the studies have shown that persons with violent tendencies tend to prefer violent media, such as the first person shooter game Doom, which both Dylan Klebold and Eric Harris obsessively played. [43] Harris even went so far as to customize Doom into a scenario that resembled the actual Columbine massacre. [44] While these studies imply that violent persons tend to prefer violent media, the extent of this relationship is not clearly defined. [45]

It is important to note, however, that correlation and causation are not identical; these studies do not prove, nor can they accurately claim, that violent video games ever made anyone more inclined to commit a violent act. [46] In fact, according to the U.S. Department of Justice, Bureau of Statistics, serious violent crime levels have been on the decline since 1993. [47] Moreover, firearm related crime has “plummeted” during this same period, marking the lowest homicide rates for fourteen to seventeen year olds ever recorded. [48] Most interesting of all, these decreases in violent crime occurred at the peak of console gaming adoption by consumers, in conjunction with the advent of truly realistic three-dimensional gaming. [49] Despite the lack of correlative proof, or even a firm understanding of the precise relationship between real-world violence and video game violence, lawmakers have attempted to use these studies as a social-science basis for legislation. [50]

### B. Video Game Regulation in the United States

The current, constitutionally permissible method for restricting minors' access to violent video games in the United States is self-regulation by the video game industry. [51] In 1994, the electronic gaming industry formed the Entertainment Software Association (ESA) as a response to growing concerns regarding the effects of violent video games on children. [52] The purpose of the ESA was to facilitate the self-regulation of video game violence in order to stave off potential congressional action. [53] To orchestrate the self-regulatory system, the Entertainment Software Rating Board (ESRB) was established by the ESA as an independent, third-party entity. [54] The ESRB was tasked with developing and maintaining a rating system for video game content. [55] Although the ESRB's ratings regime is done voluntarily, there exists a high degree of industry participation. [56] In fact, "virtually all" games that are sold at retail in the United States are rated by the ESRB. [57] While the ESRB has an overwhelming amount of participation, it has not been without its criticisms regarding organization, rating criteria and effectiveness. [58] Despite these criticisms, the ESRB remains the current standard for regulating video game content in the United States. [59]

The ESRB ratings system was created "[a]fter consulting a wide range of child development and academic experts, analyzing other rating systems" and conducting nationwide research with parents. [60] It provides "both age-based rating categories and ... objective and detailed information about what type of content is in the game." [61] The goal of the rating system is to "inform and suggest, not prohibit," and reflect the overall content of the game. [62] The ratings system covers all forms of video games across both console [63] gaming platforms and on personal computers. [64] The ESRB ratings system is divided into seven basic categories. [65] These categories include: (1) "EC" Early Childhood; [66] (2) "E" Everyone; [67] (3) "E10+" Everyone 10+; [68] (4) "T" Teen; [69] (5) "M" Mature; [70] (6) "AO" Adults Only; [71] and (7) "RP" Rating Pending. [72] Descriptors often accompany these rating icons and provide further content information regarding consumer areas of interest such as violence, sexual themes, and language." [73]

Criticism of the ESRB is not based on a lack of participation-- the ESRB averages over 1000 ratings each year, with 1285 rating assignments in 2006. [74] Although virtually all video game companies allow their games to be content rated, many video game companies specifically market their "Teen," "Mature" and "Adults Only" titles to consumers below the appropriate age range. [75] A report by the Federal Trade Commission (FTC) discovered that "nearly all the game companies ... have marketed violent M-rated games to children ..." [76] This action constitutes a drastic disregard of industry standards, and nullifies the purpose of industry self-regulation. [77] Additionally, concerns often center on lackluster enforcement of age restrictions at the retail level. [78] Due to these realities, the FTC has seriously questioned the credibility of industry self-regulation. [79] The FTC pointed out specific weaknesses including a lack of enforcement of age restrictions at the retail level, lack of sanctions for ratings violations, and lack of parental awareness of the ratings system. [80] Despite these criticisms and documented violations, however, the ESRB's self-regulatory scheme for video games is still considered more effective than the regulatory measures of both the motion picture industry and the music recording industry. [81]

### C. Video Game Regulation in Germany

Youth violence and concerns relating such tendencies to violent video games are not unique to the United States. [82] Many disturbing violent crimes have been committed in Germany by teenagers in recent years. [83] These crimes parallel the youth violence incidents in the United States, and have raised similar questions about the role that violent video games play in contributing to such actions. [84] The most notorious youth violence incident occurred in late November 2006 when eighteen-year-old Sebastian Bosse opened fire at a high school in Emsdetten, Germany. [85] Bosse's attack injured twenty-seven and culminated in his suicide. [86] Like the school shooting incidents in the United States, Bosse and other perpetrators of German crimes all shared an affinity for playing extremely violent video games. [87] Therefore, it is not surprising that German legislators, like their counterparts in the United States, have attempted to restrict minors' access to violent video games via legislation. [88] What is of interest, however, is the divergent path that Germany followed in handling such regulations as compared to the United States. [89]

Similar to the ESRB in the United States, the German video game industry made efforts to self-regulate as early as 1994. [90] The Verband der Unterhaltungssoftware Deutschlands, e.V. (VUD) (Entertainment Software

Association of Germany, Inc.) formed the Unterhaltungssoftware Selbstkontrolle (USK) (Entertainment Software Self-Regulatory Board), an independent regulatory entity tasked with maintaining a voluntary ratings program. [91] The USK “supported age-appropriate use of games,” and employed a rating system very similar to that of the ESRB. [92] Video games were rated based on their content, and were divided into the following categories: (1) without age restrictions; [93] (2) restricted for those below the age of six; [94] (3) restricted for those below the age of twelve; [95] (4) restricted for those below the age of sixteen; [96] (5) restricted for those below the age of eighteen. [97]

Unlike the United States, however, Germany was not satisfied with industry self-regulation. [98] In reaction to the violence of the Emsdetten shooting, Germany almost immediately passed legislation making the voluntary ratings system legally binding and subjecting the USK to control by the German government. [99] What had once been autonomous self-regulation similar to the ESRB became what some have described as nothing more than “castrated self-regulation.” [100] The regulations shifted true control of video game ratings away from the USK, effectively putting them into the sole possession of the German government. [101] With the government firmly in control of video game ratings and content control, the strengthening of censorship laws and expansion of the ban list are directly enforceable, and violators may be subject to criminal penalties. [102] While this smothering ratings regime is currently unique to Germany, proposed changes in the European Union threaten to apply particular aspects of Germany's methodology across the entire European Union. [103]

#### *D. Video Game Regulation Across the European Union*

EU member states may employ individual, voluntary self-regulation as in the United States. [104] States that do not have their own self-regulatory entities generally subscribe to the Pan European Game Information (PEGI) ratings. [105] PEGI is a ratings system developed in 2003 by the Interactive Software Federation of Europe (ISFE), and is based on rating systems previously existing throughout Europe. [106] Like the ESRB, PEGI attempts to inform parents in their purchasing decisions by categorizing games for appropriate ages based on their content. [107] The different age categories are similar to both the ESRB and the USK, and consist of: (1) “3+” (2) “7+” (3) “12+” (4) “16+” (5) “18+”. [108] PEGI is a voluntary system like the ESRB in the United States, with the ratings being carried out by the members of the video game industry. [109] PEGI enjoys widespread acceptance throughout the EU, and is currently the video game ratings standard in sixteen countries. [110] Although PEGI is not associated with the EU, several nations passed legislation giving full recognition to the PEGI ratings. [111] Unlike Germany, these laws do not render PEGI subject to regulation by the government of the respective EU states. [112]

## II. DISCUSSION

### *A. Regulatory Attempts to Restrict Minors' Access to Violent Video Games in the United States*

U.S. legislators, concerned with youth consumption of violent video games, were encouraged by the successes of obscenity regulations in restricting minors' access to sexually explicit materials. [113] Lawmakers relied heavily on the principles and language of judicially sanctioned obscenity statutes when drafting proposed video game regulations. [114] For example, a recent California act designed to prohibit the sale of a specific class of extremely violent video games to minors narrowly defined the characteristics of the target game. [115] The statute specifically defined what qualified as a “violent video game,” “cruel,” “serious physical abuse,” and “torture.” [116] The statute then restricted the rental or sale of video games containing such images to youth aged seventeen or younger. [117] Similarly, an earlier Indianapolis city ordinance attempted to limit minors' access to video games in arcades. [118] The ordinance required partitioning off games deemed “harmful to minors,” [119] and forbade an unaccompanied minor to play such games. [120] As justification for their proposals, proponents of such laws interpreted studies regarding youth violence to show a causal link between violent entertainment and aggressive behavior. [121] Despite the similarity of these ordinances' to obscenity regulation and purported scientific backing, neither withstood judicial scrutiny. [122]

Just as legislators have been active in trying to limit minors' access to violent video games, free speech proponents, as well as the video game industry itself, have been active in challenging such restrictions. [123] Video game statutes are typically challenged on one of “three constitutional grounds: (1) infringement of a protected First Amendment activity; (2) vagueness; and (3) compelled speech.” [124] Early challenges to these video game statutes

were met with little support by the courts, which generally held that video games were not protected speech under the First Amendment. [125] As technology advanced, however, so did the realism and quality of video game's story telling and presentation. [126] These technological advances forced the courts to reconsider the similarities of video games to other forms of protected speech. [127] This eventually led to the protection of video games as free speech under the First Amendment. [128]

The shift from categorizing video games as “pure entertainment with no informational element” to protected free speech came in the decision of *American Amusement Machines Association v. Kendrick*. [129] *Kendrick* represented a constitutional challenge to an Indianapolis city ordinance designed to limit minors' access to arcade games that contained sexually explicit and particularly violent imagery. [130] In striking down the Indianapolis city ordinance, the court emphasized three points: video games are a protected form of expression under the First Amendment, violence is not obscenity, and the social science evidence presented did not constitute a compelling interest. [131]

The court's decision in *Kendrick* dismissed the idea that video games are not a protected form of expression. [132] The court commented that “[v]iolence has always been and remains a central interest of humankind,” and analogized video games to the story telling and depictions of violence in classic literature such as *Odyssey*, *The Divine Comedy* and *War and Peace*. [133] Further, video games “with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes,” and these age-old themes are “particularly appealing to the young.” [134] The court realized that a video game was no less capable of containing the same expressive content and ideas as traditional forms of expression. [135] For this reason, while violent video games may contain content that is cruel or unsettling, they are still legally entitled the full protection of the First Amendment. [136]

Next, the court in *Kendrick* refused to “squeeze the provision of violence into a familiar legal pigeonhole, that of obscenity.” [137] The court held that violence and obscenity were separate categories, and that future statutes may not rely on obscenity language to regulate violent expression. [138] Finally, the court refused to be persuaded by the social science studies purporting to link video game violence to real world actions. [139] The court concluded that the City did not have a compelling justification for the restriction of a constitutionally protected activity, and dismissed the studies while commenting that there was no proof that “video games have ever caused anyone to commit a violent act.” [140] This decision, therefore, effectively crippled State authority to regulate minors' access to violent video games in the United States. [141]

#### B. Regulatory Attempts to Restrict Minor's Access to Violent Video Games in Germany

In stark contrast to the failings of video game legislation in the United States, legislation restricting minors' access to violent video games in Germany has received widespread acceptance. [142] The German government reacted almost immediately to recent youth violence, such as the Emsdetten shooting, by passing the Protection of Young Persons Act (Act). [143] While the German Constitution outlines speech provisions, the Act imposed significant regulations regarding access of minors to violent video games. [144] The restrictions are legitimate in the context of the German legal system, as Article 5 of the Constitution of the Federal Republic of Germany provides for significant limitations on free speech. [145] The allowances for speech censorship are intended to combat the potential for political extremists to manipulate the public psyche and to give force to child protection laws. [146]

The most notable and troubling feature of the Act's restrictions on access to violent video games is the inclusion of the harmful media index, a list of completely banned material. [147] The harmful media index focuses on broad categories of violence, racial hatred and sexual-ethical disorientation. [148] Where there is “excessive visual violence or violence is the exclusive content of the game,” such as in the first-person shooter type games often accused of inspiring school shooting perpetrators, indexing appears more probable. [149] Further, the Act bans media that is “severely harmful to minors” based on its content alone, regardless of whether or not they are listed on the index. [150] Examples of such content include glorification of violence, incitement to criminality, glorification of war, and depictions of people who are dying or suffering where there is no dominating justifiable interest in this form of reportage. [151] The government, through its harmful media index, has made it illegal to advertise, sell or even fail to prevent a child's physical or electronic access to such media. [152] Interestingly, the legal consequences for violating the ban list's restrictions remain the same regardless of the presence of a parent or guardian. [153] This

is in direct contrast to the ESRB's rating system, which is designed to inform parents of game content so that they may determine if they wish to purchase such media for their child. [154]

The breadth of the German ban list and the smothering restrictions it places on violent video games are unique to both other EU member states and the United States. [155] Despite the already stringent restrictions in Germany, legislators recently proposed a new, more restrictive law that aims to ban violent video games outright. [156] Further, while the individual Member States of the EU currently have their own policies and practices for regulating minors' access to violent video games, Germany has developed an initiative for re-evaluating the current regulatory scheme across the EU. [157] This initiative, aimed at both streamlining regulations across the EU and overriding the current self-regulatory scheme, has garnered support from both the European Justice Commissioner and the Interactive Software Federation of Europe. [158] With such prominent supporters, the German sponsored initiative may have a real chance at effecting sweeping changes regarding restrictions on violent video games throughout the EU. [159]

### *C. Germany's Proposed Changes to Violent Video Game Regulation in the European Union*

On November 14, 2006 Vice-President of the European Commission Franco Frattini expressed his concern with the increasing number of violent video games reaching the hands of European youth. [160] In response, he proposed that EU Ministers of Interior “have a first exchange of views on this issue with the objective of identifying possible scope for complementary national and European level activities in this regard, including on issues such as awareness raising, the labelling of such games and selling to minors.” [161] In closing, Vice-President Frattini offered that “a public/private partnership” may be the appropriate course for video game regulation across the European Union. [162] These comments hinted at EU legislation giving more teeth to PEGI's ratings, and potentially strengthening its enforcement mechanisms throughout the European Union. [163]

In a 2007 address to the EU Parliament, Vice-President Frattini again made a case for increased regulation of the video game industry, and suggested that the EU may adopt more stringent regulations concerning the development and sale of violent video games. [164] The focus of the increased regulations, however, no longer seems to center around strengthening methods of enforcement for PEGI ratings. [165] Despite the wide involvement of European agencies and acceptance by a majority of EU states, the Vice-President changed stance, going so far as to describe PEGI as “failing.” [166] In conjunction with Vice-President Frattini's call for increased video game regulation, Germany assumed the rotating presidency of the EU on January 1, 2007. [167] Germany's support of staunch video game regulation meshes nicely with the Vice-President's agenda, and together they have enacted an initiative to harmonize national video game restrictions across the EU. [168] In stopping just short of proposing EU-wide legislation, Vice-President Frattini made clear his preference for such sweeping measures, commenting that “[p]rotection of children cannot have borders.” [169] Likewise, the German government declared that it would conduct a study of all the national video game regulations with a view to setting EU-wide norms. [170] Given Germany's currently draconian restrictions, including their pending proposal for a complete ban on violent video games within their own borders, in addition to the support of the Vice-President, the potential for an EU-wide ban on violent video games may be looming on the horizon. [171]

## III. ANALYSIS

### *A. An Alternative Legislative Solution*

Any initiative to strengthen video game restrictions in the European Union should not fashion itself after the stifling German regime. [172] The propagation of measures similar to a ban list or other severe content restriction throughout the Member States will only serve to bolster existing concerns of diminishing free speech rights within the European Union. [173] Additionally, such limitations run contradictory to the modern trend of valuing video games as artistic expression that has both cultural and historical significance. [174] Such action would create an insurmountable rift between video game ratings and restrictions in the United States and the European Union. [175] The European Union should focus on ways to rectify the primary issues surrounding its current video game regulation scheme, such as enforcement at the retail level. [176] Bolstering the effectiveness of PEGI restrictions will serve the purpose of harmonizing regulations within the European Union, and will also work toward the over-

arching purpose of minimizing video game regulatory differences between the United States and the European Union. [177] This is of particular importance to video game developers in the United States, whose free speech rights may be curtailed domestically due to their dependence on successful international sales. [178]

Despite the inconclusive nature of scientific studies attempting to relate video game and real world violence, Vice-President Frattini has cited such linkage as the necessary basis for tighter restrictions on violent video games. [179] This constitutes an unacceptable promotion of government regulation of moral welfare over free speech rights, a promotion founded on inconclusive data. [180] Even if something greater than a correlative relation between the two was assumed to exist, however, there are much less restrictive measures than outright censorship available to keep violent video games out of the hands of those deemed too young to consume them. [181] Legislation enforcing monetary and criminal penalties against merchants who violate PEGI sales restrictions at the retail level is one potential solution. [182] Sanctions against those who sell inappropriate games to minors should be both large and cumulative in order to provide the incentives necessary to overcome the profitability of repeatedly violating sales restrictions. [183] Some EU states have already adopted similar legislation, as suggested by the Vice-President himself. [184] Given the widespread acceptance of PEGI across the European Union, it would make little sense to abandon this rating system solely because it faces the identical enforcement concerns that plague other media regulations. [185] The increased-enforcement option has the desirable qualities of minimizing the costs and difficulties of implementing a new regime, protecting the rights of citizens who are of the appropriate maturity level to view such content, and avoiding the dangerous implications of vicarious limitations on protected speech in the United States. [186]

### *B. Potential Trans-Atlantic Chilling Effects*

Harmonizing EU video game restrictions based on the German regulatory system also runs counter to the decisions of the U.S. legal system, and would create significant implications on both sides of the Atlantic. [187] Game development is a multi-billion dollar industry that is becoming increasingly global due to the prevalence of the internet and digital content distribution. [188] Many of the largest video game developers are headquartered in the United States and rely on international sales for as much as fifty-percent of their profits. [189] In order to market their products in nations with differing content restrictions, such as Germany, video games must undergo a lengthy and expensive process known as game content localization. [190] Game localization involves the adaptation of a video game's content to the standards of another nation, and is of particular importance in nations where certain content elements, allowable in the United States, may ban the game from sale altogether. [191] In the best case scenario, game localization involving only translation to another language and voice-overs, free of any significant content restructuring, can take about three months. [192] This is, however, completely dependant on the volume of material in the game, regardless of specific content considerations. [193] With the continued evolution of video games toward photo-realism and expansive virtual spaces, the time and cost required for even the simplest game localization may soon eclipse the point of feasibility for video game designers. [194]

The ever-growing cost of game localization described above does not take into account the significant restructuring of content, story and artistic expression in violent video games necessary to meet the stringent legal standards for sale in a state such as Germany. [195] This increasing cost imposes very real limitations on the artistic expression contained within video games due to the economic realities of the industry. [196] The propagation of German regulations throughout the European Union will only exacerbate this problem for U.S. game developers, leaving them with three equally unattractive options: (1) make significant alterations to the story, art and content of violent video games in accordance with new EU regulations; (2) refuse to market certain U.S. made video games to the EU because of the restrictive regulatory regime; or (3) to solely design games that are universally compatible with U.S. regulations and the new EU regulations. [197]

The first alternative facing U.S. game developers is to maintain their original artistic vision for the game, the basis for U.S. First Amendment protection, and then undergo a lengthy and cost-prohibitive game localization effort. [198] This option is self-defeating, as it requires game developers to make two separate sets of content, effectively creating two distinct games. [199] This option is precluded by the financial constraints of the game development industry. [200] Further, the alternatives to creating completely separate content to meet the requirements of individual states are equally unappealing. [201] In the second scenario, U.S. game developers could maintain their artistic integrity, forego the expensive game localization process, and refuse to market their games to

nations that would otherwise ban them for their violent content. [202] However, this option is not financially viable due to U.S. game developers' heavy reliance on overseas sales in order to maintain profitability. [203] In addition, this option ignores the prominence of the internet and the emergence of digital content distribution, which makes games published domestically immediately available throughout the world. [204] These technological advancements make banning games available online like “trying to ban the rain.” [205]

U.S. game developers, therefore, will be financially bound to the third option: designing games in the U.S. that can be universally sold abroad with minimal content or artistic changes. [206] Such a limitation, which would be fostered by broad content censorship throughout the European Union, undermines the very artistic expressions that have earned violent video games protection in the United States. [207] This amounts to a chilling effect on protected speech in the United States, an outcome that is directly contrary to the U.S. Constitution and the First Amendment protections that it supplies to game developers. [208] Video games would therefore exhibit ever-decreasing amounts of violent content, limiting a form of expression that U.S. courts have determined to have significant merit. [209] This potential outcome should be of serious concern to U.S. legislators and their EU counterparts, who must realize that because of the globalization of the modern economy, no regulatory restrictions are ever enacted in a vacuum. [210] The significant effect on protected speech in the United States should therefore factor into the considerations of Vice-President Frattini, Germany, and the other Member States of the EU when working towards the harmonization of EU violent video game regulations. [211]

#### IV. CONCLUSION

An EU-wide ban on violent video games would have a chilling-effect, as well as other undesirable consequences, in both the European Union and in the United States. The ever more restrictive laws concerning video game violence in Germany, in addition to a preference for outright banning of such “undesirable” speech, runs directly counter to core First Amendment protections guaranteed by the U.S. Constitution. The potential for the propagation of these stifling laws throughout the European Union is only bolstered by the support of EU Vice-President Frattini and Germany's newly obtained position as head of the European Union. An adoption of German video game regulation principles, or any similar law that subjugates PEGI to EU control in an attempt to ban violent media, should therefore be of critical concern to the United States.

Strengthening PEGI's enforcement mechanisms is both desirable and necessary, in the same manner that stricter enforcement of ESRB ratings is beneficial in the United States. Restructuring enforcement standards across the European Union could greatly alleviate many of the concerns currently surrounding PEGI. Additionally, such reforms would bring consistency to regulations across the European Union, and could make great strides to harmonize EU video game regulations with those of the United States. The push for harmonization, however, must not lead to the enactment of sweeping legislation enforcing any variant of the German video game regulatory system across the European Union. Such measures, when evaluated in light of the global market for video games, could lead to a chilling effect on the free speech rights of U.S. video game developers.

[1]. See Kevin E. Barton, Note, *Game Over! Legal Responses to Video Game Violence*, 16 Notre Dame J. L. Ethics & Pub. Pol'y 133, 133 (2002).

[2]. See *id.*

[3]. David Walsh et al., Nat'l Inst. on Media & the Family, 11th Annual MediaWise Video Game Report Card (2006), [http:// www.mediafamily.org/research/report\\_vgrc\\_2006.shtml](http://www.mediafamily.org/research/report_vgrc_2006.shtml). Each year, NIMF releases a study of the interactive gaming industry, the MediaWise Video Game report card, that focuses “on issues related to the welfare of children and teens.” *Id.*

[4]. David Walsh et al., Nat'l Inst. On Media & the Family, 10th Annual MediaWise Video Game Report Card (2005), [http:// www.mediafamily.org/research/report\\_vgrc\\_2005.shtml](http://www.mediafamily.org/research/report_vgrc_2005.shtml) [hereinafter 2005 NIMF Report].

[5]. See Walsh et al., *supra* note 3.

[6]. *See id.*

[7]. Christel Aliaga, *How is the time of men and women distributed in Europe?*, Statistics in focus, Apr. 2006, [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-NK-06-004/EN/KS-NK-06-004-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-NK-06-004/EN/KS-NK-06-004-EN.PDF).

[8]. *See id.*

[9]. *See* Laura Tate Kagel, Note, *Balancing the First Amendment and Child Protection Goals in Legal Approaches to Restricting Children's Access to Violent Video Games: A Comparison of Germany and the United States*, 34 Ga. J. Int'l & Comp. L. 743, 745 (2006) (providing an overview of youth violence and violent video games).

[10]. *See id.*

[11]. *See id.*

[12]. *See id.*

[13]. Paul Meller, *Germany Seeks Common EU Rules on Violent Video Games*, IDG News Service, January 17, 2007, <http://www.macworld.com/news/2007/01/17/euvidgames/index.php>. The Presidency of the Council of the European Union entails the responsibility of presiding over all aspects of the Council of the European Union. *See* Presidency of the European Union, [http://en.wikipedia.org/wiki/Presidency\\_of\\_the\\_Council\\_of\\_the\\_European\\_Union](http://en.wikipedia.org/wiki/Presidency_of_the_Council_of_the_European_Union) (last visited Apr. 7, 2007). The primary responsibility of the Presidency is organizing and chairing all meetings of the Council, in addition to working out all compromises capable of resolving difficulties between member states or between the European Union and other nations. *Id.*

[14]. *See* Meller, *supra* note 13.

[15]. *Id.*

[16]. *Id.*

[17]. *See* William Li, Note, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 Ariz. L. Rev. 467, 494 (2003).

[18]. *Video game industry sales rise to \$12.5 billion*, L.A. Times, Jan. 13, 2007, at C2, available at <http://www.latimes.com/technology/consumer/gamers/la-fi-games13jan13,1,6908018.story?coll=la-businessgames&ctrack=1&cset=true> [hereinafter *Video Game Sales*].

[19]. *See id.*

[20]. *See id.* The first video game was an interactive table-tennis-like game released in 1958 by physicist Willy Higinbotham. It ran on an oscilloscope, and was intended to prevent visitors to his laboratory from becoming bored. *See* Leonard Herman et al., *The History of Video Games*, [http://www.gamespot.com/gamespot/features/video/hov/p2\\_02.html](http://www.gamespot.com/gamespot/features/video/hov/p2_02.html) (last visited Feb. 3, 2007) [hereinafter *History of Video Games*].

[21]. *See id.*

[22]. *See id.*, at [http://www.gamespot.com/gamespot/features/video/hov/p10\\_01.html](http://www.gamespot.com/gamespot/features/video/hov/p10_01.html) (describing the evolution of video game technology).

[23]. See Wii.Nintendo.com, <http://www.nintendo.com/overviewwii> (describing the interactive functionality of the motion-sensitive controller).

[24]. See *History of Video Games*, *supra* note 20, [http://www.gamespot.com/gamespot/features/video/hov/p10\\_01.html](http://www.gamespot.com/gamespot/features/video/hov/p10_01.html). For example, *Gears of War*, a recently released first-person shooter for the Xbox 360, allows the player to force a spiked explosive into the chest of another player. See *Gears of War* (Epic Games 2006). The explosive will then quickly detonate, filling the screen with the blood and body parts of the deceased player. See *id.* Additionally, players can use a chainsaw to mutilate their opponents in a particularly graphic manner. See *id.*

[25]. Kagel, *supra* note 9, at 745.

[26]. See *id.*; See Li, *supra* note 17, at 467-70.

[27]. See Li, *supra* note 17, at 467-70.

[28]. *Id.*

[29]. *Id.*

[30]. *Id.*

[31]. *Id.*

[32]. Li, *supra* note 17.

[33]. See School Massacre, [http://en.wikipedia.org/wiki/School\\_Shooting](http://en.wikipedia.org/wiki/School_Shooting) (last visited Mar. 13, 2007).

[34]. See *Teenage gunman kills nine in US*, BBC News, Mar. 22, 2005, <http://news.bbc.co.uk/2/hi/americas/4370617.stm>.

[35]. *Id.*

[36]. *Id.*

[37]. Massacre at Virginia Tech, <http://www.cnn.com/2007/US/04/18/vtech.shooting/index.html> (last visited Apr. 20, 2007) While the story was still developing, many in the media immediately cited violent video games as an inspiration for Cho Seung-hui.

[38]. See Li, *supra* note 17, at 469.

[39]. See *id.* at 470; See *Website Posts Plays Purportedly Written by Gunman*, [http://blog.washingtonpost.com/virginia-techshootings/2007/04/website\\_posts\\_play\\_allegedly\\_w.html](http://blog.washingtonpost.com/virginia-techshootings/2007/04/website_posts_play_allegedly_w.html) (last visited Apr. 20, 2007).

[40]. *Id.*; See Walsh et al., *supra* note 3.

[41]. *Id.*

[42]. See Clay Calvert, *Violence, Video Games and A Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 *San Diego L. Rev.* 1, 17-18.

[43]. See Barton, *supra* note 1, at 138; See Calvert, *supra* note 42, at 21. Several investigations have linked violent video games to BC Law Intellectual Property & Technology Forum & Journal <http://bciptf.org> Powered by Joomla! Generated: 4 October, 2008, 04:20 children's behavioral tendencies. Barton, *supra* note 1, at 138. "These studies claim that a "preference for violent games is correlated with adjustment problems and negative self-perceptions in some groups of children." Fed. Trade Comm'n, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, (Sep. 2000), app. A at 12, available at <http://www.ftc.gov/reports/violence/appendicesviorpt.pdf> [hereinafter *FTC Report*]. Further, these studies claim that "real-life violent video game play is positively related to aggressive behavior and delinquency," although the extent of this relationship is not apparent. *Id.*

[44]. See Calvert, *supra* note 42, at 21.

[45]. See Barton, *supra* note 1, at 138. The studies that purport to show a causal relationship between media consumption habits and real life violence are not directly transferable to video games. See *id.* at 140. These studies have focused on television violence, and while there are similarities between violent video games and violent television exposure, the two are not completely analogous. *Id.* In fact, such social science evidence fails to provide the sufficient basis needed to uphold statutory limits on video game consumption. See Calvert, *supra* note 42, at 18. Judge Posner clearly stated in *Am. Amusement Mach. Ass'n v. Kendrick* that these studies offer no proof that video games ever caused anyone to commit a violent act, as opposed to merely feeling aggressive. See Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 578-79 (7th Cir. 2001).

[46]. See Barton, *supra* note 1, at 138.

[47]. Bureau of Justice Statistics Key Crime and Justice Facts at a Glance, <http://www.ojp.usdoj.gov/bjs/glance.htm#serious> (last visited Feb. 8, 2007).

[48]. *Id.*; Duke Ferris, Caution: Children at Play, [http:// gr.bolt.com/oldsite/articles/violence/violence.htm](http://gr.bolt.com/oldsite/articles/violence/violence.htm) (last visited Feb. 8, 2007).

[49]. See *id.* The first truly three-dimensional gaming console, the Sony Playstation, was released in 1995. See *id.* Moreover, Grand Theft Auto 3, one of the most often cited "murder simulators," was released while the decline in crime was near its greatest descent. See *id.*

[50]. See Barton, *supra* note 1, at 138; See *infra* Part II.A.

[51]. See Barton, *supra* note 1, at 147.

[52]. See *id.* at 135 (formerly referred to as the Interactive Digital Software Association); Entertainment Software Rating Board, About ESRB, [http:// www.esrb.org/about/index.jsp](http://www.esrb.org/about/index.jsp) (last visited Feb. 7, 2007) [hereinafter *ESRB Website*].

[53]. See Barton, *supra* note 1, at 135.

[54]. See *id.*

[55]. See *id.*

[56]. *Id.*

[57]. *Id.*

[58]. See Kagel, *supra* note 9, at 760; Enforcement of ESRB ratings policies has been criticized as "sporadic". See *id.* However, there has recently been a steady increase in the number of stores instituting enforcement policies to

prevent children from obtaining games rated outside of their appropriate age category. *See id.* The ESRB has also taken significant steps in recent years to promote education about the ratings system in an effort to strengthen enforcement. *See id.*

[59]. *See* Barton, *supra* note 1, at 135.

[60]. *See ESRB Website, supra* note 52.

[61]. *Id.*

[62]. *Id.*

[63]. Console gaming platforms are those that function through a television. *See* Barton, *supra* note 1, at 135. These include, but are not limited to, the Microsoft Xbox 360, the Sony Playstation 3, the Nintendo Wii and their respective predecessors. *See id.*

[64]. *See* Barton, *supra* note 1, at 135.

[65]. Entertainment Software Rating Board, Game Ratings & Descriptor Guide, [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited Feb. 7, 2007) [hereinafter *Ratings Guide*].

[66]. “Titles rated EC (Early Childhood) have content that may be suitable for ages 3 and older. [These] [c]ontain[] no material that parents would find inappropriate.” *Id.*

[67]. “Titles rated E (Everyone) have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.” *Id.*

[68]. “Titles rated E10+ (Everyone 10 and older) have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language and/or minimal suggestive themes.” *Id.*

[69]. “Titles rated T (Teen) have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and/or infrequent use of strong language.” *Id.*

[70]. “Titles rated M (Mature) have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content and/or strong language.” *See Ratings Guide, supra* note 65.

[71]. “Titles rated AO (Adults Only) have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.” *Id.*

[72]. “Titles listed as RP (Rating Pending) have been submitted to the ESRB and are awaiting final rating. (This symbol appears only in advertising prior to a game's release.)” *Id.*

[73]. Barton, *supra* note 1, at 136.

[74]. Entertainment Software Rating Board, Rating Category Breakdown, <http://www.esrb.org/about/categories.jsp> (last visited Feb. 7, 2007) [hereinafter *Ratings Breakdown*].

[75]. *FTC Report, supra* note 43, at 45.

[76]. *Id.*

[77]. *See* Barton, *supra* note 1, at 145.

[78]. *See id.* at 149.

[79]. *See FTC Report, supra* note 43, at 45.

[80]. *See id.* at 54-55.

[81]. *See* Barton, *supra* note 1, at 148; *See also FTC Report, supra* note 43, at 54. The Motion Picture Association of America (MPAA) is a voluntary ratings system “operated by the MPAA and the National Association of Theater Owners (NATO). The ratings are given by a board of parents who comprise the Classification and Rating Administration (CARA). CARA’s Board members view each film and, after a group discussion, vote on its rating. The ratings are intended to provide parents with advance information so they can decide for themselves which films are appropriate for viewing by their own children. The Board uses the same criteria as any parent making a judgment: theme, language, violence, nudity, sex and drug use are among content areas considered in the decision-making process.” *Film Ratings*, Motion Picture Association of America, <http://www.mpa.org/FilmRatings.asp> (last visited Apr. 7, 2007). Similar to this is the voluntary self-ratings system employed by the Recording Industry Association of America. *See* Parental Advisory Label (“PAL”) Program, <http://www.riaa.com/issues/parents/advisory.asp#logo> (last visited Apr. 7, 2007).

[82]. *See* Kagel, *supra* note 9, *passim*.

[83]. *See id.* at 746.

[84]. *See id.*

[85]. Meller, *supra* note 13.

[86]. *Id.*

[87]. *See id.*

[88]. *See* Kagel, *supra* note 9, at 746; *infra* Part II.A-B.

[89]. *See* Kagel, *supra* note 9, at 746

[90]. *See id.* at 752.

[91]. *Id.*

[92]. *Id.* at 753.

[93]. “There are no restrictions on the sale of this game. The suitability for children, however, only relates to violent or sexual content - the difficulty or complexity of the game may still be unsuited to younger children. Similar to the ESRB’s ‘Everyone’ rating.” BC Law Intellectual Property & Technology Forum & Journal <http://bciptf.org> Powered by Joomla! Generated: 4 October, 2008, 04:20 Unterhaltungssoftware Selbstkontrolle, [http://en.wikipedia.org/wiki/Unterhaltungssoftware\\_Selbstkontrolle](http://en.wikipedia.org/wiki/Unterhaltungssoftware_Selbstkontrolle) (last visited Mar. 5, 2007) [hereinafter *USK Wikipedia Entry*].

[94]. “Games with this rating may be of an abstract or comical nature, may have a darker theme or may be too

involving for children under the age of 6 ... Similar to the ESRB's 'Everyone Rating.'" *Id.*

[95]. "Games with this rating may place a focus on wars or fighting of some description. The fighting should be in a historical or science fiction context and the violence should be kept to a minimum ... Similar to the ESRB's 'Teen' or 'Everyone 10+' ratings." *Id.*

[96]. "Games featuring frequent one-on-one gunplay and moderate violence will receive this rating. The game may cover adult themes ... Similar to the ESRB's 'Mature' rating." *Id.*

[97]. "These games may contain scenes of brutal, moderately bloody violence, and they may glamorise[sic] war or violation of human rights ... Similar to the ESRB's 'Adults Only' rating." *Id.*

[98]. *See* Kagel, *supra* note 9, at 747.

[99]. *See id.* at 753.

[100]. *Id.*

[101]. *See id.*

[102]. *See* Entwurf eines Gesetzes zur Verbesserung des Jugendschutzes (JuSchVerbG), available at [http://www.bundesrat.de/cln\\_050/nn\\_8336/SharedDocs/Drucksachen/2007/0001-0100/76-07,templateId=raw,property=publicationFile.pdf/76-07.pdf](http://www.bundesrat.de/cln_050/nn_8336/SharedDocs/Drucksachen/2007/0001-0100/76-07,templateId=raw,property=publicationFile.pdf/76-07.pdf) (no english translation available) [hereinafter *JuSchVerbG*]; *EU Justice Chiefs Tackle Violent Video Games*, DW-World.DE, January 16, 2007, <http://www.dwworld.de/dw/article/0,2144,2312453,00.html> [hereinafter *DW-World Article*].

[103]. *Infra* Part II.C.

[104]. *See* Kagel, *supra* note 9, at 752.

[105]. *See* Pan European Game Information, *About rating*, <http://www.pegi.info/en/index/id/176/> (last visited Mar. 3, 2007) [hereinafter *PEGI Ratings*]. PEGI enjoys support from all major console manufacturers, and applies to products distributed in Austria, Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the UK. Pan European Game Information, *What is PEGI?*, <http://www.pegi.info/en/index/id/179/> (last visited Mar. 3, 2007).

[106]. *See PEGI Ratings, supra* note 105.

[107]. *See id.* Specific content considered in determining the ratings consists of usage of bad language, discrimination, drugs, fear, gambling, sex and violence. *Id.*

[108]. *Id.* However, PEGI does not have the same conception of violence as the ESRB. Pan European Game Information, [http://en.wikipedia.org/wiki/Pan\\_European\\_Game\\_Information](http://en.wikipedia.org/wiki/Pan_European_Game_Information) (last visited Mar. 3, 2007). For example, *Ratchet: Deadlocked*, an adventure game, is classified as "3+" by PEGI because the weapons are unrealistic and the enemies are either robots or fantasy creatures, but rated "Teen" by the ESRB. *Id.* Further, the first person shooter *XIII*, featuring comic book stylized characters and violence, was rated "12+" by PEGI due to similarities to cartoons, but rated "Mature" by the ESRB. *Id.*

[109]. *See PEGI Ratings, supra* note 105. PEGI is administered by the ISFE in conjunction with the Netherlands Institute for the Classification of Audio-visual Media (NICAM). Pan European Game Information, *FAQ*, <http://www.pegi.info/en/index/id/181/> (last visited Mar. 7, 2007). Additionally, in the United Kingdom the Video Standards council acts on behalf of NICAM. *Id.*

[110]. See *PEGI Ratings*, *supra* note 105.

[111]. See Pan European Game Information, *News*, <http://www.pegi.info/en/index/id/178> (last visited Mar. 7, 2007) [hereinafter *PEGI News*]. The Finnish Parliament passed a revision to their Act on Classification of Audiovisual Programs enabling the recognition of all PEGI age classifications into Finish Law. *Id.*

[112]. See *id.*

[113]. See Christopher Dean, Note, *Returning the Pig To Its Pen: A Pragmatic Approach to Regulating Minors' Access to Violent Video Games*, 75 Geo. Wash. L. Rev. 136, 137 (2006).

[114]. See *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 956 n.1 (8th Cir. 2003) (“The Ordinance also restricts minors' access to video games with strong sexual content ...”); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d at 1040 (noting that the law “is essentially the obscenity standard from *Ginsberg v. New York*, but directed towards depictions of violence instead of depictions of nudity or sex”); *Id.* at n.58.

[115]. See *Cal. Civ. Code §§ 1746-1746.5* (West 2005), enforcement preliminarily enjoined by *Schwarzenegger*, 401 F. Supp. 2d 1034.

[116]. See *id.* at § 1746(d).

[117]. See Dean, *supra* note 113, at 138.

[118]. Indianapolis, Ind., Gen. Ordinance 72 (July 10, 2000), enforcement permanently enjoined by *Kendrick*, 244 F.3d 572 [hereinafter *Indianapolis Statute*].

[119]. The ordinance defies the phrase “harmful to minors” as:

[A]n amusement machine that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under that age, and contains either “graphic violence” or “strong sexual content.”

*Kendrick*, 244 F.3d at 573.

[120]. See *Indianapolis Statute*, *supra* note 118.

[121]. See *id.*

[122]. See *Schwarzenegger*, 401 F. Supp. 2d 1034; See *Kendrick*, 244 F.3d 572.

[123]. See Dean, *supra* note 12, at 148.

[124]. *Id.* at 144-45.

[125]. *Id.* at 145.

[126]. See *id.*

[127]. See *Am.'s Best Family Showplace Corp v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (holding that video games are pure entertainment with no formal element warranting constitutional protection); See *id.*

[128]. *See id.*

[129]. *See Kendrick*, 244 F.3d at 572; *See id.*

[130]. *See Kendrick*, 244 F.3d at 573. The ordinance specifically:

“forbids any operator of five or more video-game machines in one place to allow a minor unaccompanied by a parent, guardian, or other custodian to use ‘an amusement machine that is harmful to minors,’ requires appropriate warning signs, and requires that such machines be separated by a partition from the other machines in the location and that their viewing areas be concealed from persons who are on the other side of the partition.”

*Id.* at 573; *See Calvert*, *supra* note 42, at 6. Further, the ordinance defined “graphic violence” as “an amusement machine’s visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfigurement.” *Id.*

[131]. *See Dean*, *supra* note 113, at 147-48.

[132]. *See Kendrick*, 244 F.3d at 573.

[133]. *See id.* at 577.

[134]. *Id.* at 577-78.

[135]. *See id.* at 577.

[136]. *See, e.g., Kendrick*, 244 F.3d 572 (enjoining enforcement of local violent-video-game ordinance).

[137]. *See Kendrick*, 244 F.3d at 574.

[138]. *Id.* The Supreme Court carved out an exception to First Amendment protection of speech, finding that obscenity has “no essential part of any exposition of ideas.” *Roth v. United States*, 354 U.S. 476, 485 (1957). Therefore, “obscenity [is] not within the area of constitutionally protected speech or press.” *Id.* at 484-85. Legislators have tried to use this obscenity exception, previously employed in regulating the sale of sexually oriented material to minors, as a legitimate basis for restricting minor’s access to violent video games. *See Dean*, *supra* note 113, at 144. Despite this, modern case law has awarded video games all the protections of speech provided by the First Amendment, and refuses to classify violent video games as obscene. *See id.* at 147. In fact, the court in *Kendrick* expressly refused to group violence into the sexuality pigeonhole of the obscenity doctrine, noting that “[v]iolence and obscenity are distinct categories of objectionable depiction.” *Kendrick*, 244 F.3d at 574.

[139]. *See id.* at 579.

[140]. *Id.* at 578.

[141]. *See id.* at 147; *See also Schwarzenegger*, 401 F. Supp. 2d 1034, 1043-44 (N.D. Cal. 2005) (providing an overview of failed attempts to regulate violent video games).

[142]. *See Kagel*, *supra* note 9, at 746.

[143]. Jugendschutzgesetz [Protection of Young Persons Act], July 23, 2002, BGBl.I at 2730, 2002 at 476 (F.R.G.) (English version available at <http://www.bag-jugendschutz.de/PDF/JuSchGEnd.pdf>) [hereinafter JuSchG]; *Id.*

[144]. *See Kagel*, *supra* note 9, at 747.

[145]. Grundgesetz [GG] [Constitution] art 5. (F.R.G.); *Id.*

[146]. *See* Kagel, *supra* note 9, at 749. The historical basis of the censorship allowances arises from the historical background surrounding Nazi Germany during World War II. *See* Kagel, *supra* note 9, at 748.

[147]. *See id.* at 754.

[148]. JuSchG, *supra* note 142, at sec. 15, Abs. para. 1 (enumerating the categories under the designation jugendgefhrend).

[149]. *See* Kagel, *supra* note 9, at 755.

[150]. *Id.*

[151]. *Id.*

[152]. *See id.* at 754-55.

[153]. *Id.* at 755.

[154]. *See* Entertainment Software Rating Board, Frequently Asked Questions, <http://www.esrb.org/ratings/faq.jsp> (last visited Mar. 3, 2007). Additionally, retail outlets are allowed to craft their own policies for enforcement. *See* Entertainment Software Rating Board, Enforcement, <http://www.esrb.org/ratings/enforcement.jsp> (last visited Mar. 3, 2007). GameStop, for example, is allegedly implementing a policy to automatically fire any employee and manager who sells a restricted title to a minor unaccompanied by a parent or guardian. *See GameStop: Sell an M-rated game to a minor, enjoy unemployment*, Destructoid, Feb. 7, 2007, <http://www.destructoid.com/gamestop-sell-an-m-rated-game-to-a-minor-enjoy-unemployment-29690.phtml>.

[155]. *See* Kagel, *supra* note 9, at 755.

[156]. *See* JuSchVerbG, *supra* note 102; *See* DW-World Article, *supra* note 102.

[157]. *See* Meller, *supra* note 13.

[158]. *Id.*

[159]. *See id.*

[160]. *See* PEGI News, *supra* note 111.

[161]. *Id.*

[162]. *See id.*

[163]. *See id.* Such public/private arrangements, as suggested by Frattini in November of 2006, have traditionally been opposed by video game regulators such as the ISFE. *See* Meller, *supra* note 13.

[164]. *Id.*

[165]. *See* DW-World Article, *supra* note 102.

[166]. *See id.*

[167]. See Meller, *supra* note 13.

[168]. See *id.*

[169]. *Id.*

[170]. *Id.*

[171]. See *id.*

[172]. But see Kagel, *supra* note 9, at 774.

[173]. *New French Law Punishes Citizens for Taping, Broadcasting Violence*, FoxNews.com, <http://www.foxnews.com/story/0,2933,257180,00.html> (last visited Mar. 20, 2007). Concerns have been raised regarding a new French law that imposes criminal liability for those filming violent acts or publishing such footage via the internet. *Id.*

[174]. See Heather Chaplin, *Is That Just Some Game? No, It's a Cultural Artifact*, N.Y. Times, E7, Mar. 12, 2007, available at <http://www.nytimes.com/2007/03/12/arts/design/12vide.html?ex=1331352000&en=380fc9bb18694da5&ei=5124&partner=permalink&exprod=permalink>.

[175]. See *infra* part II.B-C.

[176]. See *PEGI News*, *supra* note 111.

[177]. See *infra* part II.

[178]. Interview by GlobalByDesign.com with Heather Maxwell Chandler, Author, *The Game Localization Handbook*, [http://www.globalbydesign.com/resources/articles/game\\_globalization.html](http://www.globalbydesign.com/resources/articles/game_globalization.html) (Nov. 2005) [hereinafter *Chandler Interview*].

[179]. See *DW-World Article*, *supra* note 102. U.S. courts have repeatedly refused this line of reasoning, most notably in *Kendrick*. See Kendrick, 244 F.3d at 578; See *infra* part II.A.

[180]. See *DW-World Article*, *supra* note 102; See *PEGI News*, *supra* note 111.

[181]. See *PEGI News*, *supra* note 111.

[182]. See *DW-World Article*, *supra* note 102; See *id.*

[183]. See *id.*

[184]. See *id.* Such legislation, intended to give teeth to the PEGI ratings and strengthen enforcement, is not identical to German laws subjecting the USK to government control and oversight. See *id.*

[185]. See *PEGI Ratings*, *supra* note 105.

[186]. See *infra* part II-II.

[187]. See *infra* part II.A.

[188]. See *Video Game Sales*, *supra* note 18; See Welcome to Steam, <http://www.steampowered.com> (last visited Mar. 20, 2007). Steam is the premier service for digital video game content distribution via the internet. See *id.* Steam is an international service that allows users to purchase video games instantly and download their content to their personal computer for immediate enjoyment, and provides automatic updates and a large gaming community. See *id.* Many of the games offered through Steam, such as *Half-Life 2*, *Hitman: Blood Money*, and *Call of Duty 2* are violent first person shooter games. See *id.* (follow link Games).

[189]. *Chandler Interview*, *supra* note 178.

[190]. See Game Localization, [http://en.wikipedia.org/wiki/Game\\_Localization](http://en.wikipedia.org/wiki/Game_Localization) (last visited Mar. 20, 2007).

[191]. See *id.* For example, a World War II flight simulation game that allowed a player to be a German pilot required extensive content changes in order to avoid being banned in Germany. See *Chandler Interview*, *supra* note 178. These significant changes to the overall concept of the game included removing many of the references to the German nationality because of Germany's extremely strict guidelines about depictions of Germany during World War II. See *id.* Further, games that do not alter content for differing locales may be removed from shelves all together. See Chihuahua Gov. Orders GRAW2 Seizure, <http://www.shacknews.com/ja.zz?comments=46301> (last visited Apr. 7, 2007). The Government of the Mexican State of Chihuahua recently seized all copies of Tom Clancy's Ghost Recon Advanced Warfighter 2 (GRAW2). *Id.* "Chihuahua governor Jose Reyes Baeza Terraces, who issued the order for seizure, explained [that] the game's setting defames the country of Mexico." *Id.* GRAW2 depicts a "full-scale civil war" between "Mexican loyalists and insurgent rebel forces," which poses an "imminent threat to the United States" requiring the U.S. Government to respond. *Id.* The seizure follows concerns expressed by the mayor of Juarez, Mexico claiming that GRAW2 inaccurately reflects his city in a negative manner and increases tensions BC Law Intellectual Property & Technology Forum & Journal <http://bciptf.org> Powered by Joomla! Generated: 4 October, 2008, 04:20 between the U.S. and Mexico. *Id.*

[192]. See *Chandler Interview*, *supra* note 178.

[193]. *Id.*

[194]. See *id.*

[195]. See *id.*

[196]. See Email Interview with Stephanie O'Malley Deming, Founder, XLOC Globalization Solutions (Apr. 9, 2007) [hereinafter *O'Malley Deming Interview*].

[197]. See *id.*

[198]. See Kendrick, 244 F.3d at 573; See *Chandler Interview*, *supra* note 178; See *infra* part II.A.

[199]. See *Video Game Sales*, *supra* note 18; See *Chandler Interview*, *supra* note 178.

[200]. See *id.*

[201]. See *O'Malley Deming Interview*, *supra* note 196.

[202]. See *id.*

[203]. See *Video Game Sales*, *supra* note 18; See *Chandler Interview*, *supra* note 178.

[204]. See *DW-World Article*, *supra* note 102.

[205]. *Id.*

[206]. See *O'Malley Deming Interview*, *supra* note 196.

[207]. See Kendrick, 244 F.3d at 573; See *infra* part II.A.

[208]. See *id.*

[209]. See *id.*

[210]. See Matthew McMahan, Note, *The International Effects of the Adoption of a Consumption Tax in the United States*, 39 Vand. J. Transnat'l L. 519, 522 (2006).

[211]. See *id.*