



MICHIGAN COMPUTER LAWYER

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Computer Law Section's Annual Meeting
Reminder 16

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The Family Entertainment Protection Act and its Local & State Law Predecessors: No Lessons Learned

By Stephen Bouren, Ed Langs Writing Contest First Place Winner

Introduction

On December 16, 2005 Senator Hillary Clinton and Senator Joe Lieberman introduced the Family Entertainment Protection Act (FEPA). The bill's intended purpose is "To limit the exposure of children to violent video games."¹ While Senator Clinton stated that, "this bill is not an attack on video games," it is difficult to see what else the bill could possibly accomplish. As will be made clear in this paper, there have been numerous similar attempts to regulate the sale, use, and rental of video games in the past. None of these laws have been able to withstand judicial scrutiny and neither will the Family Entertainment Protection Act (FEPA). FEPA suffers the same constitutional deficiencies as the laws on which it is based and, if enacted into law by Congress, it will be struck down on the same First Amendment grounds as those laws were.

That FEPA will eventually be overturned is crystal clear, as are the motives of its supporters. FEPA is nothing more than a bald attack on video games for no other reason than getting publicity for Senators Clinton and Lieberman. By introducing FEPA, Senators Clinton and Lieberman can tell their constituents that they truly stand for family values without having to actually take a stand on anything. They know as well as anyone else that their bill is a complete and utter waste of time, but so long as their names are in the papers, they appear to be fighting the good fight for their constituents.

A thorough examination of past legislation intended to curb children's exposure violent and sexually explicit video games will make it clear that the

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Family Entertainment Protection Act is doomed to failure. Local legislation in Indianapolis, Indiana and St. Louis County, Missouri as well as state legislation in Illinois (as well as Michigan, California, and Washington) have all attempted what FEPA seeks to do, and all have failed. This paper will examine the Indianapolis and St. Louis ordinances as well as Illinois' state law and then relate them to the FEPA, highlighting just how close the FEPA hews to this past legislation and thus, why FEPA will never succeed.

Indianapolis, IN - Amusement Machine Ordinance

The Ordinance – Chapter 831 of the Municipal Code of Indianapolis

On June 4, 2001, the city of Indianapolis, Indiana enacted Chapter 831 of its municipal code. Chapter 831 sought to restrict the placement and usage of amusement machines that were, in the estimation of Indianapolis lawmakers, “harmful to minors”. Under Chapter 831, an amusement machine harmful to minors was one

“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...with respect to what is suitable material for persons under the age of eighteen years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen years and:

- (1) Contains graphic violence; or
- (2) Contains strong sexual content.²

The ordinance defined graphic violence as the “visual depiction...of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming, or disfiguration.”³ This definition clearly encompassed much of what can be found in many, if not most, games of this type.

After defining exactly what was objectionable, Chapter 831 went on to proscribe the use of such machines by minors. First, the ordinance made it unlawful for the operator of an amusement location to exhibit amusements deemed harmful to minors unless each such machine had a conspicuous sign indicating that it was not to be operated by a person under 18 years of age unless that person was accompanied by a parent or guardian.⁴ Furthermore, the ordinance made it illegal to place so-called harmful amusement machines within ten feet of non-harmful amusement machines.⁵

Not only could “harmful” and “non-harmful” machines not occupy space within ten feet of each other, but the “harmful” machines had to have some sort of partition or barrier which “completely obstruct(ed) the view of person outside the partitioned area of the playing surface or display screen” of the “harmful” machines.⁶ Thus, violent video games were likened to tawdry peep show machines by the Indianapolis lawmakers, who sought to require the complete and utter separation of so-called harmful amusement machines from those deemed to be non-harmful. In such a place

games like “Pac Man” were to have what amounted to a statutorily prescribed ten foot personal protection order against games like “House of the Dead.”

Of course the ordinance instituted penalties for violations of its draconian mandates. One or more violations could result in the suspension or outright revocation of an amusement location’s license to conduct its business.⁷ Three or more violations *required* revocation of an amusement location’s registration, subject to notice and hearing requirements.⁸ While no business could be cited for more than one violation in a day, continuing violations were deemed separate violations for each day they continued and the fine imposed for such violations was not to be less than \$200.00.⁹ Such violations were to be ferreted out, according the ordinance, by various law enforcement agencies. The ordinance imposed a duty on local law enforcement to “make frequent inspections of all amusement locations” and to report any violations found therein to the appropriate chief of police or county sheriff.¹⁰

The U.S. Court of Appeals for the Seventh Circuit Enjoins Chapter 831

In *American Amusement Machine Association, et al. v. Teri Kendrick, et al.*,¹¹ the United States Court of Appeals for the Seventh Circuit heard plaintiff American Amusement Machine Association’s appeal of the United States District Court for the Southern District of Indiana’s denial of plaintiff’s request for a preliminary injunction of Chapter 831.

According to the Seventh Circuit, in finding for the defendant, the district court agreed with plaintiffs that video games are protected speech under the First Amendment to the U.S. Constitution and that children are afforded First Amendment protection.¹² Still, the district court reasoned that Chapter 831 would violate the First Amendment only if Indianapolis lacked “a reasonable basis for believing the Ordinance would protect children from harm.”¹³ Indianapolis found a reasonable basis, according to the district court, by basing Chapter 831 on two empirical studies that purported to link playing violent video games with more aggressive attitudes and behavior in young people.¹⁴ The district court also found that the ordinance was sheltered from any claims that it might be excessively vague under the First Amendment by its association of violent and sexually explicit video games with obscenity.¹⁵ That is, materials that are considered obscene are not generally afforded First Amendment protection and thus, by implication, neither are obscene video games. The Seventh Circuit disagreed.

First, the Seventh Circuit was not persuaded that violent video games are obscene. That is, the Seventh Circuit stated that, in general, the concerns of traditional obscenity laws and the concerns of Chapter 831 do not coincide. The main reason for the proscription of obscenity, according to the Seventh Circuit, is that it is patently offensive without regard for its affect on anyone’s conduct.¹⁶ That is, the offensiveness of the obscene material is the harm caused. Conversely, Chapter 831 sought to proscribe the alleged increase in violent behavior supposedly brought on by so-called harmful amusement machines or video games. This distinction, according to the Seventh Circuit, prevented Chapter 831 from successfully using obscenity to stop plaintiffs from validly claiming First Amendment protection for the “harmful” video games Chapter 831 sought to regulate.¹⁷

Obscenity also did not shield Chapter 831 because the games at issue concerned only violence and not sex.¹⁸ Said Judge Posner in the Seventh Circuit’s opinion, “The notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is the essence of the traditional concern with obscenity.”¹⁹

Because the video games to be regulated under Chapter 831 were not found to be “obscene” within the legal meaning of the term, the city was forced to “present a compelling basis for believing that... (the) harms (were) actually caused by obscenity and (were) not pretexts for regulation on grounds not authorized by the First Amendment.”²⁰ That is, the city had to show that the “harmful” amusement machines actually caused the harm claimed: inciting minors to commit violent acts which cause harm to the minor himself or to the public at large. Because children have First Amendment rights, the Seventh Circuit stated that the grounds for Chapter 831 “must be compelling and not merely plausible.”²¹

The court likened limiting a minor's access to violent video games to limiting a minor's access to classic, but clearly violent, literature.²² The court opined that limiting a minor's access to violent depictions right up to the age of 18 would leave the minor unable to cope with the world as it is upon reaching majority.

The court was not persuaded that the interactive nature of video games clearly made their influence on minors more dramatic. In fact the court found the suggestion that a video game's interactivity makes it somehow different than film, television, or literature, to be "superficial, in fact erroneous."²³ The most effective examples of literature and film, according to the court, contain elements of interactivity, even though the reader or viewer does not press a button or manipulate a joystick. Readers and viewers live vicariously through the characters they read about or watch on the screen in much the same way gamers live vicariously through their on-screen avatars.

The court further found that video games present the same sort of themes and ideas that have been pervasive in all entertainment media for centuries and that video games essentially are vehicles through which a story is told. While perhaps such games will never be regarded as classic literature, the court found that violent video games cannot be said to be entirely devoid any socially redeeming values. The court cited the game "Ultimate Mortal Kombat 3," a violent fighting game that was popular in arcades at the time. The court recognized that the game was in-fact extremely violent, but pointed to the fact that in the game a female fighter was every bit the equal of her male counterparts. To the court the game was presenting a strong feminist message, perhaps even an ideology, "just as books and movies do."²⁴

The city attempted to argue that any worthwhile message conveyed by a video game is limited by a parent's right to permit his or her child to actually play the game and experience the message. The court stated that this parental right is, "to a considerable extent illusory."²⁵ Under Chapter 831, a parent was required to accompany a minor to a video gaming establishment in order for the minor to play so-called harmful amusement machines. The court found that "conditioning a minor's First Amendment rights on parental consent of this nature is a curtailment of those rights."²⁶ In order to support such a significant curtailment of rights, the city was obligated to set forth a compelling basis on which a minor's First Amendment rights could be so limited. The city relied primarily on two studies that purported to show some causal link between playing violent video games and violent behavior in minors. The court found that these studies were not enough to support Chapter 831's significant infringement of First Amendment rights. Said the court, "The studies do not find that video games have ever caused anyone to commit a violent act...or have caused the average level of violence to increase anywhere."²⁷ Thus, according to the Seventh Circuit, the studies did not serve as evidence "that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive entertainments."²⁸

In sum, the Seventh Circuit concluded that Chapter 831 "curtails freedom of expression significantly and, on this record, without any offsetting justification, 'compelling' or otherwise."²⁹ Based on its findings, the court granted a preliminary injunction to the plaintiffs, estopping the city from enforcing Chapter 831. Troublingly, the court did not foreclose any attempts in the future to limit access to violent video games, but stated that the literary character of video games combined with the fictional appearance of their so-called graphic violence defeated the overly broad mandates of Chapter 831. While the court granted only a preliminary injunction, the city chose not to pursue the matter further and the injunction, or the effects thereof anyway, has stood. Thus, this early attempt to restrict gamers' First Amendment rights was defeated. Still, the court left open the question that at some point in the nebulous future, an anti-video-game law could be drafted narrowly enough to survive constitutional challenge.

St. Louis County, Missouri – Ordinance No. 20,193

The Ordinance

On October 26, 2000, lawmakers in St. Louis County passed Ordinance No. 20,193. The purpose of the ordinance, while not succinctly stated by the lawmakers, was clearly to keep video games with graphic violence and strong sexual content out of the hands of people under the age of 17.

Ordinance 20,193 restricted the access of minors to video games deemed “harmful” by the St. Louis County lawmakers. Within the meaning of the ordinance, a harmful video game was one 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 minors, lacks serious literary, artistic, political or scientific value as a whole for minors, and contains either graphic violence or strong sexual content.³⁰

The ordinance defined graphic violence as “the 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 disfiguration.”³¹

The ordinance defined strong sexual content as “the visual depiction or representation of nudity or explicit human sexual behavior by a human or human-like being in one or more of the following forms: masturbation, deviate sexual conduct, sexual intercourse, or fondling of genitals.”³²

Like the Indianapolis ordinance, Ordinance 20,193 sought to segregate so-called harmful amusement machines from those that were not deemed by the legislature to be harmful.³³ While the segregation mandates of Ordinance 20,193 were not as strict as those of the Indianapolis ordinance, it did require that “harmful” machines be kept in a separate area clearly marked as “Restricted – 17”.³⁴ Under the ordinance, minors were not to be admitted to the “Restricted – 17” section unless accompanied by or given permission by a parent or guardian. So-called harmful video game machines were also to be marked with a red dot, indicating that they contained graphic violence and/or strong sexual content, and this policy was to be clearly displayed by amusement machine exhibitors.³⁵

Ordinance 20,193 took restricting minors’ access to “harmful” video games a step further than the Indianapolis ordinance by making it unlawful for anyone to “knowingly sell or rent a video game which is harmful to minors to a minor unless that minor is accompanied by a parent or guardian who consents to the purchase or sale.”³⁶ Further, any person or entity that sold “harmful” video games was to have a statutorily prescribed “Parental Advisory Disclosure Message” in one-inch high red letters against a white back ground.³⁷ The message disclosed that the establishment in fact sold video games containing graphic violence and/or strong sexual content and described the ratings system established by the Entertainment Software Review Board (ESRB) that is present on every video game in America.³⁸

Ordinance 20,193 established penalties for violations of its mandates. Under § 602.455, any person or entity that violated any section of the ordinance was to be fined not more than \$1,000, imprisoned for not more than one year, or both.³⁹

The U.S. Court of Appeals for the Eighth Circuit Enjoins Ordinance 20,193

On June 3, 2003, the U.S. Court of Appeals for the Eighth Circuit issued an opinion enjoining enforcement of St. Louis Ordinance No. 20,193, overturning a district court dismissal of plaintiffs’ (comprised of various video game associations and retailers) constitutional challenge of the ordinance.⁴⁰

The Eighth Circuit stated that the district court’s assertion that “because video games are a new medium, they must ‘be designed to express or inform, and there has to be a likelihood that others will understand that there has been some type of expression.’” was erroneous. According to the Eighth Circuit, the Supreme Court has held that the First Amendment protects “entertainment, as well as political and ideological speech” and that “a particularized message is not required for speech to be constitutionally protected.”⁴¹ Said the court, “If the First Amendment is versatile enough to ‘shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,’...we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to similar protection. The mere fact that they appear in a novel medium is of no legal consequence.”⁴² Thus, the Eighth Circuit, like the Seventh Circuit before it, found that video games are entitled to First Amendment protection. Like the Seventh Circuit, the Eighth Circuit was convinced that video games

contain stories and age old themes seen in literature, movies, and other forms of entertainment, all of which receive First Amendment protection.

The defendants attempted to argue that because the expressive parts of a video game may usually be bypassed by the player, video games are not expressive, and thus not entitled to First Amendment protection.⁴³ The court pointed out that “the same could be said of action-packed movies... (where) any viewer with a videocassette or DVD player could simply skip to and isolate the action sequences.”⁴⁴ The court was thus, not persuaded that increased player control or convenience provided by modern technology should automatically disqualify expressive works from protection by the First Amendment.

The court expanded on this, stating that the interactive nature of video games was also not a compelling reason to disqualify video games from First Amendment protection.⁴⁵ Indeed, the Eighth Circuit cited to Judge Posner’s opinion in the Indianapolis case, agreeing that the most entertaining literature is interactive in that it draws the reader into its narrative and invites the reader to sympathize with or disagree with the characters as he will.⁴⁶

Because the Eighth Circuit found that video games are entitled to First Amendment protection, the onus was on the defendants to justify the ordinance against a strict scrutiny standard of review.⁴⁷ Like the Seventh Circuit in the Indianapolis case, the Eighth Circuit was not persuaded by defendants’ argument that the games covered by the ordinance were obscene and thus entitled to less protection. The Eighth Circuit stated, “material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene.”⁴⁸ Because plaintiffs only challenged the portions of the ordinance regarding violence, there was no element of sexual material at issue in this case.

The Eighth Circuit found that a content-based restriction of speech like the St. Louis ordinance is presumptively invalid and thus, defendants had the burden of demonstrating that the ordinance was necessary to serve a compelling state interest and that it was narrowly tailored to achieve the end intended.⁴⁹

St. Louis County first stated that it had a compelling interest in “protecting the psychological well-being of minors” and that it sought to do so by reducing the harm suffered by children who play violent video games.⁵⁰ The court agreed that that the county had a legitimate interest in protecting the psychological well-being of minors, but found the defendants’ conclusion that there is a strong correlation between playing violent video games and “a deleterious effect on... (a minor’s) psychological health is simply unsupported by the record.”⁵¹ When the government attempts to defend restrictions on speech it must do more than simply “posit the existence of the disease sought to be cured.”⁵² The defendants in this case, according to the Eighth Circuit, utterly failed to do anything more than state “vague generalit(ies)” without the “substantial supporting evidence of harm that is required before an ordinance that threatens protected speech can be upheld.”⁵³

The county next set forth a compelling interest in “assisting parents to be the guardians of their children’s well-being.”⁵⁴ Again, the court did not dispute the county’s interest and stated that it is “beyond doubt” that parents should have the power to decide what games their children may and may not play.⁵⁵ The issue, according to the court, was “whether the county constitutionally may limit First Amendment rights as a means of aiding parental authority.”⁵⁶ The court said no, stating that “the government cannot silence protected speech by wrapping itself in the cloak of parental authority.”⁵⁷ Like the Seventh Circuit before it, the Eighth Circuit held that, in most cases “the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors.”⁵⁸

Thus, the Eighth Circuit enjoined St. Louis County from enforcing Ordinance 20,193. The government simply did not have the substantial empirical evidence required to support its finding that violent video games cause deleterious psychological effects on minors. Because the government could not show any harm nor show that the law in any real way addressed this harm, the ordinance could not survive the strict scrutiny analysis required under the First Amendment. Further, the Eighth Circuit was loathe to allow the county to wrap such an ordinance in parental authority to shield it from attack on First Amendment grounds. The court found that minors have First Amendment rights that cannot be abridged based solely on aiding parents with child rearing.

Illinois Violent/Sexually Explicit Video Games Law - § 720 ILCS 5/12A & B

The Statute

In July of 2002, the Illinois legislature adopted the Violent Video Games Law and the Sexually Explicit Video Games Law. These statutes were to go into effect on January 1, 2006. In enacting the laws, the Illinois legislature found that minors who play violent video games:

- (1) Exhibit violent, asocial, or aggressive behavior.
- (2) Experience feelings of aggression.
- (3) Experience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior.⁵⁹

The Illinois legislature further found that the state had a compelling interest in:

- (1) Preventing violent, aggressive, and asocial behavior.
- (2) Preventing psychological harm to minors who play violent video games.
- (3) Eliminating any societal factors that may inhibit the physiological and neurological development of its youth.
- (4) Facilitating the maturation of Illinois' children into well-meaning, productive adults.⁶⁰

The legislature defined violent video games as those that include “realistic depictions of human-on-human violence in which the player kills, seriously injures, or otherwise causes serious physical harm to another human, including, but not limited to depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.”⁶¹

With regard to sexually explicit video games, the legislature found that such games were “inappropriate for minors and the State has a compelling interest in assisting parents in protecting their minor children from sexually explicit video games.”⁶² According to the Illinois legislature, a sexually explicit video game is one:

that the average person, applying contemporary community standards would find, with respect to minors, is designed to appeal or pander to the prurient interest and depicts or represents in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual simulated normal or perverted sexual act or a lewd exhibition of the genitals or post-pubescent female breast.⁶³

While the Violent Video Game Law (VVGL) and the Sexually Explicit Video Game Law (SEVGL) were technically separate laws, they provided the same restrictions and labeling requirements, the same penalties for violations of those restrictions and labeling requirements, and the same affirmative defenses for retailers. Thus, these terms of VVGL and the SEVGL will be discussed together.

The VVGL and SEVGL, like the St. Louis County ordinance, restricted the sale or rental of violent and sexually explicit video games to minors.⁶⁴ Minors under these statutes were all persons under the age of 18.⁶⁵ If violent or sexually explicit video games were sold using an electronic scanner, the VVGL and SEVGL forced sellers to have the scanner prompt sales clerks to check the identification of the person buying a violent or sexually explicit video game before the sale was completed.⁶⁶ Furthermore, violent or sexually explicit video games could not be sold through self-service check-out devices under the VVGL and SEVGL.⁶⁷ The penalty for violating any of these sections was a fine of up to \$1,000.⁶⁸

The VVGL and SEVGL provided affirmative defenses for sellers of violent and sexually explicit video games. These included:

- (1) Defendant was a family member of the minor for whom video game was purchased.
- (2) The minor presented some apparently official document purporting to show he or she was over the age of 18.
- (3) For the retailer, the clerk had complete knowledge that the buyer was indeed a minor and sold the violent or sexually explicit game to the minor with specific intent to do so.
- (4) The video game was pre-packaged and rated EC, E10+, E, or T by the ESRB.⁶⁹

Besides making it unlawful to sell or rent violent and/or sexually explicit video games to minors, the VVGL and SEVGL imposed strict labeling requirements for violent and sexually explicit video games. All such games were to be labeled with a solid white “18” outlined in black. The label was to be no less than 2 inches by 2 inches and displayed on the front face of the video game package.⁷⁰ If a seller failed to include such a label, the first 3 offenses were punishable by a \$500 fine, with each subsequent violation worth \$1000.⁷¹

The SEVGL also provided for compulsory notification of the ESRB ratings system. While this provision was contained in the SEVGL, it provided that any retailer that sold video games was required to comply with the posting requirements, regardless of whether or not it sold violent and/or sexually explicit video games.⁷² Section 12B-30(a) provided that video game sellers were to prominently post signs notifying customers of the ESRB ratings system. These signs were to be posted within 5 feet of the area in which games were displayed for sale or rental, at the information desk (if applicable), and at the point of purchase.⁷³ The signs were also to be in 36 point type, in black ink on a light background and at least 18 by 24 inches.⁷⁴ In addition to the signs, retailers had to make available, on customer request, brochures detailing and explaining the ESRB ratings system.⁷⁵ The penalty for not complying with either the signage or the brochure provisions was \$500 for the first three violations and \$1000 for each subsequent violation.⁷⁶

The U.S. District Court for the Northern District of Illinois Enjoins the VVGL & SEVGL

On December 2, 2005, the U.S. District Court of the Northern District of Illinois, in a very thorough and detailed opinion, decided to enjoin both the VVGL and SEVGL on First Amendment grounds.⁷⁷

The district court quickly disposed of the issue of whether or not video games are protected speech under the First Amendment finding that, “[v]ideo games are generally designed to entertain players and viewers, but they can also inform and advocate viewpoints. They are therefore considered protected expression under the First Amendment.”⁷⁸

The court then examined the Illinois legislature’s motivation for enacting the VVGL, beginning with the alleged negative effect violent video games were found by the legislature to have on a minor’s aggressive thoughts and behaviors. The appellate courts in the previously discussed decisions did not examine these studies as closely as the district court did in this case, so the analysis is worth examining as it will likely be very similar to any subsequent analysis of the research propping up FEPA.

The court did a systematic examination on the record of all studies presented by the defendants’ expert, Dr. Anderson, which purported to show a correlation between aggressive behavior and playing violent video games.⁷⁹ The court also surveyed studies conducted by plaintiffs’ experts as well as criticisms of defendants’ experts’ studies.⁸⁰ Ultimately the court agreed with plaintiffs’ experts “Dr. Goldstein and Dr. Williams that neither Dr. Anderson’s testimony nor his research establish a causal link between violent video game exposure and aggressive thinking and behavior.”⁸¹ Further, the court found that “researchers in this field have not eliminated the most obvious alternative explanation: aggressive individuals may themselves be attracted to violent video games.”⁸² The court was also unconvinced that any demonstrable impact violent video games may have on aggressive thoughts and behavior was lasting beyond the short term.⁸³

With regard to the studies whose findings ran counter to those of the Illinois’ legislature when it enacted the VVGL, the court took issue with the fact that the legislature never examined any such studies. That is, the legislative record contained none of the articles cited by plaintiffs’ experts, nor did it include any “data whatsoever that was critical of research finding a causal link between violent video game play and aggression.”⁸⁴ According to the court, “these omissions undermined defendants’ claim that “the legislature made ‘reasonable inferences’ from the scientific literature based on ‘substantial evidence.’”⁸⁵

The court also examined the studies put forth by defendants’ experts regarding the effect of violent video games on brain activity in order to find support for the legislature’s claim that minors who play violent video games “experience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior.”⁸⁶ At best, plaintiffs’ expert, Dr. William Kronenberger, could state that his studies only demonstrated “a correlative,

not a causal, relationship between high media violence exposure and children who experience behavioral disorders, decreased brain activity in ACC and the DLFPC, and increased activity in the amygdala and the parahippocampal gyrus (indicating aggressive or violent behavior).⁸⁷

Plaintiffs' expert, Dr. Howard Nusbaum, took exception to Dr. Kronenberger's studies and the purported results that flowed therefrom.⁸⁸ The court found Dr. Nusbaum's testimony to be the more credible of the two, stating that "Dr. Kronenberger's studies cannot support the weight he attempts to put on them via his conclusions."⁸⁹ The court went on to say that the defendants "offered no basis to permit a reasonable conclusion that, as the legislature found, minors who play violent video games are more likely to 'experience a reduction of activity in the frontal lobes of the brain which (are) responsible for controlling behavior.'"⁹⁰

After hearing testimony from plaintiffs regarding the chilling effect the VVGL and SEVGL would have on the free speech of the video game industry, the court moved into a constitutional analysis of the VVGL and SEVGL. Attacking the VVGL first, the court stated that, "[a]ll parties agree that the VVGL is a content-based regulation subject to the strictest scrutiny under the First Amendment."⁹¹ Thus, defendants were obligated to show a compelling interest in limiting the protected speech and that it had pursued the least restrictive means of doing so. Defendants posited five interests it found to be compelling reasons to regulate violent video games:⁹²

1. Preventing violent, aggressive, and asocial behavior.
2. Preventing psychological harm to minors who play such games.
3. Eliminating societal factors that may inhibit the physiological and neurological development of (Illinois) youth.
4. Facilitating the maturation of Illinois' children into law-abiding, productive adults.
5. Assisting parents in protecting their children from such games.

In supporting its compelling interests, Illinois relied on the three legislative findings made in the statute itself. As previously mentioned, the Illinois legislature found that minors who play violent video games were more likely to⁹³:

1. Exhibit violent, asocial, or aggressive behavior.
2. Experience feelings of aggression.
3. Experience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior.

The court then examined each of these legislative findings in turn, examining first the claim that playing violent video games makes children more likely to exhibit violent, asocial, or aggressive behavior and thus, the state had a compelling interest in preventing such behavior. The court did not disagree that the state had a compelling interest in preventing violent and aggressive behavior, but stated that where First Amendment rights are implicated, "the state may regulate only expression that meets the requirements of *Brandenburg v. Ohio*, [395 U.S. 444 (1969)]."⁹⁴ The court held that, under *Brandenburg*, "the State may regulate protected expression based on the belief that it will cause violence only if the expression is directed to inciting or producing imminent lawless action, and is likely to incite or produce such action."⁹⁵ Thus, "the government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time."⁹⁶

The court was not persuaded by Illinois' findings or arguments in this regard, finding initially that there was no evidence that violent video games were designed for anything more than entertainment. There was no testimony or evidence indicating that violent video games were created with the express purpose of inciting violence.⁹⁷ Secondly, the court was not persuaded by the defendants' previously discussed expert testimony and thus found that "the evidence (defendants) offered regarding the purported effects on minors of playing violent video games did not even approach... (the) requirement that violent video games are 'likely to' produce 'imminent' violence."⁹⁸

Moving on to the legislature's finding that playing violent video games results in a decrease of frontal lobe activity in children, the court quickly dismissed it, stating "there is barely any evidence at all, let alone substantial evidence, showing that playing violent video games causes minors to experience (the claimed frontal lobe activity reduction)."⁹⁹ As discussed previously, the court was not persuaded by the defendants' expert, Dr. Kronenberger, and the

fact that the legislature did not even consider competing studies severely undercut the validity of this finding in the court's view.¹⁰⁰

The court next discussed the legislature's claim that violent video games cause developmental and/or psychological harm to minors. The court agreed that preventing such harm to minors is a compelling state interest, but found that it "does not provide a basis for restricting expression protected by the First Amendment."¹⁰¹ The court held that, "the State lacks authority to ban protected speech on the ground that it affects the listener's or observer's thoughts and attitudes," and likened any such attempt to thought control.¹⁰² According to the court, "[i]f controlling access to allegedly 'dangerous' speech is important in promoting the positive psychological development of children...that role is properly accorded to parents and families, not the State."¹⁰³

Addressing the defendants' claim that the state has a compelling interest in assisting parents who want to limit their children's access to violent video games, the court examined the evidence proffered by the defendants supposedly indicating the ease of access by minors to violent video games. The court pointed out that the study defendants relied on indeed found that minors have relatively easy access to violent video games, but the study also found that minors had very easy access to R-rated DVD movies and explicit music. The court said that while, "[t]he state may have a compelling interest in assisting parents with regulating the amount of media consumed by their children...it does not have a compelling interest in singling out video games in this regard."¹⁰⁴ The court found that this under-inclusiveness severely undercut the state's claim that limiting access to violent video games was in fact intended to serve the stated purpose of assisting parents.¹⁰⁵

The defendants also attempted to assert that violent video games were obscene with regard to minors and thus could be regulated more easily than with regard to adult access. The defendants relied on *Ginsberg v. State of New York*, 390 U.S. 629, (1968), to prop up this argument.¹⁰⁶ The court dismissed this argument, first stating that *Ginsberg* was concerned with a wholly different form of speech, and thus, was not applicable to the facts in the case at hand.¹⁰⁷ Secondly, the court said that "[n]owhere in *Ginsberg* (or any other case we can find, for that matter) does the Supreme Court suggest that the government's role in helping parents to be guardians of their children's well-being is an unbridled license to government to regulate what minors read and view."¹⁰⁸

After examining and dismissing each of defendants' so-called compelling interests in regulating violent video games, the court turned to the question of whether the VVGL was narrowly tailored enough to survive strict scrutiny. The state argued that because only minors' access to violent video games was impeded, the VVGL was narrowly tailored to meet its objectives.¹⁰⁹ Defendants reasoned that children could still obtain these games with parental consent and the adult access was entirely unrestricted. The court was not persuaded by these arguments as, in its opinion, violent video games are protected speech, even with regard to minors. Thus, violent video games are not within the class of materials that are carved out of First Amendment protections specifically for minors.¹¹⁰ The court also commented on the chilling effect the VVGL would have on the First Amendment rights of both adults and minors stating it was, "highly probable that game makers and sellers (would) self-censor or otherwise restrict access to games that have any hint of violence, thus impairing the First Amendment rights of both adults and minors."¹¹¹ The court also found that the inherent vagueness of the VVGL's definition of "violent video games" would chill First Amendment rights of game makers and consumers, both adult and child, and thus also found that the VVGL failed on vagueness grounds under the First Amendment.¹¹²

The court thus permanently enjoined the VVGL for all of the above discussed reasons including the defendants' failure to present substantial proof of any harm caused by violent video games, defendants' failure to narrowly tailor the VVGL, and the chilling effect the VVGL would have on the exercise of legitimate First Amendment rights.

The court then analyzed the Sexually Explicit Video Game Law (SEVGL) under the First Amendment. Defendants attempted to rely on *Ginsberg v. New York* to support the SEVGL's regulation of sexually explicit video games. According to the district court, *Ginsberg* allows the regulation of materials that are obscene for minors.¹¹³ *Ginsberg*

sets out three factors that material must meet in order to be deemed obscene with respect to minors. The material must be of the sort that:

1. predominately appeals to the prurient, shameful or morbid interest of minors;
2. is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
3. is utterly without redeeming social importance for minors.¹¹⁴

Using the *Ginsberg* factors, the court found that “the SEVGL, which includes the first two prongs of the Supreme Court’s obscenity test but omits the third prong, goes beyond regulating material that is obscene for minors.”¹¹⁵ That is, the court found that video games containing sexually explicit content cannot be said to be “utterly without redeeming social importance for minors” and thus, the SEVGL did not fulfill the *Ginsberg* factors. Because the SEVGL failed under this standard, “[i]t (was)...not subject to the deferential standard of review for juvenile obscenity regulations applied in *Ginsberg*.”¹¹⁶ Thus, the SEVGL, a content based regulation of speech, had to pass muster under a First Amendment strict scrutiny analysis.

Defendants argued that even if sexually explicit video games were non-obscene speech the SEVGL should only have to survive a lower standard of review (something less than strict scrutiny) because the statute was created to protect children.¹¹⁷ The district court dismissed this argument stating that such a lower standard is only to be applied in the context of broadcast media.¹¹⁸ The court found that video games are not sufficiently like broadcast media to warrant application of a lower standard of review. Specifically the court stated that sexually explicit video games bear clear indicators of their content (ESRB ratings) and, unlike broadcast media, must be actively sought out and used in order to put forth any message whatsoever.¹¹⁹ Thus, the court found that strict scrutiny was indeed the correct standard of review for the SEVGL. That is, the SEVGL had to be narrowly tailored to achieve compelling state interests.

In striking down the SEVGL, the court stated that “the SEVGL regulate(d) an unconstitutionally vague amount of speech and (was) therefore not narrowly tailored.”¹²⁰ That is, the SEVGL did not carve out an exception for sexually explicit material that has some value or importance for minors and thus “would result in the suppression of ‘large amounts of non-pornographic material with serious educational or other value.’”¹²¹ The court also found that the over-inclusiveness of the SEVGL was “compounded by the fact that it eliminate(d) the requirement that the material be considered as a whole.”¹²² Thus, a game with very little sexually explicit material, perhaps a scene or two, would be prohibited for minors under the SEVGL because it could not be considered as a whole. The court held that “[s]uch a sweeping regulation on speech – even sexually explicit speech – is unconstitutional even if aimed at protecting minors.”¹²³

The court also found that the SEVGL’s definition of sexually explicit video games failed on vagueness grounds, also because the SEVGL contained no “serious value” exception.¹²⁴ Because the SEVGL lacked a “serious value” exception the court found that a game with social value on a national level would be subject “to the whim of community determinations regarding patent offensiveness and prurient appeal of even a single image” contained in the game.¹²⁵ Ultimately the court found that because “the SEVGL – particular its definition of ‘sexually explicit’ – is vague and not narrowly tailored...its sale, rental, and check-out provisions (were) unconstitutional.”¹²⁶

After finding the sale, rental, and check-out provisions of the VVGL and SEVGL were unconstitutional, the court moved on to the labeling, signage, and brochure provisions contained in the SEVGL. Defendants argued for a rational basis standard of review based on *Zauderer v. Office of Disciplinary Counsel of the S. Ct. of Ohio*, 471 U.S. 626 (1985).¹²⁷ *Zauderer* allows state mandated commercial speech to be evaluated under a rational basis test if the mandated speech provides “‘purely factual and uncontroversial information’ intended to ‘dissipate the possibility of consumer confusion or deception.’”¹²⁸ The court held that the labeling, signage, and brochure requirements in the SEVGL did not meet this standard and thus had to be examined under strict scrutiny.¹²⁹

In making this finding the court stated that “the requirement that all violent and sexually-explicit video games bear an ‘18’ sticker disclose(d) no factual information.”¹³⁰ Not only does such a label provide no substantive information, its very placement would be the result of a subjective determination of a game’s content by the retailer,

which is clearly not “purely factual”.¹³¹ Moreover, defendants provided no evidence that the then in-place ESRB ratings system resulted in any consumer confusion whatsoever.¹³² With regard to the signage and brochure provisions, the court held that these provisions would be unduly burdensome to retailers and thus did not survive strict scrutiny.¹³³

In sum, the district court held that “[p]laintiffs (were) unquestionably entitled to a permanent injunction barring enforcement of both the VVGL and the SEVGL.”¹³⁴ The court found that plaintiffs’ loss of First Amendment freedoms from the two laws would “unquestionably (constitute) irreparable injury” and that no other remedy beside injunction would be sufficient.¹³⁵ Thus, the VVGL and SEVGL were permanently enjoined for being overbroad and vague and for having no substantial convincing evidence on which to support the contentions on which the laws were based.

The Family Entertainment Protection Act (FEPA)

The Bill

The Family Entertainment Protection Act (FEPA) was introduced by Senator Hilary Clinton on December 16, 2005. The stated purpose of the bill is to “limit the exposure of children to violent video games.”¹³⁶

FEPA begins with findings of fact. These findings include:¹³⁷

(2) Experimental research and longitudinal research conducted over the course of decades shows that exposure to higher levels of violence on television, in movies, and in other forms of media in adolescence causes people in the short-term and, after repeated exposure, even years later to exhibit higher levels of violent thoughts, anti-social and aggressive behavior, fear, anxiety, and hostility, and desensitization to the pain and suffering of others.

(4) New research shows that exposure to violent video games causes similar effects as does exposure to violence in other media...and research shows that the uniquely interactive, engaging nature of video games may be especially powerful in shaping children’s thoughts, feelings, and behaviors.

(9) Research shows that children whose parents monitor and control their access to violent video games are less likely to demonstrate the negative effects of such media.

(10) Parents rely on the (ESRB) ratings system to protect their children from inappropriate material yet, numerous studies have demonstrated that young people can access Mature-rated games with relative ease.

(11) There is a need to enact legislation to ensure that the ratings system is meaningful.

FEPA goes on to make it unlawful for any business to “sell or rent, or permit the sale or rental of any video game with a Mature, Adults-Only, or Ratings Pending rating from the (ESRB) to any individual who has not attained the age of 17 years.”¹³⁸ FEPA provides affirmative defenses to businesses, including being shown apparently valid and official identification indicating that a person is above 17 years of age when he or she is, in-fact, not.¹³⁹ Another affirmative defense provided by FEPA is evidence that a seller has a ratings enforcement policy in place which includes cash register prompts to check age identification, clear labels on each game indicating the rating of the game, signage explaining the ratings enforcement policy of the business, and, when applicable, an online age verification system.¹⁴⁰ The enforcement policy defense is not available to any business that is found to “repeatedly” violate FEPA despite having a conforming enforcement policy.¹⁴¹

FEPA, of course, prescribes penalties for violation of its mandates stating that “[t]he manager or agent of the manager acting in a managerial capacity of a business found to be in violation of the... (sale and rental to minors prohibitions)... shall be subject to a civil penalty, community service, or both.”¹⁴² The first such violation may result in a fine of up to \$1000, 100 hours of community service, or both.¹⁴³ Each subsequent violation may result in a fine of up to \$5,000, 500 hours of community service, or both.¹⁴⁴

FEPA, going beyond any previous local or state statute, also provides for oversight of the ESRB, requiring the Federal Trade Commission (FTC) to contract with an independent auditing firm to “determine, in a written report, on an annual basis, whether the ratings established by the (ESRB) remain consistent and reliable over time.”¹⁴⁵ FEPA

also mandates that the FTC conduct yearly secret audits to determine how frequently minors are able to purchase Mature and Adults-Only rated games. Under FEPA, the FTC must also investigate video games for embedded content, accessible through “a keystroke combination, pass-code, or other technological means,” that is inconsistent with the rating given to a particular game in which such content is embedded.¹⁴⁶ If such content is discovered, the FTC “shall take appropriate action under its authority to regulate unfair or deceptive acts or practices in or affecting commerce as authorized under section 5 of the Federal Trade Commission Act.”¹⁴⁷

Constitutionality of FEPA

Previous attempts to regulate video games, both locally and on a state-wide level, have failed under First Amendment analysis. There is no reason to believe that FEPA will not meet the same fate.

Initially it must be recognized that FEPA will be examined under the First Amendment strict scrutiny standard as video games are clearly protected speech. Each case discussed above held such, and there is no compelling argument that FEPA is different from the Indianapolis, St. Louis County, or Illinois laws in this regard. FEPA attempts to restrict access by minors to video games, a protected form of expressive speech. Thus, it must pass a strict scrutiny analysis to survive attack on First Amendment grounds.

Strict scrutiny, as discussed in the cases above, requires the government to show its law to be narrowly tailored to accomplish compelling governmental interests. The sole purpose put forth in FEPA is, “[t]o limit the exposure of children to violent video games.” To support this purpose, FEPA makes findings with regard to the effects of violent video games on children, stating that research “shows exposure to violent video games causes...as does exposure to violence in other media...increased levels of aggression” in minors.¹⁴⁸ While FEPA’s vague reference to “research” is nebulous, it is hard to imagine that the research available to Senator Clinton is any different than the research available to the legislative bodies in Indianapolis, St. Louis County, and Illinois. The research in those cases was found to be, without exception, deficient to prove up any actual ill effects on minors as a result of playing violent video games. While the courts in those cases did not state that no such evidence could or would ever be found, it seems unlikely that any new compelling research has been done since the VVGL and SEVGL were struck down in December 2005. Thus, it seems clear that the government would be unable to carry its burden to prove, through substantial supporting evidence¹⁴⁹

FEPA also makes the statement that there is a “need to enact legislation to ensure that the (ESRB) ratings system is meaningful.”¹⁵⁰ Again, it is difficult to determine what this statement is based on, but one can analogize this statement with Illinois’ attempt to institute its own labeling requirements for violent and sexually explicit video games. While FEPA institutes no labeling requirement itself, it does provide for federal government oversight of the ESRB rating system, including auditing game ratings for “slippage”.¹⁵¹ FEPA bases this oversight on the assertion that the ESRB rating system must remain meaningful, but it seems unlikely that there is any evidence that the ESRB rating system is in danger of any sort of slippage.

Defenders of FEPA may attempt to base this finding and supporting provisions on the FTC studies cited in the Illinois case to prop of the VVGL and SEVGL labeling and notice provisions. Any such reliance must ultimately fail for the reasons stated by the district court in that case, namely that while “[t]he state may have a compelling interest in assisting parents with regulating the amount of media consumed by their children...it does not have a compelling interest in singling out video games in this regard.”¹⁵² FEPA even states that “exposure to higher levels of violence on television, in movies, and in other forms of media...causes people in the short-term and, after repeated exposure...to exhibit higher levels of violent thoughts, anti-social and aggressive behavior, fear, anxiety, and hostility, and desensitization to the pain and suffering of others.”¹⁵³ Yet, FEPA only seeks to regulate video games, completely ignoring the supposed ill effects of other violent media.

The only justification the FEPA attempts to make is that the “uniquely interactive...nature of video games may be especially powerful in shaping children’s thoughts, feelings, and behaviors.”¹⁵⁴ This assertion was not found to be compelling in any of the cases, going all the way back to the Seventh Circuit’s opinion on the Indianapolis ordi-

nance. The Seventh Circuit in that case was not persuaded that the interactive nature of video games clearly made their influence on minors more dramatic. In fact the court found the suggestion that a video game's interactivity makes it somehow different than film, television, or literature, to be "superficial, in fact erroneous."¹⁵⁵ The most effective examples of literature and film, according to the court, contain elements of interactivity, even though the reader or viewer does not press a button or manipulate a joystick. FEPA simply will not be able to overcome this finding because it brings nothing new to the table.

Quite simply FEPA will, like its local and state law counterparts, fail to provide any substantial evidence to support its findings or justify its significant abrogation of First Amendment rights. FEPA, like its state and local counterparts, cannot survive a strict scrutiny analysis. That is, FEPA is not narrowly tailored to achieve compelling government interests. FEPA is thus nothing more than a poorly drafted and ill conceived attention grab on the part of Senators Clinton and Lieberman and poses no real threat to the First Amendment rights of U.S. gamers.

Endnotes

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|----|---|----|--|
| 1 | FEPA Bill S.2126 | 25 | <i>Id.</i> at 578. |
| 2 | Sec. 831-1 of the Indianapolis Municipal Code | 26 | <i>Id.</i> at 578. |
| 3 | <i>Id.</i> | 27 | <i>Id.</i> at 579. |
| 4 | Sec. 831-5(i) of the Indianapolis Municipal Code | 28 | <i>Id.</i> at 579. |
| 5 | Sec. 831-5(j) of the Indianapolis Municipal Code | 29 | <i>Id.</i> at 579. |
| 6 | <i>Id.</i> | 30 | St. Louis County Ordinance § 602.430(c) |
| 7 | Sec 831-5(l) of the Indianapolis Municipal Code | 31 | St. Louis County Ordinance § 602.430(d) |
| 8 | <i>Id.</i> | 32 | St. Louis County Ordinance § 602.430(e) |
| 9 | Sec 831-9 of the Indianapolis Municipal Code | 33 | St. Louis County Ordinance § 602.435. |
| 10 | Sec 831-8 of the Indianapolis Municipal Code | 34 | <i>Id.</i> |
| 11 | <i>American Amusement Machine Association, et al. v. Teri Kendrick, et al.</i> , 244 F.3d 572 (2001). | 35 | St. Louis County Ordinance § 602.445(2) |
| 12 | <i>Id.</i> at 574. | 36 | St. Louis County Ordinance § 602.440 |
| 13 | <i>Id.</i> at 574. | 37 | St. Louis County Ordinance § 602.445(1) |
| 14 | <i>Id.</i> at 574. | 38 | <i>Id.</i> |
| 15 | <i>Id.</i> at 574. | 39 | St. Louis County Ordinance § 602.455 |
| 16 | <i>Id.</i> at 574. | 40 | <i>Interactive Digital Software Association, et al. v. St. Louis County, et al.</i> , 329 F.3d 954 (2003). |
| 17 | <i>Id.</i> at 575. | 41 | <i>Id.</i> at 957. |
| 18 | <i>Id.</i> at 579. | 42 | <i>Id.</i> at 957. |
| 19 | <i>Id.</i> at 576. | 43 | <i>Id.</i> at 957. |
| 20 | <i>Id.</i> at 576. | 44 | <i>Id.</i> at 957. |
| 21 | <i>Id.</i> at 576. | 45 | <i>Id.</i> at 957. |
| 22 | <i>Id.</i> at 577. | 46 | <i>Id.</i> at 958. |
| 23 | <i>Id.</i> at 577. | 47 | <i>Id.</i> at 958. |
| 24 | <i>Id.</i> at 578. | 48 | <i>Id.</i> at 958. |

- 49 *Id.* at 958.
50 *Id.* at 958.
51 *Id.* at 958.
52 *Id.* at 958.
53 *Id.* at 959.
54 *Id.* at 959.
55 *Id.* at 959.
56 *Id.* at 959.
57 *Id.* at 960.
58 *Id.* at 960.
59 720 ILCS 5/12A-5(a)(1)-(3).
60 720 ILCS 5/12A-5(d)-(g).
61 720 ILCS 5/12A-10(e).
62 720 ILCS 5/12B-5.
63 720 ILCS 5/12B-10(e).
64 720 ILCS 5/12A-15(a) and B-15(a).
65 720 ILCS 5/12A-10(c) and B-10(c).
66 720 ILCS 5/12A-15(b) and B-15(b).
67 720 ILCS 5/12A-15(c) and B-15(c).
68 720 ILCS 5/12A-15(a) & (b) and B-15(a) & (b).
69 720 ILCS 5/12A-20(1)-(4) and B-20(1)-(4).
70 720 ILCS 5/12A-25 and B-25.
71 720 ILCS 5/12A-25(b) and B-25(b).
72 720 ILCS 5/12B-30(a).
73 *Id.*
74 720 ILCS 5/12B-30(b).
75 720 ILCS 5/12B-35(a).
76 720 ILCS 5/12B-30(c) and 35(b).
77 *Entertainment Software Association, et al. v. Rod Blagojevich, et al.*, 404 F. Supp. 2d 1051 (2005).
78 *Id.* at 1056.
79 *Id.* at 1059-1063.
80 *Id.* at 1062-1064.
81 *Id.* at 1063.
82 *Id.* at 1063.
83 *Id.* at 1063.
84 *Id.* at 1063.
85 *Id.* at 1063.
86 720 ILCS 5/12A-5(a)(3).
87 404 F. Supp. 2d 1051, 1065.
88 *Id.* at 1066-1067.
89 *Id.* at 1067.
90 *Id.* at 1067.
91 *Id.* at 1072.
92 *Id.* at 1072.
93 *Id.* at 1073.
94 *Id.* at 1073.
95 *Id.* at 1073.
96 *Id.* at 1073.
97 *Id.* at 1074.
98 *Id.* at 1074.
99 *Id.* at 1074.
100 *Id.* at 1074.
101 *Id.* at 1074.
102 *Id.* at 1074-1075.
103 *Id.* at 1075.
104 *Id.* at 1075.
105 *Id.* at 1075.
106 *Id.* at 1075-1076.
107 *Id.* at 1076.
108 *Id.* at 1076.
109 *Id.* at 1076.
110 *Id.* at 1076.
111 *Id.* at 1076.
112 *Id.* at 1077.
113 *Id.* at 1078.
114 *Id.* at 1078.
115 *Id.* at 1078.
116 *Id.* at 1078.
117 *Id.* at 1079.
118 *Id.* at 1079.
119 *Id.* at 1079.
120 *Id.* at 1080.
121 *Id.* at 1080.

- 122 *Id.* at 1080.
123 *Id.* at 1080.
124 *Id.* at 1081.
125 *Id.* at 1081.
126 *Id.* at 1081.
127 *Id.* at 1081.
128 *Id.* at 1081.
129 *Id.* at 1082.
130 *Id.* at 1081.
131 *Id.* at 1081.
132 *Id.* at 1082.
133 *Id.* at 1082.
134 *Id.* at 1082.
135 *Id.* at 1082.
136 FEPA Bill S.2126
137 FEPA Bill S.2126 §§ 2(2), 2(4), 2(9), 2(10), 2(11).
138 FEPA Bill S.2126 §4(a).
139 FEPA Bill S.2126 §4(b)(1)(A).
140 FEPA Bill S.2126 §4(b)(1)(B)(i)(I)-(III) & (ii).
141 FEPA Bill S.2126 §4(b)(2).
142 FEPA Bill S.2126 §4(c).
143 FEPA Bill S.2126 §4(c)(1).
144 FEPA Bill S.2126 §4(c)(2).
145 FEPA Bill S.2126 §5(a).
146 FEPA Bill S.2126 §7(a)(1)-(3).
147 FEPA Bill S.2126 §7(b).
148 FEPA Bill S.2126 §2(4).
149 329 F.3d 954, 959.
150 FEPA Bill S.2126 §2(11).
151 FEPA Bill S.2126 §5.
152 404 F. Supp. 2d 1051, 1075.
153 FEPA Bill S.2126 §2(2).
154 FEPA Bill S.2126 §2(4).
155 *Id.* at 577.

Computer Law Section's Annual Meeting

Please save the date for the Computer Law Section's Annual Meeting:

Wednesday, September 19, 2007
5:30 p.m. — 8:30 p.m.

We will be meeting at:

Palazzo di Bocce
4291 S. Lapeer Road
Orion, MI 48360
(Approx 2 miles north of the Palace)

and the schedule will be:

5:30-8:30 p.m. Appetizers
6:00-6:30 p.m. Business Meeting
6:30-8:30 p.m. Bocce Ball (with instruction)

Registration details to follow.