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Brown v. EMA/ESA: U.S. Supreme Court Stops California from Playing Games with the First Amendment*

*Christian Genetski***

I joined the Entertainment Software Association (“ESA”) in early July 2011, two weeks after the Supreme Court issued its landmark decision in *Brown*,¹ a case that brought to a head the video game industry’s long-running struggle to protect its artistic expression from regulation based on game content. The Court’s decision was both a victory for free speech, and an overdue recognition of video games’ equality with other forms of expressive art. Although the case undoubtedly marks a watershed moment for the industry, many legal challenges persist and new ones continue to emerge as the industry itself evolves.

This article will broadly address two topics. The first is a discussion of the *Brown* case, the four different opinions, and the implications the majority opinion has for the video game industry in content regulation and beyond. The second half of this article will discuss what lies beyond content regulation in the next generation of legal issues. This article will examine many of the video game industry’s legal and policy challenges, which stem largely from the new frontiers this incredibly innovative industry is defining.

Before discussing the *Brown* opinion, should we should understand a bit about the demographics of the video game industry—who “gamers” are and what the industry is doing. These important statistics provide some insight into the breadth of the *Brown* decision’s impact and context for where the video game industry is today and where it is headed.² The numbers also illuminate some of the challenges that the video game industry will face in the future.

First, picture a typical gamer. Most people conjure a similar image, typically involving a teenage boy, dimly lit room and sodas and snacks. Although that gamer still very much exists, there has been a dramatic shift in the overall gaming demographic. Gamers now encompass a much broader section of the populace than they have in the past. Gamplay is now a well-ingrained part of America’s cultural landscape, with seventytwo percent of

* This article was adapted from an oral presentation delivered at the Guild Hall Game: Business: Law Conference on January 26, 2012.

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1. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

2. *Id.*

American households playing computer and video games.³ The average gamer is thirty-seven years old, and women make up forty-two percent of all gamers.⁴ Most people have personal anecdotes that demonstrate this trend. Picture a mother, who—for the first time—does not pay any attention to what her child tries to tell her because the mother is staring down at her iPhone, trying to lock in a double-word score on Words with Friends. When your mom has trouble listening because she is preoccupied with mobile gaming, the truth of these statistics hits home.

It is a promising time to enter the video game industry. The sector is strong and evolving. The industry generated \$25.1 billion in 2010.⁵ From 2005 to 2010, the industry's revenue more than doubled.⁶ Over that same time period, the entire U.S. GDP only grew just over fifteen percent.⁷ Computer and video game companies directly and indirectly employ more than 120,000 people in thirty-four states, with an average employee salary of around \$90,000.⁸

The notion of what games are and what games can achieve is also evolving. Games will no doubt continue to provide fun and entertainment, but they also increasingly provide a foundation through which people connect with one another or reestablish long lost connections with old friends. Games' additional uses include a variety of other interesting purposes, such as education and medical research.

This thriving industry faces two broadly defined categories of legal challenges. First, the unique, game-centric challenges targeted at the video game industry over the last decade, primarily in the form of content regulation. There were attempts, both federally—which never gained full traction—and at the state level—that certainly did gain full traction. These attempts led to legislation and regulation concerning consumer choice about the video games that they are able to purchase, mostly aimed at minors and focused on violent content.

3. *Id.*

4. *Id.*

5. *2011 Essential Facts About the Computer and Video Game Industry*, ENTMT SOFTWARE ASS'N, http://www.theesa.com/facts/pdfs/ESA_EF_2011.pdf (last visited Oct. 14, 2012).

6. Stephen E. Siwek, *Video Games in the 21st Century: The 2010 Report*, ENTMT SOFTWARE ASS'N, http://www.theesa.com/facts/pdfs/VideoGames21stCentury_2010.pdf (last visited Oct. 15, 2012).

7. *US Gross Domestic Product GDP History*, USGOVERNMENTSPENDING.COM, http://www.usgovernmentspending.com/spending_chart_2000_2010USb_13s11i011mcn_US_Gross_Domestic_Product_GDP_History (last visited Oct. 14, 2012).

8. *2011 Essential Facts About the Computer and Video Game Industry*, ENTMT SOFTWARE ASS'N, http://www.theesa.com/facts/pdfs/ESA_EF_2011.pdf (last visited Oct. 14, 2012).

Second, the video game industry shares legal challenges with other technology and online industries. For example, in the realm of intellectual property, the video game industry creates some of the most dynamic and incredible content that exists, and it is important to protect these creations. The video game industry is similar to other content creators, but the gaming platforms, especially the newer ones, must be thought of as a business first and as a game second. Furthermore, the video game industry now stands alongside the social networking businesses and other Web 2.0 and 3.0 companies dealing with issues such as piracy, data security, and digital entitlements.

The ESA formed fifteen years ago in response to efforts aimed squarely at the video game industry and the purported evils of violent video game content. There have been a series of laws passed since that time, each with a slightly different approach, but with the same end: regulation of the distribution and sale of video games based on their content. The video game industry has been united in the battle against those laws by asserting full and equivalent First Amendment protection.

The track record has been very good. Leading up to the *Brown* case, the industry was 13-0 in fighting back challenges; none of these laws took effect because all were defeated in the courts.⁹ Interestingly, the Supreme Court agreed to hear the *Brown* case.¹⁰ Typically, the Court grants review of a very low percentage of the petitions. The common reason it grants certiorari is to resolve a split in the various circuits. However, when California petitioned the Supreme Court to hear the case, then styled *Schwarzenegger*, the 13-0 record in favor of striking down laws that attempted to regulate violence in video games certainly did not reflect a split. Given this record, it seemed like a long shot that the Court would entertain the case. So when the Court granted certiorari, it was a very serious day for the gaming industry because an adverse decision by the Supreme Court would have put the industry in a very different place than where it is today.

California's law was typical of other laws that sought to regulate violent video game content in the sale to minors. Specifically, it prohibited the sale or rental of violent video games to minors and required a label of "18" to be placed on the packaging.¹¹ Specific game content falling under California's definition of "violent video game" included "killing, maiming, dismembering, or sexually assaulting an image of a human being. . . in a manner that [appeals to] a deviant or morbid interest of minors."¹² Additionally, in order to fall under this definition, the violent content of the game must "cause the

9. *Video Game facing Supreme Court review*, GAMECRAFT (May 17, 2010) <http://blog.gamecraft.org/tag/politics/>.

10. *Schwarzenegger v. Entm't Merchs. Ass'n.*, 130 S. Ct. 2398 (2010) (later restyled *Brown v. Entm't Merchs. Ass'n*).

11. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

12. *Id.*

game, as a whole, to lack serious literary, artistic, political, or scientific value.”¹³ This additional requirement was carefully selected. It was borrowed from a New York law on obscenity upheld by the Supreme Court in 1968 in *Ginsberg v. New York*.¹⁴ California attempted to port over a standard that had survived First Amendment scrutiny in the obscenity context by crafting a law that specifically protected children from obscenity for which adults were not protected. This law was unique in that respect.

California argued that the *Ginsberg* holding on obscenity should be expanded to include children exposed to violence specifically in the video game context.¹⁵ They asked the Court not to apply a strict scrutiny standard but instead to treat content-based regulations for violent speech directed at children as a lesser-protected category of speech.¹⁶ ESA, on the other hand, argued that *Ginsberg* was the wrong starting point.¹⁷ The starting point for First Amendment analysis is whether the content subject to restriction is an expressive work that is entitled to full First Amendment protection. If it is, then any content-based restriction is subject to strict-scrutiny review.¹⁸ That distinction is critical in First Amendment law because in most cases, the test determines the results. When strict scrutiny is applied, almost without exception, the law fails to pass constitutional muster. To survive strict scrutiny, a law must pass a two-prong test: the law must address a compelling state interest, and that interest must be achieved in a narrowly tailored manner.¹⁹ It is generally well understood that applying strict scrutiny is the death knell for any law subjected to it, which is why California argued against its use.

In addition to arguing for strict scrutiny, ESA proposed in the alternative that even if the Court chose to apply a lower balancing test, California’s statute, as drafted, would still fail because it was unconstitutionally vague.²⁰ Using California’s definition to determine whether or not a game would require an “18” sticker would be impossible to meaningfully administer. In oral arguments, Justice Scalia wanted to know, given the law’s criminal penalties, how a game producer could know if he was in compliance with the law.²¹ California answered that the law would develop organically over time, and Justice Scalia took California to task over that response.²²

13. *Id.* at 2732–33.

14. *Id.* at 2735.

15. Reply Brief of Petitioner-Appellant at 2, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08-1448).

16. Brief of Petitioner-Appellant at 29, *Brown*, 131 S. Ct. 2729 (No. 08-1448).

17. Brief of Respondent-Appellee at 17, *Brown*, 131 S. Ct. 2729 (No. 08-1448).

18. *Id.*

19. *Brown*, 131 S. Ct. at 2738.

20. Brief of Respondent-Appellee at 17, *Brown*, 131 S. Ct. 2729 (No. 08-1448).

21. Transcript of Oral Argument at 13, *Brown*, 131 S. Ct. 2729 (No. 08-1448).

22. *Id.*

The game industry marshaled an incredible effort when the Supreme Court granted review. Ninety different organizations representing a broad spectrum of interests, many of which are often on opposing sides regarding other issues, came together to unite in supporting the gaming industry. Incredibly, ten attorneys general drafted and signed an amicus brief in support of the position that the California statute was unconstitutional. Many attorneys general in other states, including California, were those leading the charge to uphold the law, so it was an amazing effort to get that sort of recognition. In addition, a long list of social scientists and researchers proffered evidence to combat studies that California offered in justification for its law that suggested children suffer negative impacts from exposure to violent video games. These scientists and researchers showed that the science in most of those studies was subject to a number of flaws or was equally applicable well outside the video game context.²³

The gaming industry won in a 7-2 decision to strike down the California law.²⁴ Five justices—Scalia, Ginsberg, Sotomayor, Kagan, and Kennedy—formed the majority in defeating the law, with Justice Scalia writing the majority opinion.²⁵ Justice Alito wrote a concurring opinion in which Chief Justice Roberts joined, and two justices, Thomas and Breyer, each wrote dissenting opinions.²⁶

Justice Scalia applied strict scrutiny and struck down the law on the basis that it neither had a compelling justification nor was it narrowly tailored.²⁷ Regarding the compelling justification, Scalia pointed to discrepancies in the social science and found it fell far short of what would have been required for California to prove.²⁸ On the tailoring, he found the law to be both underinclusive and overinclusive.²⁹ The law was underinclusive because it only targeted video games while overlooking other forms of entertainment.³⁰ The studies, which California proffered as evidence, suggested that the disputed effect video games had on children was roughly equivalent to that of morning cartoons, movies, television and many other forms of entertainment that have all received First Amendment protection.³¹ Yet this law did not target these forms of entertainment.³² If California was truly

23. *Brown*, 131 S. Ct. at 2739.

24. *See generally Brown*, 131 S. Ct. 2729

25. *Id.* at 2732.

26. *Id.*

27. *Id.* at 2742.

28. *Id.* at 2739.

29. *Id.* at 2742.

30. *See Brown*, 131 S. Ct. at 2742.

31. *Id.* at 2739.

32. *Id.* at 2742.

attempting to protect children from the effects of violent images, it was taking only a sliver of the things its social science suggested should be treated similarly. Therefore, in Scalia's view, and the majority's minds, this law was not really about curbing the effects of violent images on children. Instead, it was about the exact thing the First Amendment prohibits: targeting the particular content, message, or viewpoint of a specific category of speech.³³

Additionally, according to Scalia, the ends that the law sought to accomplish were already being achieved by other means—specifically, the efforts of the Entertainment Software Rating Board (“ESRB”), a voluntary industry ratings organization.³⁴ The ESA found this recognition particularly gratifying given its affiliation with ESRB. Scalia pointed to studies that showed this voluntary industry self-regulation effort was already achieving the goal of aiding parental authority sought by the California law.³⁵

Finally, Scalia pointed to the overinclusiveness of the law.³⁶ Evidence suggested many parents did not want to prohibit their children from being able to purchase these games, but since the law would require the consent of all parents, it was overinclusive.³⁷ The law essentially placed restrictions on the children of parents who did not want them based on how California thought the children should be restricted.³⁸

At the outset of the opinion where he found that strict scrutiny applied, Scalia stated, “[V]ideo games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.”³⁹ This is one of the most critical statements in the opinion. It will have a living, breathing, forward-looking effect on the industry because it signals the arrival of full maturity in the video game industry. Basically, Scalia acknowledged that video games are expressive works on equal constitutional footing with film and literature.

Great comparisons exist in the opinion in which Scalia compares video games to Dante's *Inferno*.⁴⁰ Specifically, he notes that one of the key arguments proffered by California—that the interactivity of video games somehow made them different and thus less entitled to protection—was actually backwards.⁴¹ Instead, Scalia recognized that some of the greatest literature

33. *Id.* at 2740.

34. *Id.*

35. *Id.* at 2741.

36. *Brown*, 131 S. Ct. at 2741.

37. *Id.*

38. *Id.*

39. *Id.* at 2733.

40. *Id.* at 2737.

41. *Id.* at 2738.

has an interactive component to it. He also noted that children's choose-your-own-adventure books were interactive.⁴² The interactivity of video games actually makes them more artistic and more expressive, not less.⁴³ These are lynchpin findings by the Court that will serve the video game industry well. Scalia correctly noted that throughout history as new art forms emerged, the same criticisms have been levied at them over and over again.⁴⁴ Dime novels faced the same criticisms as far back as the 1800s.⁴⁵ Movies were once subject to these sorts of regulations, and now it was the video game industry's turn. Therefore, video games compelled the same result.⁴⁶

Scalia noted that in *Ginsberg v. New York*, New York successfully carved out a particular form of speech, namely obscenity, entitled to less protection and then distinguished speech directed at children from that directed at adults.⁴⁷ Scalia also noted that although very finite harbors carved out from First Amendment protection were always present, such as obscenity and fighting words,⁴⁸ violence in expressive works is not obscenity, and our nation always protected it.⁴⁹ It should be no different here.

Justice Alito, with Chief Justice Roberts joining, wrote a concurring opinion.⁵⁰ Justices Alito and Roberts would have bypassed deciding whether strict scrutiny applies because they believe the law is easily struck down on vagueness grounds—the secondary argument ESA raised.⁵¹ Some things mentioned in that opinion are mildly troubling. Justice Alito pointed to the fact that he thought of video games as a new and emerging space, a newer technology.⁵² Video games are still evolving, and it might be premature to make judgments.⁵³ However, Alito's concurrence discussed at length the interactivity component of video games and provided a litany of examples of the most egregious and offensive subject matter.⁵⁴ Even though he agreed the California law did not provide any sort of meaningful solution, he pointed

42. *Brown*, 131 S. Ct. at 2738.

43. *Id.*

44. *Id.* at 2737.

45. *Id.*

46. *Id.*

47. *Id.* at 2735.

48. *Brown*, 131 S. Ct. at 2733.

49. *Id.* at 2735.

50. *Id.* at 2742 (Alito, J., concurring).

51. *Id.* at 2742–43.

52. *Id.* at 2742.

53. *Id.*

54. *Brown*, 131 S. Ct. at 2749.

to these examples as a reason for caution.⁵⁵ As one can see, the industry would be in a much different place had this been the majority opinion. Scalia spoke to these concerns in the majority opinion. Specifically, he said the very examples Alito raised and found to be the most offensive were the very reason the First Amendment protection was so critical.⁵⁶ At its core, the First Amendment protects individuals from discrimination against viewpoints and certain types of speech.⁵⁷

Two dissenters, with wildly different points of view, wrote their own opinions as to why the Court should uphold the law. Justice Thomas based his dissent solely on an originalist view—a view for which he is well known. He found no evidence the drafters intended First Amendment protection to extend to children.⁵⁸ He said minors lack expressive rights except those granted to them by their parents.⁵⁹ While that might be a popular point of view in many households with unruly teenagers, it is not a widely accepted view as applied against government regulations.

Justice Breyer dissented on other grounds, arguing that he would apply strict scrutiny and find that California's law withstood the test.⁶⁰ Again, this is a very interesting position given the Supreme Court's precedent regarding the typical outcome of strict scrutiny. As support for that view, Breyer pointed to a social science from his own independent research, complete with numerous citations to web sources and materials found outside the record of the case.⁶¹ This is somewhat odd, yet something dissenting judges have a bit more freedom to do.

For the ESA, one of the most gratifying parts of the opinion was the recognition by Justice Scalia that the industry on its own was largely achieving the objectives that California put forth as the justification for the law.⁶² According to a 2011 Federal Trade Commission Report, video game retailers are the strictest and most effective in enforcing age rating policies.⁶³ Retailers prevented 87% of underage purchases⁶⁴ and "[t]he ESRB continues to lead [the movie, music, and gaming industries] in providing clear and promi-

55. *Id.* at 2751.

56. *Id.* at 2738.

57. *Id.*

58. *Id.* at 2751 (Thomas, J., dissenting).

59. *Id.* at 2759.

60. *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

61. *Id.* at 2771.

62. *See id.* at 2740–41.

63. *See FTC Undercover Shopper Survey on Enforcement of Entertainment Ratings Finds Compliance Worst for Retailers of Music CDs and the Highest Among Video Game Sellers*, FTC (Apr. 20, 2011), <http://www.ftc.gov/opa/2011/04/violentkidsent.shtm>.

64. *See id.*

nent disclosures of rating information in television, print, and online advertising.”⁶⁵ The ESA remains committed to doing so going forward. The victory in the Supreme Court is a critical, important, and very strong disincentive to states introducing similar laws because the fate of such laws is clear at this point. The video game industry remains committed to providing information that parents need to evaluate the choices that they think are right for their children, and the ESRB does a good job of this. The Federal Trade Commission (“FTC”) repeatedly recognizes the video game industry as having the best voluntary self-regulation effort.

In terms of lessons from the Supreme Court case, the ESA reached an agreement on its petition with the state of California which reimbursed the ESA \$950,000 for its attorney’s fees incurred in connection with the Supreme Court case.⁶⁶ Together with the \$370,000 already awarded for the successes in connection with the same law in the two lower courts, this amounts to just over a \$1.3 million price tag for this effort by California.⁶⁷ Including the first thirteen unsuccessful cases involving state regulation of the video game industry, some states have spent over \$3 million in pursuit of these efforts.⁶⁸ The bottom line is that these content regulation efforts do not pay, and now that the Supreme Court has spoken, the ESA is optimistic that the issue is settled.

One of the major benefits from *Brown* is the Supreme Court’s endorsement of expansive First Amendment protection for video games. This endorsement has a broad impact on areas of content regulation, the right of publicity, marketing, and advertising. The clear, definitive statement from the Court is that video games are on equal footing with other expressive content.⁶⁹ We certainly hope this signifies the end of content regulation, but beyond that, it will have other effects. For example, there are few high-profile right-of-publicity cases involving Electronic Arts, Inc.’s (“EA”) college football game pending in different courts. These cases reached different outcomes and the timing of them is such that the District Court decided *Keller v. Electronic Arts, Inc.*⁷⁰ before the Supreme Court issued the *Brown* opinion.⁷¹ By contrast, *Hart v. Electronic Arts, Inc.*,⁷² a case decided after

65. *Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Games Industries*, FTC (Apr. 2007), <http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf>.

66. *California Taxpayers to Reimburse Video Game Industry for Costs from Failed Schwarzenegger Supreme Court Case*, ENTMT SOFTWARE ASS’N (Jan. 26, 2012), http://www.theesa.com/newsroom/release_detail.asp?releaseID=164.

67. *Id.*

68. *Id.*

69. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

70. *See Keller v. Elec. Arts, Inc.*, 2010 WL 530108 (N.D. Cal. 2010).

71. *See Brown*, 131 S. Ct. at 2729.

Brown,⁷³ relied heavily on Justice Scalia's opinion in *Brown*⁷⁴ and on the recognition of video games as an equally-expressive art form. These broad effects will likely manifest themselves in interesting places, including marketing and advertising. Attempts to regulate in-game advertising might be different than advertising and product placement in film. The language of this opinion and the definitive holding will continue to have benefits in those areas as well.

The industry's work is not finished, and the legal challenges continue to evolve in lock step with the manner in which the industry delivers its content. Some of these challenges include intellectual property issues involving anti-piracy enforcement and technology, as well as policy issues relating to data privacy and security, accessibility, availability, marketing, subscription renewal, virtual currency, and right of publicity. The industry will also look at broader technological issues. Expect to see a lot of different fights on a lot of different fronts. Some will affect the entire industry, while others will affect only different parts of the industry. Pure mobile application developers will face issues irrelevant to console manufacturers, and vice versa. The days of having one issue, where video games are in the crosshairs of content regulations and everyone unites, are changing.

On the intellectual property front, piracy of video game content remains a pervasive problem. People spend significant resources and devote incredible talent to develop amazing games. Every year, the bar is set higher as to the type of content to which users are exposed, and there are many others who are aspiring to succeed in this industry. It is important to protect these efforts and valuable investments. If theft of intellectual property continues, then the industry must evolve to overcome it.

In the video game context specifically, one may typically play the pirated games because modification services and technologies exist that allow circumvention of console security systems that would otherwise prohibit the play of pirated games on those devices. For massive multiplayer online games ("MMOs") and server-based games, unauthorized private servers pose a potential threat to subscription revenue streams. In the online, mobile, and browser-based market, the problems tend to be intellectual property problems, but companies are also facing a tax on their business models due to hacks, cheats, online fraud, and similar issues.

There are a number of ways to address these problems, certainly through both legislation and regulation. The U.S. Copyright Office's triennial rule-making is developing methods to explore whether to grant exemptions to the Digital Millennium Copyright Act's ("DMCA") Section 1201 anti-circumvention provisions.⁷⁵ A response to a request that would create an

72. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011).

73. See *Brown*, 131 S. Ct. at 2729.

74. See *id.*

75. See Copyright Protection and Management Systems, 17 U.S.C. § 1201 (2006).

exemption allowing for the jail breaking of video game consoles was due in February.⁷⁶ This is an important issue for the video game industry because of the multitude of reasons why someone might want to circumvent the security on a game console. That same circumvention enables one to play pirated games, which poses a problem for both the console makers and game publishers. Rogue-sites legislation in Congress received a lot of attention in the past year. There is an underlying fundamental agreement that, for the worst of the worst sites, this is a real problem, and the industry ought to think carefully about trying to find meaningful solutions. There are, and will continue to be, other cases that will sort out those issues that have a big impact on this industry in the casual, social-gaming world, such as: how much copyright protects “lite” gaming content, what is protectable, and what differentiates the “copying of ideas” from “expression.”

The Ninth Circuit decided a case involving Square Enix which is interesting, yet has mostly gone unnoticed.⁷⁷ The case involved a class action lawsuit based in part on the loss of in-game characters in an MMO.⁷⁸ Players who stopped playing for three to four years and later came back to the game were not able to play the same characters as they did previously.⁷⁹ The case addressed whether or not there was some duty on behalf of the game publisher to maintain that data.⁸⁰ The Ninth Circuit pointed to the user agreement, which discloses up front that game data – including the characters – is property of Square Enix, and held that Plaintiffs lacked standing to sue.⁸¹ The court upheld the user agreement and affirmed a motion to dismiss.⁸² This issue will evolve and the outcome will depend heavily on what is contained in the up-front user agreements. The game design and game function will influence those legal issues as well. Degrading virtual assets will speak

76. See *Jailbreaking Is Not A Crime: Tell the Copyright Office to Free Your Devices!*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.org/pages/jail-breaking-not-crime-tell-copyright-office-free-your-devices> (last visited Oct. 22, 2012). In October 2012, the Copyright Office recommended, and the Librarian of Congress agreed, to *reject* the proposed exemption to permit jailbreaking video game consoles based on the ESA’s showing that proponents had not demonstrated that such an act was noninfringing nor that the alleged noninfringing uses weren’t achievable by other lawful means. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 208, 65260 (Oct. 26, 2012) (to be codified 37 C.F.R. pt. 201).

77. See *Leong v. Square Enix of Am. Holdings, Inc.*, 2011 WL 6364705 (9th Cir. Dec. 20, 2011).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

directly to consumer expectation. Obviously, a clearly worded player agreement at the outset is critical.

On the intellectual property front, there are also perhaps more quiet, voluntary, and cooperative efforts underway to try to speak to the underlying problems both in education and technology solutions. The copyright alert system was announced last year.⁸³ Implementation of this system is a joint effort by the film and music industries, along with five of the major Internet Service Providers (“ISPs”) in the United States.⁸⁴ These efforts aim to educate and provide a graduated notice response program for peer-to-peer infringements.⁸⁵ Payment processors continue to work with content creators to make clear that their services do not support the worst of the worst infringements. Search providers and others continue to work on technologies to implement quicker and more effective takedowns of the egregious infringements.

Increasingly, ESA’s focus is extending far beyond intellectual property. Within the last year, the ESA has advocated before a variety of agencies on a number of issues, both domestically and internationally—including the COPPA Rule: Children’s Privacy Rule, Nighttime Shutdown legislation in Korea, and Accessibility.⁸⁶ The ESA would not consider involving itself in these programs five years ago, yet this is where it is headed. The ESA faces these issues because video games are online, socially-connected business.

Perhaps paramount on the new technology issues list is privacy. An ongoing debate continues to take place in the United States, Canada, and in the European Union (“EU”) concerning the right way to balance consumer privacy interests with the massive amounts of online data collection, sharing, and disclosure. At issue is how each country can perform the balancing act in a way that does not stifle technological innovation and curtail the ways that allow the video game industry to create great experiences for consumers. The United States and the EU take two very different approaches towards privacy. It has been said the United States has a reductionist approach to privacy and to defining the exact types of information subject to heightened protection.⁸⁷ Europe, however, has taken a very expansionist view: by default, if one passes information to another—even if it was the IP address the

83. David Kravets, *Copyright Scofflaws Beware: ISPs to Begin Monitoring Illicit File Sharing*, WIRED (Oct. 8, 2012), <http://www.wired.com/threatlevel/2012/10/isp-file-sharing-monitoring/>.

84. *Id.*

85. *Id.*

86. See Mike Gallagher, *Beyond Content: New Legal Frontiers and Emerging Policy Challenges for the Game Industry*, ENTMT SOFTWARE ASS’N (Mar. 6, 2012) http://www.theesa.com/newsroom/ABA_Speech_for_Website_4_3_2012.pdf [hereinafter *Beyond Content*].

87. See generally Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 (1980).

computer passed—and the information is tied to the individual in any way, then the transmission is personal.⁸⁸ This European approach contrasts sharply with the default assumptions in the United States and leaves two very different approaches creating two very different implications.

Here in the United States, the Federal Trade Commission (“FTC”) is the primary driver through enforcement actions, as seen in two recent high-profile consent decrees involving Google and Facebook.⁸⁹ The ESA, along with many in the technology industry, filed comments in the FTC’s COPPA rulemaking proceedings during the 2010 through 2012 rule reviews.⁹⁰ Passed in 2000, COPPA requires a parent’s verifiable offline consent before certain information about children can be collected or disclosed.⁹¹ Historically, COPPA only applied to real identity information unique to a specific individual, such as a first name, last name, physical address, or email address.⁹² However, the FTC proposed extending the definition of personal information to include screen names, which are prevalent in the gaming industry.⁹³ In “freemium” game offerings, the use of screen names enriches a user’s interactive experience by allowing users to: (1) have their screen names show up on leaderboards; (2) resume their progress in a game; and (3) track experience points.⁹⁴ These uses of screen names accomplish privacy objectives by not requiring the collection of real name and address information. The ESA filed comments emphasizing the need to give careful thought to the industry’s ability to provide robust offerings to children.⁹⁵ Outside of

88. Case C-70/10, *Scarlet v. SABAM* (2011).

89. *Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple’s Safari Internet Browser*, FTC (Aug. 9, 2012), <http://www.ftc.gov/opa/2012/08/google.shtm>; *FTC Approves Final Settlement With Facebook*, FTC (Aug. 10, 2012), <http://www.ftc.gov/opa/2012/08/facebook.shtm>.

90. *See Public Comments—2012 COPPA Rule Review*, FTC, <http://ftc.gov/os/comments/copparulereview2012/index.shtm> (last visited Oct. 13, 2012); *Public Comments—2011 COPPA Rule Review*, FTC, <http://www.ftc.gov/os/comments/copparulereview2011/> (last visited Oct. 13, 2012); *Public Comments—2010 COPPA Rule Review*, FTC, <http://www.ftc.gov/os/comments/copparulev2010/index.shtm> (last visited Oct. 13, 2012).

91. Children’s Online Privacy Protection Act of 1998, 15 U.S.C. § 6502(b)(1) (2006).

92. *Id.* § 6501(8).

93. Children’s Online Privacy Protection Rule, 77 Fed. Reg. 46,643-01 (proposed Aug. 12, 2012) (to be codified at 16 CFR pt. 312).

94. Daniel Nations, *What is Freemium?*, <http://ipad.about.com/od/iPad-Glossary/a/What-Is-Freemium.htm>, (last visited Oct. 22, 2012).

95. *See* Christian Genetski, *Re: COPPA Rule Review, 16 CFR Part 312, Project No. P104503*, FTC (Dec. 23, 2011), <http://www.ftc.gov/os/comments/copparulereview2011/00349-82375.pdf>.

the COPPA context, in the behavioral advertising area, this same debate is playing out with adults.

Friction is an important concept for free or ad-supported games, or games that rely on micro-transactions. Such games need sustained user engagement, but many of these games only have an average user interaction of about 90 seconds. Thus, the number of times a user returns to the game throughout the day is important. A user who plays in short bursts must be able to return to where he left off, and to do this, there must be some kind of personal identifier. A COPPA restriction that requires offline consent is a friction-inducing event that will cause drop-off in user participation in the game. This drop-off will lead to a business reality in which fewer offerings will be made available to children. COPPA will not eliminate all offerings to children because there exists a specific market of publishers who will continue to collect personal information under the broader definition. Even so, the friction caused by COPPA will reduce the incentive to make offerings available to children. Certain consequences will result: (1) only the screen name or similar identifier will be removed from the game; (2) the game will cease to be offered; or (3) the game will be “age-gated” and not available to children. The ESA believes there are downsides to these possible results, which they discuss in their comments to the proposed COPPA rules.

Earlier this year, the FTC published an updated privacy report that speaks more broadly to its views on children and privacy.⁹⁶ Elements of ESA’s views can be seen in the Google and Facebook settlements.⁹⁷ There has also been action on Capitol Hill including a number of “do-not-track bills” that would require the up-front opportunity to opt out of information tracking even beyond personal information.⁹⁸ Congress is working on other bills, too, including broad privacy bills and child-focused bills.⁹⁹ ESA’s general sentiment is that there will be even more activity in 2012 and a lively discussion on these bills. However, considering it is an election year and the general lack of consensus, it is unlikely that a bill will emerge and pass this year.

The year 2012 is a high-profile year for the video game industry, which, along with a host of other victims, felt a large impact in the data-security

96. *FTC Report, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, FTC (Mar. 2012), <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

97. *Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple’s Safari Internet Browser*, FTC (Aug. 9, 2012), <http://www.ftc.gov/opa/2012/08/google.shtm>; *FTC Approves Final Settlement With Facebook*, FTC (Aug. 10, 2012), <http://www.ftc.gov/opa/2012/08/facebook.shtm>.

98. Chris Lefkow, *US lawmakers plan ‘Do Not Track’ bills*, PHYS ORG (May 6, 2011), <http://phys.org/news/2011-05-lawmakers-track-bills.html>.

99. *See id.*

space. For one, the White House issued a cyber-security legislative proposal in May 2011.¹⁰⁰ In addition, there were seven legislative proposals between the two houses of Congress that concerned data-security practices and data-breach notification.¹⁰¹ While data-breach notification and protecting consumer information are both important, it is also important to recognize that criminal acts cause these breaches. Corporations have a responsibility to protect information and to rapidly notify users if their information is compromised, but everyone agrees that doing all the right things does not mean every wrong can be prevented. Hacking can no longer be romanticized. The problem must be looked at holistically by balancing the issues of corporate and criminal responsibility.

Congress is taking a couple different approaches. For example, Senator Lieberman re-introduced a broad cyber-security bill that addresses data-breach notification and data-security requirements.¹⁰² Importantly, the bill will provide funding for the formulation of a government approach to this issue and for the development of critical infrastructure.¹⁰³ Alternatively, there are seven bills that focus more heavily on data breach.¹⁰⁴ Similar to the efforts over privacy, these bills involve much disagreement, and in an election year, it is unlikely that a data breach approach will emerge. At the state level, more efforts are aimed at cyber-bullying. While not targeting the video game industry directly, the attack on cyber-bullying affects online services generally. States have also made efforts to pass sex-offender registration statutes.

Switching gears from privacy to accessibility, the Federal Communications Commission ("FCC") is a body that has not historically had much interaction with the video game industry. Rather, the industry has been neither litigious nor heavily regulated by the FCC—as opposed to the American Bell Telephone Company, its break up into independent regional telephone companies, and the long history of heavy regulation in the telecom space. But a merger is happening, and in 2010, the FCC focused on the gaming industry as seen in the Twenty-First Century Communications and Video Accessibil-

100. Jacob J. Lew, *Memorandum from the Executive Office of the President to the Speaker of the House and the President of the Senate*, WHITE HOUSE (May 12, 2011), <http://www.whitehouse.gov/sites/default/files/omb/legislative/letters/Cybersecurity-letters-to-congress-house-signed.pdf>.

101. Francine E. Friedman, et al., *Legislative Proposals Compete As Privacy, Data Security, and Breach Notification Continue to Draw the Attention of Federal Policymakers*, AKIN GUMP STRAUSS HAUER & FELD LLP (Sept. 2011) http://www.akingump.com/files/Publication/735d9a6c-7304-418d-9b66-326907b1dc06/Presentation/PublicationAttachment/44e45b2e-8ee3-4ff4-8aec-371be04b3591/Friedman_et%20al_MCC%209-11.pdf [hereinafter *Legislative Proposals*].

102. Cybersecurity Act of 2012, S. 3414, 112th Cong. (2012).

103. *Id.*

104. *Legislative Proposals*, *supra* note 101.

ity Act of 2010 (“CCVA”).¹⁰⁵ Specifically for the gaming industry, the CCVA reaches advanced communication services, like chat functionality, and requires accessibility to be built into those services.¹⁰⁶ The law and the FCC implementing order authorize waivers for certain classes of equipment and services if the primary purpose is not the offering of the communication services.¹⁰⁷ In-game chat is a feature of many different game platforms that could possibly be regulated. However, the industry feels strongly that these chat features are not the primary reason people play games. The game itself is the draw, while there are plenty of instant message services available if a customer wishes solely to chat. The ESA filed a petition for a waiver with the FCC, which should reset the clock and allow the industry to seek another waiver.¹⁰⁸

Some interesting laws have developed internationally, specifically in Korea.¹⁰⁹ The amendment to the Juvenile Protection Act (“JPA”) imposes a nighttime shutdown requirement.¹¹⁰ The requirement that games for minors must be turned off from midnight to 6:00 AM is directed mostly at MMOs. In combination with the amendment to the JPA, the amendment to the Game Industry Promotion Act (“GIPA”) imposes age-verification and name-registration requirements.¹¹¹ Both mobile games and console games, to the extent the user is not paying separately for the online component, are exempted from this requirement. Yet, a lack of clarity exists between the two laws regarding their effect on different types of PC games beyond the MMO. The ESA is observing what effect this type of regulation will have and whether it will be utilized in other areas.

Many online games rely on subscription revenue, and they have different varieties of auto-renewal clauses. Some states seek to impose notice and disclosure requirements for auto-renewed contracts. The risk of patchwork state legislation exists, so the ESA seeks to conform new bills to favorable laws in Louisiana, California, and Illinois. The ESA wants to avoid the problem of having thirty-eight different sets of laws to comply with, each tied to certain types of users. The hope is to provide the industry with clear expectations that allow game creators to tailor broad solutions for compliance.

105. Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (to be codified in scattered sections of 47 U.S.C.).

106. *Id.* § 104(a).

107. *Id.*

108. *Petition of the Entertainment Software Association*, FCC (Mar. 21, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021902591>.

109. Amended Juvenile Protection Act (JPA), May 19, 2011, Kwanbo 10659 (Korea); Amended Game Industry Promotion Act (GIPA), July 21, 2011, Partial Revision Act 07.21.2011 No. 10879 (Korea).

110. Amended Juvenile Protection Act (2011).

111. Amended Game Industry Promotion Act (2011).

Taxation of game content is another current topic to consider. The question is whether digital downloads should be taxed, and if so, in what instances. Specifically, the taxation of micro-transactions is a looming issue. This is a period in which state legislatures are actively seeking revenue and will reach for it wherever they can find it.¹¹² ESA's activity in this area will increase.

On the other hand, money-laundering compliance is not a top priority for video game companies. But the Financial Crimes Enforcement Network ("FinCEN") and the Department of Treasury issued rules last year that affect the video game industry.¹¹³ Under the rules, "issuers of prepaid access must collect personal information from customers, maintain transaction records, file suspicious activity reports, and providers must register with FinCEN."¹¹⁴ Even though the rule was originally established to combat money laundering, the reporting requirements imposed on prepaid access and gift cards impact how the gaming industry does business. The ESA has filed a request seeking an exception for prepaid access amounts less than 2,000 dollars per day, which, for all practical purposes, would exclude the industry from reporting requirements.¹¹⁵

Another interagency working group is poised to issue voluntary guidelines for food marketing to children in a number of forms, including video games and game advertising.¹¹⁶ Originally, these guidelines were intended to apply to all minors, but their scope may be scaled back to only shield minors under thirteen years of age. Again, the *Brown* case shows that whatever guidelines develop, the video game should be put on equal footing with other forms of entertainment that have advertising.¹¹⁷ As mentioned earlier, most state right-of-publicity statutes carve out exceptions for expressive works. The statutes typically define expressive works to include film, television, literature, and comic books. Some now include video games thanks to the industry's hard work, but most are still silent on gaming. Even in the wake of *Brown*, states continue to place video games in a lesser status than other

112. See, e.g., Alana M. Barragán-Scott, *LR 6866: Taxability of Software, Virtual Goods, Digital Content, & Subscription Cards to Online Game Access*, MISSOURI DEP'T OF REVENUE (Aug. 17, 2011), <http://dor.mo.gov/rulings/show.php?num=6866>.

113. *FinCEN Issues Prepaid Access Final Rule Balancing the Needs of Law Enforcement and Industry*, FINCEN (July 26, 2011), http://www.fincen.gov/news_room/nr/html/20110726b.html.

114. *Id.*

115. *Beyond Content*, *supra* note 88.

116. Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf> (last visited Oct. 22, 2012).

117. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

expressive works.¹¹⁸ The National Football League Players Association (“NFLPA”) is a strong supporter of maintaining this disparate treatment. *Brown* offers a very strong rebuttal to these lesser-status provisions, but the lack of recognition by many states shows that industry’s work is not done.

Audience Question # 1:

What are some potential solutions to piracy in the video game industry?

There is no one solution. Rather, there is a broad array of possible approaches. Much of the criticism directed at other industries stems from their inability to change business models quickly enough to address consumer demand. This critique is not usually levied against the video game industry, and appropriately so. The gaming industry does a great job of finding different ways to get content to users, which is an indirect way to combat piracy. It is true, however, that AAA titles—which can cost around one hundred million dollars to create and require a high dose of blood, sweat, tears, and incredible talent—are large investments worthy of protection. Strong copyright protection is certainly needed.

As the industry moves further into cloud-content, the DMCA anti-circumvention provisions will be critical for protecting game environments and preserving the user’s current rights.¹¹⁹ The next step requires thinking about ways that the industry can meaningfully address the real problems with overseas sites. In particular, the industry must find a way to regulate sites with the sole purpose of providing the means and financial incentive to illegally distribute protected copyright content. Any solution must be balanced and allow for continued innovation. Innovation cannot be stopped.

Audience Question # 2:

Please discuss the issue of cyber crime and the distinction between dealing with cyber crime versus street crime.

First, there are important distinctions between different types of cyber crime, which can be seen in the unique consequences of each type of cyber crime. For example, Anonymous committed cyber vandalism when the group allegedly took down the Department of Justice website for an hour and a half and the Motion Picture Association of America website for a couple of hours to protest the Megaupload indictment.¹²⁰ On the other hand, a different crime is committed when hackers infiltrate an online-gaming network, steal credit card information from users, and continue to assault the network in a way that requires the network be taken offline. In 2000, one of the Department of Justice’s big cases centered on the denial-of-service attacks that took

118. See *Beyond Content*, *supra* note 88.

119. See 17 U.S.C. § 1201 (2012).

120. Andy Greenberg, *Anonymous Hackers Hit DOJ, FBI, Universal Music, MPAA and RIAA After MegaUpload Takedown*, FORBES (Jan. 19, 2012) <http://www.forbes.com/sites/andygreenberg/2012/01/19/anonymous-hackers-claims-attack-on-doj-universal-music-and-riaa-after-megaupload-takedown/>.

down eBay and Yahoo—two pillars of the Internet.¹²¹ The sites were down for six hours.¹²² The investigation led to a fifteen year old in Canada, who was the mastermind behind the attacks.¹²³ If this happened today, the world would feel differently about that discovery; all would wonder if something worse was afoot.

Also, physical stores close every night for several hours making them unavailable for at least six hours every day. Most people now understand that if a website goes down for a few hours, long-lasting ramifications may result. Some breaches are carried out for sport or as a protest, but even in these cases, there is often an underlying, decidedly less-romantic goal in mind. Regularly, the underlying goal is to quickly hash and distribute the stolen credit card numbers through a variety of networks where they are bought, sold, and used quickly. As any victim of identity or credit card theft can attest, the experience is incredibly frustrating and affects a person's willingness to provide confidential information even if no money was ultimately lost. The experience is not good for the industry.

Rather, the gaming industry strives to be a leader in safeguarding customer information. Even though everybody takes this responsibility seriously, last year was a wakeup call. RSA—one of the companies who provides solutions that the rest of the industry relies upon—fell victim to hacking in 2011.¹²⁴ Part of the debate needs to center around the fact that these criminal acts result in some level of corporate responsibility. Class actions to sue corporate victims of crime, where there is no clear negligence in failing to protect the information, are moving the needle in the wrong direction.

Audience Question # 3:

Is law enforcement committed to stopping cyber crime?

Law enforcement is committed, but the solution is not as simple as kicking in the door down the street. Nothing happens in the same place. Often, criminals use collective activity and social-engineering phone calls to carry out the crime. Law enforcement should continue training in that area.

Also, cyber crimes create an international problem requiring an incredible amount of coordination. The crimes are often complete by the time anyone realizes they occurred, and law enforcement is forced to backtrack to find out what happened. In the Justice Department, it used to be said that international coordination needed to get past the days of using a quill pen and a glorious piece of paper to send a request overseas and then waiting nine

121. Gary Genosko, *FCJ-057 The Case of 'Mafiaboy' and the Rhetorical Limits of Hacktivism*, THE FIBRECULTURE JOURNAL, <http://nine.fibreculturejournal.org/fcj-057/> (last visited Oct. 22, 2012).

122. *Id.*

123. *Id.*

124. David Goldman, *Massive hack hit 760 companies*, CNN (Oct. 28, 2011), http://money.cnn.com/2011/10/27/technology/rsa_hack_widespread/index.htm.

months to get a response. International law-enforcement coordination once worked that way. Now, there exist great 24/7 networks that allow real-time response capability on an international level. However, the unpleasant reality is that international coordination is still hard.

Audience Question # 4:

With the *Brown* decision defining “games” as an expressive medium alongside novels, will there be a change in the way game companies follow patent law or copyright law, because patents are not issued for novels?

Inventions, including business processes, are patented, and a copyright applies to the expression of an idea, not the idea itself. Ideas have some protection, but expressions of ideas are given less protection than inventions. The effects of *Brown* could play out in other countries but likely not in the United States. Countries use different methods to classify works for taxation or tax-exemption purposes, so at the margins, there is potential for some impact. Also, whether something is classified as software or as an audiovisual work has implications, but the effects are largely outside of intellectual property.

Audience Question # 5:

What are the trademark implications of user-generated content—where the user often uses content that the provider considers its copyrights and trademarks in combination with the user-generated content?

These issues will arise in very fact-specific contexts that may, in some cases, pit one content owner against another. In terms of a broad industry effort, there are some limitations, but collective solutions should be pursued. In trying to define where the lines blur, there will be two ways in which the debate develops. One way will center on the question of what rules govern a particular game. Those rules may not be the same for all games. For example, in order to encourage the use of user-generated content in a game, it may behoove one game publisher to ask for a license to use the user-generated content in the game but allow the user to retain the rights. In other scenarios, the game environment may be such that users are allowed to generate some level of content, but the game publisher would retain the rights. Especially for small, beginning developers, it is important to resolve the issues of ownership rights on the front end to the extent possible. Sometimes these games take on a life of their own and go in a different direction. Most issues can be addressed if developers clearly establish the apportionment of rights and responsibilities from the beginning. Secondly, the issue of rights can be clarified by the technology itself. A game can be designed such that it is obvious who owns which rights. These are the two focal points around which the industry will establish its approach to the problem of content rights.

Audience Question # 6:

What will result from Sony's amendment to their Terms of Service, having players basically forego their right to have actions to sue?¹²⁵

This issue is not limited to Sony; it is an industry-wide issue. In fact, the video game industry is not alone in its concern with this topic. All businesses that have a Terms of Use Agreement with their consumers are affected. In the wake of the California decision, countless law-firm blogs advised companies to alter their Terms of Use and to amend any provision that would be struck down under the decision. Then, after the Supreme Court overturned the California decision, these same blogs advised companies to tweak their Terms of Service because it had again become clear that they had a contractual right to enforce arbitration agreements. This is not a particularly controversial area if looked at broadly. All people are influenced by where they come from. Still, many would agree that class-action litigation can impose incredible costs on business while not necessarily resulting in benefits to the consumers who are part of the class.

125. See Matt Raspe, *Sony amends PSN Terms of Service, prevents class-action lawsuits*, PSU (Sept. 15, 2011) <http://www.psu.com/a012920/Sony-amends-PSN-Terms-of-Service-prevents-class-action-lawsuits>.

