



FIRST AMENDMENT LAW REVIEW

Volume 2 | Issue 2

Article 7

3-1-2004

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Recommended Citation

Carmen K. Hoyme, *Freedom of Expression and Interactive Media: Video Games and the First Amendment*, 2 FIRST AMEND. L. REV. 377 (2004).

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Freedom of Expression and Interactive Media: Video Games and the First Amendment

Carmen K. Hoyme*

INTRODUCTION

Twenty-first century video games are a unique medium in which programmers use computer code to transform their creative fantasies into interactive environments for players. Today's games have complex player-determined story lines and life-like imagery and sound. Millions of children, adolescents, and young adults in the United States are avid game players.¹ According to industry statistics, sixty percent of the population, or roughly one hundred forty-five million Americans, play video games.² Recent studies indicate that the average age of players is twenty-eight years old,³ and that thirty-eight percent of game players are under the age of eighteen.⁴ Two hundred twenty-two million video games were purchased in the United States in 2002, with annual sales totaling 6.9 billion dollars.⁵

Despite their popularity, critics express concern that the extremely violent content of games such as *Mortal Kombat*, *Doom*, and *Grand Theft Auto* has a negative impact on minors. In *Mortal Kombat*, for example, the game play includes inflicting wounds on one's opponent that "bleed long after injuries are inflicted," decapitating another character, and "ripping skeletons out of

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1. INTERACTIVE DIGITAL SOFTWARE ASS'N, VIDEO GAMES & YOUTH VIOLENCE: EXAMINING THE FACTS 4 (2001), available at <http://www.idsa.com/IDSAfinal.pdf>.

2. *Id.*

3. *Id.*

4. INTERACTIVE DIGITAL SOFTWARE ASS'N, ESSENTIAL FACTS ABOUT THE COMPUTER & VIDEO GAME INDUSTRY: 2003 SALES, DEMOGRAPHICS AND USAGE DATA 3 (2003), available at <http://www.theesa.com/EF2003.pdf>.

5. *Id.* at 11.

bodies.”⁶ In *Doom*, the action involves “bodies flying, blood splattering and screaming noises, in some cases bodies completely exploding into charred husks.”⁷ One of the most highly publicized game series, *Grand Theft Auto*, provides players with the opportunity to solicit prostitutes, run down and kill pedestrians, and “[launch] rocket[s] into . . . police cars.”⁸ Legal controversies involving video games derive primarily from disagreement about the impact of this content on minors.⁹

Debate over the impact of violent video games on minors has reached the courts in two forms. First, tort claims against game producers have alleged that violent video games caused minors who played the games to injure others.¹⁰ Second, members of the game industry have brought constitutional challenges to regulations designed to limit minors’ access to violent games.¹¹ In both scenarios, federal courts have determined that modern video games are expression and are entitled to some degree of protection under the First Amendment.¹²

Three circuits recently have decided cases implicating First

6. Tom Lane, *New Mortal Kombat Bloodier than Ever*, at <http://www.cnn.com/2002/TECH/fun.games/11/24/midway.kombat/index.html> (Nov. 24, 2002) (on file with the First Amendment Law Review).

7. Richard Wright, *Doom*, at <http://www.mediamatic.net/cwolk/view/7932> (last visited Mar. 31, 2004) (on file with the First Amendment Law Review).

8. Terence Wong, *Grand Theft Auto 3 Review*, at <http://firingsquad.com/games/gta3> (June 7, 2002) (on file with the First Amendment Law Review).

9. It is not surprising that the controversy is focused on children. As one scholar of popular culture noted, “A new medium with mass appeal, and with a technology best understood by the young . . . almost invariably attracts a desire for adult or government control.” JOHN SPRINGHALL, *YOUTH, POPULAR CULTURE, & MORAL PANICS* 160–61 (1998).

10. See *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002).

11. See *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Machine Ass’n v. Kendrick (Kendrick II)*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

12. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

Amendment protection for video games.¹³ The Supreme Court declined to review either of the two cases in which a petition for certiorari was filed.¹⁴ With the extent of applicable First Amendment protection unsettled, video game-related litigation continues. In October 2003, plaintiffs filed a tort suit in Tennessee against the manufacturer, distributor, and retailer of the popular video game *Grand Theft Auto III*.¹⁵ One plaintiff had been shot by two teenagers who said they were emulating the action of the game when they began sniping at cars passing on the highway.¹⁶ The defendants removed the case to U.S. district court and moved to dismiss on the grounds that the claim was barred by the First Amendment.¹⁷ They argued that it was constitutionally impermissible to impose liability based on the expressive content contained in the game. Precedent supports the defendants' position.¹⁸

Courts have acknowledged that video games are protected by the First Amendment, but the extent of that protection remains unsettled. Thus far, the courts have focused their analyses on the expressive rights of those who create the games, not those who play them. This Note will argue that the interactive character of the games implicates the expressive rights of players as well, and as a result, video games require full First Amendment protection. It will examine the three primary arguments raised by critics of video games: (1) that the games amount to incitement, (2) that they are obscene, and (3) that they are harmful for minors. This piece will also discuss the interactive nature of video games and the

13. *Interactive Digital Software Ass'n*, 329 F.3d 954; *Meow Media, Inc.*, 300 F.3d 683; *Kendrick II*, 244 F.3d 572.

14. *James v. Meow Media, Inc.*, 537 U.S. 1159 (2003) (mem.); *Kendrick v. Am. Music Machine Ass'n*, 534 U.S. 994 (2001) (mem.).

15. Matthew Yi, *Gamemaker Sued Over Highway Shootings*, S.F. CHRON., Oct. 23, 2003, at B3.

16. *Id.* The other plaintiffs were family members of a second victim, who was killed in the same incident. *Id.*

17. Duncan Mansfield, "*Grand Theft Auto*" Makers Fight \$246M Lawsuit, at http://www.usatoday.com/tech/news/2003-11-11-gta-lawsuit_x.htm (Nov. 11, 2003).

18. See *Meow Media, Inc.*, 300 F.3d at 695; *Wilson*, 198 F. Supp. 2d at 182; *Sanders*, 188 F. Supp. 2d at 1280.

implications of interactivity for First Amendment protection. This Note will conclude by suggesting that the argument in favor of full First Amendment protection is strengthened by this interactivity. If courts emphasized the interactive nature of video games, they would conclude that video games are entitled to the guarantees of the First Amendment at a level exceeding the hesitant protection they have received thus far.

Video Games As "Speech"

When the video game industry was in its infancy, courts held that the medium was not sufficiently expressive or informational to constitute "speech" within the meaning of the First Amendment.¹⁹ They found the crude graphics and simple repetitive play involved in the first generation of games analogous to pinball machines or board games, which do not receive First Amendment protection.²⁰ These decisions are inapplicable to twenty-first century video games with their complex story lines and sophisticated realistic imagery.²¹ Because today's games have so little in common

19. See *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983); *America's Best Family Showplace Corp. v. City of New York, Dep't of Bldgs.*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982); *Kaye v. Planning & Zoning Comm'n, Westport*, 472 A.2d 809, 812 (Conn. Super. Ct. 1983); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609-10 (Mass. 1983); *Caswell v. Licensing Comm'n*, 444 N.E.2d 922, 926-27 (Mass. 1983).

20. *America's Best Family Showplace*, 536 F. Supp. at 174 (stating that like pinball, chess, or baseball, video games are pure entertainment lacking any informational element). However, recent controversy over the Monopoly parody "Ghettopoly" has demonstrated that board games can be sufficiently expressive to offend consumers and spark public debate. The game, which is themed on stereotypical portrayals of low-income, urban African-Americans, caused outrage and inspired boycotts of stores that sold the game. See Darryl Fears, "Ghettopoly" Provokes Protests, WASH. POST, Oct. 12, 2003, at A03.

21. The imagery of video games is increasingly recognized as "art," even by traditional artists and academics. One critic, writing on the status of video games in 2003, indicated that "[d]ue respect for gaming and its aesthetic potential is also burgeoning in exhibitions . . . the past year signaled the ascent of games as an artist's medium." Alexander Galloway, *Playing for Respect*, ARTFORUM, December 2003, at 45.

with their ancestors of the 1980s, they are properly viewed as an entirely different medium. Many of these early decisions have been explicitly or implicitly rejected by subsequent decisions.²²

When presented with video games in their current form, courts have generally decided that they are sufficiently communicative to constitute expression protected by the First Amendment.²³ The Sixth Circuit has acknowledged that the images and ideas communicated in video games are “expressive content,”²⁴ and the Seventh Circuit has even described some games as “literary” in character.²⁵ Most recently, in *Interactive Digital Software Ass’n v. St. Louis County*,²⁶ the Eighth Circuit flatly rejected the notion that video games do not amount to speech.²⁷ The court decided that because this novel medium clearly contained “age old themes,” “messages,” and “ideology,”²⁸ it was “as much entitled to the protection of free speech as the best of literature.”²⁹

ARGUMENT

Notwithstanding the unequivocal language courts have used in describing video games as protected expression, the courts’

22. See, e.g., *Interactive Digital Software Ass’n*, 329 F.3d at 957 (stating that the “pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games” should receive protection similar to other protected media); *Wilson*, 198 F. Supp. 2d at 181 (contrasting unprotected “games that are merely digitized pinball machines” with protected games “that are analytically indistinguishable from other protected media”); *Sanders*, 188 F. Supp. 2d at 1279 (characterizing the early cases as “not persuasive because they have been superseded or are directly contrary to established precedent”).

23. See *Interactive Digital Software Ass’n*, 329 F.3d at 957; *Meow Media, Inc.*, 300 F.3d at 696; *Kendrick II*, 244 F.3d at 577; *Wilson*, 198 F. Supp. 2d at 180; *Sanders*, 188 F. Supp. 2d at 1279.

24. *Meow Media, Inc.*, 300 F.3d at 695.

25. *Kendrick II*, 244 F.3d at 579.

26. 329 F.3d 954 (8th Cir. 2003).

27. *Interactive Digital Software Ass’n*, 329 F.3d at 957–58.

28. *Id.* at 957 (quoting *Am. Amusement Machine Ass’n v. Kendrick (Kendrick II)*, 244 F.3d 572, 577–78 (7th Cir. 2001)).

29. *Id.* at 958 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

actual holdings suggest that there are conceivable facts under which video games might not be protected. To better understand the future of the medium under the First Amendment, it is useful to examine the arguments raised by those who seek to limit protection and to consider the likelihood of a factual situation in which such arguments would be viable.

Incitement

Recent cases have made clear that video games are speech under the First Amendment. Accordingly, those who have advocated for limitations on the expression therein have sought, unsuccessfully, to show that specific games fall within unprotected categories of speech. One such category of unprotected speech is incitement, defined by the United States Supreme Court in *Brandenburg v. Ohio*³⁰ as speech “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”³¹ Subsequent holdings clarified that the speaker must actually intend to produce violent or lawless action by a specific person or group,³² and that the “mere tendency of speech to encourage unlawful acts” is insufficient to meet the *Brandenburg* test.³³

Tort plaintiffs have argued that the extremely violent messages and images in video games caused those who played them to act violently.³⁴ In *James v. Meow Media*,³⁵ the plaintiffs were the parents of three high school girls who had been killed by a fourteen year old classmate. The assailant, Michael Carneal, brought a pistol and five shotguns to school one morning and shot into a crowd of students, wounding five and killing three. Investigation into the

30. 395 U.S. 444 (1969) (per curiam).

31. *Id.* at 447.

32. *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (per curiam).

33. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 236 (2002).

34. *See James v. Meow Media, Inc.*, 300 F.3d 683, 688 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 169–70 (D. Conn. 2002); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002).

35. *Meow Media, Inc.*, 300 F.3d 683.

murders revealed that Carneal was an avid player of “first-person shooter” video games, in which the game-play primarily involves shooting at “virtual opponents.”³⁶ The plaintiffs argued generally that exposure to the games desensitizes young people to violence and makes them more likely to commit violent acts,³⁷ and specifically that “persistent exposure to [these games] gradually undermined Carneal’s moral discomfort with violence.”³⁸

In *Wilson v. Midway Games*,³⁹ a similar case, the mother of a thirteen year old who was murdered by his friend alleged that at the time of the killing, the friend was addicted to the video game *Mortal Kombat*™.⁴⁰ She claimed he was so obsessed with the game that when he stabbed her son in the chest with a kitchen knife, he believed he was one of the characters in the game acting out his “finishing move.”⁴¹ In her suit against the makers of the game, she contended that its violent content amounted to incitement because it was “designed . . . to addict players to the exhilaration of violence”⁴² and to “[reward] players when they tap into their ‘killer responses.’”⁴³

Despite the intuitive appeal of arguments that video game play desensitizes, encourages, and models violence for young people who commit crimes, precedent indicates that the messages conveyed by video games do not satisfy the definition of incitement.⁴⁴ In *James v. Meow Media*, the Sixth Circuit explained

36. *Id.* at 687–88. Carneal reportedly was a regular player of *Doom*, *Quake*, *Castle Wolfenstein*, *Redneck Rampage*, *Nightmare Creatures*, *Mech Warrior*, *Resident Evil*, and *Final Fantasy* video games. *Id.* at 687.

37. *Id.* at 688.

38. *Id.* at 698.

39. 198 F. Supp. 2d 167 (D. Conn. 2002).

40. *Id.* at 169.

41. *Id.* at 170 (“One of the characters, ‘Cyrax,’ kills his opponents by grabbing them around the neck in a ‘headlock’ and stabbing them in the chest.”).

42. *Id.* at 170.

43. *Id.* at 169–70.

44. *James v. Meow Media, Inc.*, 300 F.3d 683, 698–99 (6th Cir. 2002), cert. denied, 537 U.S. 1159 (2003); *Am. Amusement Machine Ass’n v. Kendrick (Kendrick II)*, 244 F.3d 572, 575 (7th Cir. 2001) (“[The city] is arguing that violent video games incite youthful players to breaches of the

that the plaintiff's allegations of incitement failed in three ways: First, there was no evidence that the defendants *intended* to cause violence by the players. Second, the theory that a player's persistent exposure to the violent content "undermined [his] moral discomfort with violence" did not satisfy the requirement that violent action be imminent. Third, there was insufficient evidence to suggest that the violent behavior of the player was "likely" as required by the test.⁴⁵ Similarly, the court in *Wilson* determined that the defendant's alleged conduct amounted "at worst" to mere advocacy of unlawful conduct at some indefinite time in the future, which is not incitement.⁴⁶ Incitement-based claims may also fail because the messages in video games are "not directed to any person or group of persons."⁴⁷

In *James v. Meow Media*, the court declined to attach tort liability based on the theory that the games were incitement, but it held that the "First Amendment protects video games in the sense uniquely relevant to this lawsuit."⁴⁸ The court cautioned that its decision "should not be interpreted as a broad holding on the protected status of video games."⁴⁹ The court's unwillingness to make a broad statement about the status of the medium is characteristic of appellate courts' treatment of the topic. Courts have been clear, on the other hand, that they are unwilling to dilute the exacting *Brandenburg* standard to accommodate plaintiffs' allegations. To argue successfully that a video game amounts to incitement would require, at a minimum, evidence that the video

peace. But this is to use the word incitement metaphorically."), *cert. denied*, 534 U.S. 994 (2001); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1279-81 (D. Colo. 2002).

45. *Meow Media, Inc.*, 300 F.3d at 698-99 ("[I]t is a long leap from the proposition that [the defendant's] actions were foreseeable to the *Brandenburg* requirement that the violent content was 'likely' to cause [the behavior].").

46. *Wilson*, 198 F. Supp. 2d at 182 (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

47. See *Sanders*, 188 F. Supp. 2d at 1280 (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

48. *Meow Media, Inc.*, 300 F.3d at 696.

49. *Id.* at 696.

game maker intended the game to produce imminent lawless action, and that playing the game was actually the immediate cause of the unlawful action. It is highly unlikely that these preconditions will be met under any set of facts.⁵⁰

Obscenity

Another category of unprotected speech into which litigants have attempted to shoehorn video game violence is obscenity. Material is obscene and thus unprotected if, according to “‘contemporary community standards,’” the challenged material “appeals to the prurient interest . . . depicts or describes [sexual conduct] in a patently offensive way” and, when viewed in its entirety, lacks “serious literary, artistic, political, or scientific value.”⁵¹ Lawmakers have attempted to justify restrictions on minors’ exposure to graphically violent video games by characterizing the content of such games as “obscene.”⁵² The

50. Except in a handful of unusual cases, claims that media expression incited violence under the *Brandenburg* standard have not been successful. In *Byers v. Edmondson*, 97-0831 (La. App. 1 Cir. 5/15/98), 712 So. 2d 681, the plaintiff alleged that the makers of the movie “Natural Born Killers” intended to incite viewers to go on “killing sprees” shortly after viewing the movie. *Id.* p.14, 712 So.2d at 690–92. The Louisiana Court of Appeals held that the complaint stated a claim that, if proved, might satisfy the requirements of *Brandenburg*. *Id.* On remand, the trial court granted summary judgment for the defendants, and this ruling was affirmed on appeal. *Byers v. Edmondson*, 01-1184, p.17 (La. App. 1 Cir. 6/5/02), 826 So. 2d 551, 558.

The single case in which a media defendant has been held liable in tort for violence committed as a direct result of a publication is *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997). The result in *Rice* can be explained by the bizarre facts of the case: the defendant publisher had not only produced a book entitled *Hit Man: A Technical Manual for Independent Contractors*, but had also stipulated that it intended for the book to provide assistance to murderers. *Id.* at 241–42. The Fourth Circuit emphasized the extremely limited holding by stating “it will presumably never be the case [again] that the broadcaster or publisher actually intends . . . to assist . . . in the commission of a violent crime.” *Id.* at 265.

51. *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1973)).

52. See *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003); *Am. Amusement Machine Ass’n v. Kendrick*

language of such regulations often closely tracks the traditional standard for obscenity, but applies to violent content as well as sexual material.

The challenged ordinance in *American Amusement Machine Ass'n v. Kendrick*⁵³ forbade video game operators from allowing an unaccompanied person under the age of eighteen to “use an amusement machine harmful to minors.”⁵⁴ The term “harmful to minors” was defined as appealing predominantly to “minors’ morbid interest in violence or prurient interest in sex,” being “patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen,” lacking “serious literary, artistic, political or scientific value,” and containing “either ‘graphic violence’ or ‘strong sexual content.’”⁵⁵ The term “graphic violence” used therein was defined as “visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or ... [disfigurement].”⁵⁶ Lawmakers in *Kendrick* and elsewhere have argued that, with respect to minors, graphic depictions of violence are so “patently offensive” by “community standards,” that they should be categorized as obscene.⁵⁷

The courts have been unpersuaded by arguments equating violence with obscenity and have maintained that the two are “distinct categories of objectionable depiction”⁵⁸ and that “violence cannot fall within the legal definition of obscenity.”⁵⁹ Rejection of these arguments reflects the general reluctance of courts to

(*Kendrick II*), 244 F.3d 572, 574 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

53. 244 F.3d 572 (2001).

54. *Id.* at 573.

55. INDIANAPOLIS & MARION COUNTY, IND., REV. CODE § 831-1 (2002) (emphasis added).

56. *Id.*

57. *Kendrick II*, 244 F.3d at 573–74. See also *Interactive Digital Software Ass'n*, 329 F.3d at 958 (rejecting the contention by St. Louis County that “‘graphically violent’ video games . . . are obscene as to minors.”).

58. *Kendrick II*, 244 F.3d at 574.

59. *Interactive Digital Software Ass'n*, 329 F.3d at 958.

incorporate other types of material into the narrow traditional definition of obscenity, which typically applies to sexual content.⁶⁰ As the Eighth Circuit explained, “Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults.”⁶¹

Although the courts have rejected obscenity-based rationales for video game regulations, not every opinion precludes the possibility that there is a threshold at which violence becomes obscene.⁶² The Seventh Circuit emphasized that the principle underlying the obscenity exception is offensiveness—the material is unprotected not because it is believed to cause harm but because to many people it is “disgusting, embarrassing, degrading, disturbing, outrageous, and insulting.”⁶³ The opinion included speculation about the potential offensiveness of graphic violence:

One can imagine an ordinance directed at depictions of violence because they, too, were offensive. Maybe violent photographs of a person being drawn and quartered could be suppressed They might even be described as “obscene,” . . . even if they have nothing to

60. See, e.g., *Miller v. California*, 413 U.S. 15, 23–24 (1973) (“State statutes designed to regulate obscene materials must be carefully limited As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.”).

61. *Interactive Digital Software Ass’n*, 329 F.3d at 958. *But see infra* note 61 and accompanying text.

62. *Kendrick II*, 244 F.3d at 575. *But see* *United States v. Thoma*, 726 F.2d 1191, 1200 (7th Cir. 1984) (“[A]bsent some expert guidance as to how such violence appeals to the prurient interest of a deviant group, there is no basis upon which a trier of fact could deem such material obscene.”).

63. *Kendrick II*, 244 F.3d at 575. The obscenity doctrine may also be viewed as an example of the state’s authority to regulate morality. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (stating that legislation may be based on the “assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior . . . ‘Many of these effects may be intangible and indistinct, but they are nonetheless real.’” (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 103, (1946))). Under this view, the obscenity doctrine could more comfortably accommodate violence as something that the state wishes to morally condemn.

do with sex. In common speech, indeed, “obscene” is often just a synonym for repulsive⁶⁴

The court also suggested that “a photograph of a person being decapitated might be described as ‘obscene.’”⁶⁵

Given the progress of video games toward increasingly life-like renditions of on-screen death and mayhem, it is possible that games in the future could depict, among other things, realistic decapitation. This level of violence might be “included within the legal category of the obscene.”⁶⁶ The Seventh Circuit noted that “[i]f the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries . . . a more narrowly drawn ordinance might survive a constitutional challenge.”⁶⁷

Although the definition of unprotected obscenity is extremely narrow, it is at least plausible that its contours could be adjusted to include the most graphic depictions of violence. The basic definition includes only sexual content,⁶⁸ but statutory descriptions of obscene material that also include the depiction of excretory functions and organs are constitutional.⁶⁹ However, given the prevalence of violence in the mainstream media, introducing any violent content into the realm of the “obscene” would create difficult line-drawing problems for the courts.

Harm to Minors

The protection afforded expression is adjusted depending

64. *Kendrick II*, 244 F.3d at 575; *see also* *Winters v. New York*, 333 U.S. 507, 518–20 (1948) (holding a statute that prohibited sale of certain violent material invalid on vagueness grounds, but cautioning against the conclusion that the state had no power to regulate violent material).

65. *Id.*

66. *Kendrick II*, 244 F.3d at 575.

67. *Id.* at 579–80.

68. *Miller v. California*, 413 U.S. 15, 24 (1973).

69. *Id.* at 25 (listing among the examples of representations that might be regulated “[p]atently offensive representation or descriptions of . . . excretory functions).

on the intended audience, and “certain speech, while fully protected when directed to adults, may be restricted when directed towards minors.”⁷⁰ Courts have agreed that the State has a compelling interest in “protecting the ‘psychological development of minors,’ ”⁷¹ which, in some cases, justifies restricting their access to certain speech even though adults’ access to the same material could not constitutionally be limited.⁷²

Based on these principles, some state and local governments have enacted regulations to limit minors’ access to video games with graphically violent and sexual content.⁷³ The provisions restricting access to games with strong sexual content are well-

70. *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002) (citing *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)), *cert. denied*, 537 U.S. 1159 (2003); *see also Ginsberg v. New York*, 390 U.S. 629, 637–43 (1968) (legitimizing government regulation of sexually explicit material that is obscene with respect to minors, although not with respect to adults); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288 (10th Cir. 1983) (upholding constitutionality of an ordinance prohibiting the display of material “harmful to minors” although it “to some degree restrict[ed] the viewing by adults of . . . constitutionally protected [material].”). *But see Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 65–68 (2nd Cir. 1997) (striking down an ordinance that prohibited the sale of trading cards depicting violent “heinous crimes” to minors).

71. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003) (quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)); *see also New York v. Ferber*, 458 U.S. 747, 756–57 (1982); *Ginsberg*, 390 U.S. at 639–43.

72. *Ginsberg*, 390 U.S. at 636.

73. *See, e.g., INDIANAPOLIS & MARION COUNTY, IND., REV. CODE* § 831-1 (2002); *ST. LOUIS COUNTY, MO., REV. ORDINANCES* § 602.425–460 (2003); *OKLA. STAT.* tit. 21, § 1040.75 (2001); *WASH. REV. CODE* § 9.91.180 (2003); *H.R. 2739*, 84th Gen. Assem., Reg. Sess. (Ark. 2003).

In March 2004, the New York City Council held a hearing on two proposed bills to restrict the sale of violent video games to minors. After the Council viewed segments of the game *Grand Theft Auto: Vice City*, one councilman commented that he “wasn’t even aware that this filth existed.” Frank Lambardi, *Pols Open Fire on Vid Games*, N.Y. DAILY NEWS, Mar. 31, 2004, at 5.

The U.S. Congress has also considered the issue. *See, e.g., Protect Children from Video Game Sex and Violence Act of 2003*, H.R. 669, 108th Cong. (2003).

supported by decisions involving other media⁷⁴ and have generally not been challenged.⁷⁵ The provisions regarding graphic violence, however, have sparked a significant amount of litigation.⁷⁶

A recent video game case, *Interactive Digital Software Ass'n v. St. Louis County*,⁷⁷ involved a First Amendment challenge to a county ordinance that restricted minors' access to violent games. In support of the ordinance, the county argued that "there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health."⁷⁸ It offered the testimony of a psychologist, who testified that playing violent video games leads to more aggressive thoughts and often to more aggressive behavior.⁷⁹ It further offered the results of several studies that suggested possible negative effects from playing graphically violent games.⁸⁰ As a second justification, the county suggested that by giving parents the power to control what types of material their children have access to, the restriction "assist[ed] parents [in] be[ing] the guardians of their children's well-being."⁸¹

Similarly, in *Kendrick II*, representatives of the video game industry challenged an Indianapolis ordinance limiting minors' access to games depicting violence.⁸² The city in this case raised

74. See, e.g., *Ginsberg*, 390 U.S. at 632–33.

75. See, e.g., *Interactive Digital Software Ass'n*, 329 F.3d at 956 n.1 ("The ordinance also restricts minors' access to video games with strong sexual content, but plaintiffs do not challenge those provisions of the ordinance."); *Am. Amusement Machine Ass'n v. Kendrick (Kendrick II)*, 244 F.3d 572, 579 (7th Cir. 2001) ("We are not concerned with the part of the Indianapolis ordinance that concerns sexually graphic expression."), *cert. denied*, 534 U.S. 994 (2001).

76. See *Interactive Digital Software Ass'n*, 329 F.3d 954; *Kendrick II*, 244 F.3d 572; see also, Ian Ith, *Judge Blocks Law Restricting Sale of Violent Video Games*, SEATTLE TIMES, July 11, 2003, at B1 (reporting that a federal judge in Washington State issued a temporary injunction against enforcement of the state Video Violence Law, WASH. REV. CODE § 9.91.180 (2003), which restricted minors' access to games depicting violence against police officers).

77. 329 F.3d 954 (2003).

78. *Id.* at 958.

79. *Id.* at 958–59.

80. *Id.* at 959.

81. *Id.*

82. *Am. Amusement Machine Ass'n v. Kendrick (Kendrick II)*, 244 F.3d

slightly different arguments in defense of the restriction. The city claimed not only that the games were psychologically harmful, but specifically that they “engender[ed] violence on the part of the players, at least when they are minors.”⁸³ In support of this contention, it offered the results of studies indicating that “playing a violent video game tends to make young persons more aggressive” and pointed to the “larger literature finding that violence in the media engenders aggressive feelings.”⁸⁴ In *Kendrick I* the district court had found that the city had demonstrated a reasonable basis for the regulation.⁸⁵ The court of appeals disagreed: “[G]iven the entirely conjectural nature of the benefits of the ordinance to the people of Indianapolis . . . [t]he judgment is . . . reversed.”⁸⁶

Because these ordinances restrict access based on the violent material in the games, they have been treated as presumptively invalid content-based restrictions and evaluated by the courts under the strict scrutiny standard.⁸⁷ Under this analysis, the State bears the burden of demonstrating that the legislation furthers a compelling state interest and is narrowly tailored to serve that interest.⁸⁸ Although the courts concede that protecting the psychological well-being of minors is “compelling in the abstract,”⁸⁹ defendant-governments have not yet persuaded the courts that restricting access to violent games is a narrowly tailored means for advancing that interest.

In *Kendrick II*, the Seventh Circuit overturned the district court decision and granted an injunction against enforcement of the

572, 573 (7th Cir. 2001) (citing *INDIANAPOLIS & MARION COUNTY, IND., CITY-COUNTY GENERAL ORDINANCE 72* (July 10, 2000) (codified at *INDIANAPOLIS & MARION COUNTY, IND., REV. CODE* § 831-1 (2002)), *cert. denied*, 534 U.S. 994 (2001).

83. *Id.* at 573–74.

84. *Id.* at 574.

85. *Am. Amusement Machine Ass’n v. Kendrick* (*Kendrick I*), 115 F. Supp. 2d 943, 963 (S.D. Ind. 2000).

86. *Kendrick II*, 244 F.3d at 580.

87. *Id.* at 576; *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003).

88. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

89. *Interactive Digital Software Ass’n*, 329 F.3d at 958.

Indianapolis ordinance.⁹⁰ In determining that the ordinance did not meet the strict scrutiny standard, the court articulated two distinct criticisms of the city's proffered justification. First, the social science research did not support the claim that the games were "dangerous to public safety"⁹¹ because the studies did not provide evidence that violent video games have ever caused violent acts or increased the average level of violence.⁹² Second, the ordinance was not narrowly tailored to achieve the city's stated aims.⁹³

The *Kendrick II* court was highly critical of the social science data offered in support of the city's finding that the games caused harm to its citizens, a claim the court described as "implausible, at best wildly speculative."⁹⁴ The court did acknowledge the possibility that this deficiency "could be overcome by social scientific evidence" but ruled that it had not been.⁹⁵ The court set forth the following specific criticism of the studies offered by the city:

They [did] not suggest that it is the *interactive* character of the games, as opposed to the violent images in them, that is the cause of aggressive feelings. The studies thus are not 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.⁹⁶

Since it is constitutionally impermissible to regulate otherwise protected material merely because of its violent content, research would have to demonstrate that the unique characteristics of video games present a special risk of psychological harm or violent behavior. Research in this field is ongoing,⁹⁷ and it is

90. *Kendrick II*, 244 F.3d at 580.

91. *Id.* at 578.

92. *Id.* at 578-79.

93. *Id.* at 580.

94. *Id.* at 579.

95. *Id.*

96. *Id.*

97. See, e.g., Lillian Bensley & Juliet Van Eenwyk, *Video Games & Real-Life Aggression: Review of the Literature*, 29 J. OF ADOLESCENT HEALTH 244

possible that the accumulated data from social science fields may eventually be sufficiently extensive and specific to show that violent interactive games have an effect on young audiences that is significantly more profound than the influence of violence conveyed through “passive” media.

After its sharp criticism of the scientific support for the ordinance, the court turned to the lack of narrow tailoring:

[The city] doesn't even argue that the *addition* of violent video games to violent movies and television in the cultural menu of . . . youth significantly increases whatever dangers media depictions of violence pose to healthy character formation or peaceable, law-abiding behavior. Violent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed.⁹⁸

The court's criticism reveals that in order to support such a regulation, the data must show: (1) a direct causal link between exposure to violent media and violent behavior in young people, and (2) a clear difference between the behavioral effects of video games and of all the other sources of media violence that justifies differential treatment of the games.⁹⁹

In *Interactive Digital Software*, the Eighth Circuit likewise invalidated a St. Louis ordinance criminalizing the knowing sale, rental, “making available,” or permitting “the free play of” graphically violent video games to or by minors.¹⁰⁰ The court characterized the county's claim that the games were psychologically harmful to minors as abstract conjecture,

(2001); Jeanne B. Funk et al., *Playing Violent Video Games, Desensitization, and Moral Evaluation in Children*, 24 *APPLIED DEVELOPMENTAL PSYCHOL.* 413 (2003); Steven J. Kirsh, *The Effects of Violent Video Games on Adolescents: The Overlooked Influence of Development*, 8 *AGGRESSION & VIOLENT BEHAVIOR* 377 (2003). See generally *CHILDREN IN THE DIGITAL AGE: INFLUENCES OF ELECTRONIC MEDIA ON DEVELOPMENT* (Sandra L. Calvert et al. eds., 2002).

98. *Kendrick II*, 244 F.3d at 579.

99. *Id.* at 580.

100. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 602.425–.460 (2003).

unsupported by adequately specific evidence of actual harm.¹⁰¹ Likewise, the court did not find the asserted interest in “assisting parents to be the guardians of their children’s well-being” sufficiently compelling to justify limiting First Amendment rights.¹⁰²

The courts’ criticisms of the “harm to minors” arguments leave open the possibility that if a state presented data clearly linking video games to harm and could justify singling out video games from other mediums containing similar content, the regulation might survive constitutional scrutiny. Alternatively, a system of self-regulation within the video game industry could serve a similar purpose and would avoid First Amendment problems.

Children’s exposure to violence from other media on the “cultural menu”¹⁰³ is somewhat tempered by non-judicial systems. Most notably, their access to violent movies is limited by constitutionally permissible industry-imposed restrictions. The Motion Picture Association of America (MPAA) rating system classifies movies depending on their “theme, violence, language, nudity, sensuality, drug abuse, and other elements.”¹⁰⁴ The age restrictions suggested by the rating system are enforced by a majority of theater owners. Minors are not admitted to movie theaters to see R (“Restricted”) rated movies unless accompanied by a parent or guardian, and minors are not admitted at all to movies rated NC-17.

The Electronic Software Rating Board (ESRB) issues video game ratings using categories parallel to those used by the MPAA for movies. “Mature” rated games have content that “may be suitable for persons ages 17 and older” and “may contain mature sexual themes, or more intense violence and/or language;” “Adults Only” rated games are “not intended for persons under the age of 18” because they have “content suitable only for adults,” which

101. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958–59 (8th Cir. 2003).

102. *Id.* at 959–60.

103. *Kendrick II*, 244 F.3d at 579.

104. JACK VALENTI, THE PURPOSE OF THE RATING SYSTEM, at <http://www.mpa.org/movieratings/about/content3.htm> (last visited Mar. 31, 2004).

means “graphic depictions of sex and/or violence.”¹⁰⁵ The content descriptors that supplement the rating system include such labels as: “Blood and Gore – Depictions of blood or the mutilation of body parts,” “Nudity – Graphic or prolonged depictions of nudity,” and “Strong Sexual Content – Graphic depiction of sexual behavior, possibly including nudity.”¹⁰⁶

Both the MPAA ratings and the video game ratings provided by the ESRB are intended as guidelines for parents.¹⁰⁷ Their effects however, are decidedly different because most movie theaters and major video store franchises have opted to give force to the age restrictions suggested by the ratings.¹⁰⁸ Arcades and video game retailers have not generally followed suit. This may be because the financial interests of retailers and manufacturers in the video game business are too dependent on their underage fans. Because so many eager recipients of graphic video game violence are minors, limiting this audience would have a profound impact on the video game industry.¹⁰⁹

105. ENTMT SOFTWARE RATINGS BD., *GAME RATING AND DESCRIPTOR GUIDE*, at http://www.esrb.org/esrbratings_guide_print.asp (last visited Mar. 31, 2004).

106. *Id.* Prior versions of content-descriptors included: “Realistic Violence . . . photographic-like depictions of aggressive conflict” and “Realistic Blood and Gore . . . depictions of mutilation or dismemberment of body parts in realistic or photographic-like detail.” Brett Atwood, *ESRB: Understanding Video Game Ratings*, at <http://www.amazon.com/exec/obidos/tg/feature/-/71576/103-2338817-9291805> (last visited Mar. 31, 2004).

107. At least one state has used the language of the industry-promulgated ratings in its access-restriction statute. The Arkansas legislature proposed a regulatory act in which “[t]here is a rebuttable presumption that video games rated ‘M’ or ‘AO’ by the Entertainment Software Review Board are harmful to minors.” H.R. 2739, 84th Gen. Assem., Reg. Sess. (Ark. 2003). It may be more difficult to challenge a restriction that tracks the rating system, because, through the ratings, the industry is ostensibly acknowledging that those games are not suitable for minors.

108. VALENTI, *supra* note 104.

109. In 2002, U.S. sales of “entertainment software” totaled \$6.9 billion. Industry statistics indicate that only 13.2% of the game titles sold during that time carried the “mature” rating (indicating strong violent content) and only 37.9% of the most frequent video game players were minors. INTERACTIVE DIGITAL SOFTWARE ASS’N, *supra* note 4, at 3–4, 9. Even so, restricting 37.9% of players from accessing 13.2% of the games on the market could cost the

Interactivity

Another argument for limiting First Amendment protection of video games focuses on their unique interactive element. Unlike “passive” entertainment such as television, movies, and literature, video games require active participation by the consumer. Not only do players make decisions that affect the “plot” of the story, they also arguably develop skills and learn behavior in the course of playing the game.¹¹⁰ Interactivity is a salient feature of the games, above and beyond their expressive content. Several courts have distinguished the communicative aspects to which they granted protection from any non-communicative aspects of the games. In *James v. Meow Media, Inc.*,¹¹¹ for example, the Sixth Circuit noted that the games in question were “a mixture of expressive and inert content.”¹¹² It noted that attaching tort liability to the communicative aspect of protected speech violates the First Amendment but did not discuss the implications of liability for non-communicative aspects because the plaintiff failed to raise the issue.

In *Kendrick II*, the Seventh Circuit suggested that the city’s evidence in support of its regulation would have been more persuasive if it demonstrated that the *interactivity*, not merely the

industry hundreds of millions of dollars.

110. Commentators have noted the “training” capabilities of video games. One author points out the otherwise inexplicable case of a fourteen year old player who, despite having no “appreciable exposure to handguns,” displayed an “astounding” accuracy as a marksman when he shot eight people at his school. Kevin Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 MICH. ST. DCL L. REV. 51, 52 (2003). Further evidence that some skills are acquired by playing games is found in the use of games as training tools by the military. Computer simulations are utilized to prepare personnel for combat situations. *Id.* at 76. In fact, one of the most vocal opponents of violent video games is Lt. Col. David Grossman, a former Army psychologist who specialized in training recruits to kill. He argues that the “games require so much bloody killing that . . . children exposed to [them] . . . may begin to enjoy the act of killing opponents on-screen.” *20/20: The Games Kids Play: John Stossel Looks at Debate Over Violent Video Games* (ABC television broadcast, Mar. 22, 2000).

111. 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003).

112. *Id.* at 695.

communicated content, of the games caused harm to minors.¹¹³ If research demonstrated that the interactivity of the game presented a special risk of psychological harm or violent behavior, the court might have found that the ordinance was adequately supported. The Sixth Circuit rendered its decision in *Meow Media* on state law grounds, but devoted several pages of dicta to First Amendment concerns. In its discussion, the court noted that “there are features of video games which are not terribly communicative, such as the manner in which the player controls the game.”¹¹⁴ The court implied that free speech issues are not implicated by the player’s control of game play.

On the other hand, some have argued, “It is odd to think that the *additional* expression of the game player would somehow negate or detract from the expression that video game developers intend to communicate Quite the contrary, the interactive dimension of the video game medium is . . . one of its most expressive . . . features.”¹¹⁵ Even the most engaging story presented in traditional media does not require participation by those who receive it. The plot of a television show or movie is complete and inalterable at the time it is filmed. The printed words of a text are fixed, and the story determined, at the time it is published. On the other hand, video game designers have been described as “storytellers, with a twist: . . . they let the player control the story and decide the outcome. They create a web of possibilities and a player chooses a path.”¹¹⁶

The courts generally have not viewed the interactivity of video games as a distinguishing factor. The Seventh Circuit in *Kendrick II* touched on the issue of interactivity, but may have been too quick to dismiss the distinction between traditional forms of expression and video games:

113. *Am. Amusement Machine Ass’n v. Kendrick (Kendrick II)*, 244 F.3d 572, 579 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

114. *Meow Media, Inc.*, 300 F.3d at 696.

115. Brief of Amici Curiae International Game Developers Association at 24–25, *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (No. 02-3010).

116. Olivia Crosby, *Working So Others Can Play: Jobs in Video Games Development*, OCCUPATIONAL OUTLOOK Q., Summer 2000, at 2, 3.

Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.¹¹⁷

The court later states that “‘passive’ entertainment aspires to be interactive too and often succeeds.”¹¹⁸ The opinion apparently equates the terms “engaging” and “interactive,” which in fact are analytically distinguishable. An engaging narrative (in a traditional medium) may inspire rapt attention and enthusiasm, but it cannot involve the audience in the making of the story itself; the latter can be achieved only by a truly interactive medium.

In *Interactive Digital Software*, the Eighth Circuit briefly discussed the interactive nature of games in response to St. Louis County's assertion that this quality made them more likely to cause psychological harm to minors. The court rejected the county's argument and quoted the above language from *Kendrick II* before concluding that “some books . . . can be every bit as interactive as video games.”¹¹⁹ The court correctly determined that interactivity did not suggest a lower level of protection. What it did not acknowledge, however, is that a truly interactive medium (not merely an engaging story) may involve the expressive rights of several parties and thus efforts to restrict it should be viewed with particular skepticism.¹²⁰

117. *Kendrick II*, 244 F.3d at 577.

118. *Id.* at 579.

119. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957–58 (8th Cir. 2003) (discussing the “Choose Your Own Nightmare” series).

120. *See, e.g., Turner Broad. Syst., Inc. v. FCC.*, 512 U.S. 622, 666 (1994) (“[W]e have stressed in First Amendment cases that the deference afforded to legislative findings does ‘not foreclose our independent judgment of the facts

The plaintiff in *Wilson* focused her liability claim on the interactive nature of the games and the court agreed that because of their interactivity, the games were “something more than motion pictures or television programs.”¹²¹ According to the court, interactivity “tends to cut in favor of First Amendment protection, inasmuch as it is alleged to *enhance* everything expressive and artistic about [the game].”¹²² Interactivity does cut in favor of protection, but not merely because it enhances the receipt of ideas expressed by the game’s creator. More significantly, it transforms a passive recipient of expression into an active participant whose experience with the game may also be characterized as expression. The district court in *Wilson* did not discuss the possibility that interactive media are even more expressive than traditional forms; rather, it ultimately concluded that games are “analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, [and] are protected under the First Amendment.”¹²³

In future cases, legal argument and analysis may include the position that those who play video games are engaging in a wholly novel twenty-first century form of expression. The expressive aspect of playing video games is highlighted by games in which many players may interact with each other in the game forum.¹²⁴

bearing on an issue of constitutional law.’ ” (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” (citations omitted)).

121. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 174 (D. Conn. 2002).

122. *Id.* at 181.

123. *Id.*

124. Online gaming is increasingly popular. According to industry statistics, 37% of frequent game-players played online in 2002 (up from only 18% in 1999). INTERACTIVE DIGITAL SOFTWARE ASS’N, *supra* note 4, at 3. The content of such games is largely determined by the players themselves. The Entertainment Software Ratings Board (ESRB) explains, “[O]nline games that include user-generated content . . . carry the notice ‘Game Experience May Change During Online Play’ to warn consumers that content created by players of the game has not been rated by the ESRB.” ENTMT

With the advent of “online gaming,” many players now join together via the internet to play video games.¹²⁵ In *Reno v. ACLU*,¹²⁶ the Supreme Court held that communication with others over the Internet is speech that is entitled to full First Amendment protection.¹²⁷ Therefore, participation in online games that involve communicating with others must also be entitled to full protection. As an amicus curiae in *Interactive Digital Software* noted, “It is simply illogical to suppose that the same game is expressive and protected by the First Amendment when played over the internet, and yet unexpressive and unprotected when played otherwise.”¹²⁸

CONCLUSION

According to the Supreme Court, “[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”¹²⁹ The “standards” suited to the assessment of video games have not yet been fully articulated. Courts have held that First Amendment protection applies to video games and have, so far, rejected arguments that certain games fall into unprotected categories. The language of the holdings, however, is carefully qualified to avoid declaring a blanket protection.¹³⁰ In other words, the courts have

SOFTWARE RATINGS BD. *supra* note 105.

125. Brief of Amici Curiae International Game Developers Association at 10, *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (No. 02-3010). (“The emergence of online video games has opened up the additional possibility of a number of individual players collectively shaping the story and game experience.” (citing Seth Stevenson, *Not Just a Game Anymore, Video*, NEWSWEEK, Jan. 1, 2000 at 94)).

126. 521 U.S. 844 (1997).

127. *Id.* at 870.

128. Brief of Amici Curiae at 5 n.2, *Interactive Digital Software Ass’n* (No.02-3010).

129. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

130. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (“Before the county may constitutionally restrict the speech at issue here, the County must come forward with empirical support for its belief that ‘violent’ video games cause psychological harm to minors. *In this case* . . . the County has failed . . .”) (emphasis added); *James v. Meow Media, Inc.*, 300 F.3d 683, 699 (6th Cir. 2002) (remarking in dicta that

not held that this medium is unequivocally protected. One opinion noted that “the label ‘video game’ is not talismanic, automatically making the object to which it is applied either speech or not speech.”¹³¹ Another court found the argument that “games . . . must receive the full protection of the First Amendment” unconvincing.¹³²

Nonetheless, some have suggested that video games “possess a creative capacity that will surpass, if it has not already done so, that of more traditional entertainment media that are fully protected by the First Amendment.”¹³³ The “surpassing” creative capacity is due in part to the interactivity of the games. The Second Circuit recently noted that “the realities of what any computer code can accomplish must inform the scope of its constitutional protection.”¹³⁴ The programming code that makes up a video game represents visual art and “literary themes,” but its narrative capability is not realized until someone plays the game by making decisions, acting, and reacting to the virtual environment. In so doing, the player literally determines the “story” that unfolds.

attaching tort liability to the expressive content of games “raises grave constitutional concerns”), *cert. denied*, 537 U.S. 1159 (2003); *Am. Amusement Machine Ass’n v. Kendrick* (Kendrick II), 244 F.3d 572, 579 (7th Cir. 2001) (“It is conceivable though unlikely that in a plenary trial the City can establish the legality of the ordinance.”), *cert. denied*, 534 U.S. 994 (2001); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002) (holding not that the First Amendment is a complete bar to tort liability, but that “[p]laintiffs’ theory fails the narrow tailoring test . . . [and] is, as a matter of law, overbroad”).

131. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002).

132. *Kendrick II*, 244 F.3d at 574.

133. Brief of Amici Curiae at 6, *Interactive Digital Software Ass’n* (No.02-3010). The art community likewise is beginning to accept the idea that video games will be elevated at least to the level of other artistic media: “[G]aming still resides in a distinctly lowbrow corner of contemporary culture, not yet deemed—or scrutinized as—an art form That age of innocence may be ending, however, as more rigorous consideration emerges . . . mark[ing] the full induction of video games into traditional academic discourse.” Galloway, *supra* note 21, at 45.

134. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 453 (2d Cir. 2001).

There is no story unless and until the player actively shapes it. Video games thus involve more than merely the expressive right of a speaker and the right of an audience to receive the expression. Playing many modern video games is an expressive act,¹³⁵ and, in the case of online gaming, also involves associating with others within the forum provided by the game. Because the expressive rights of both programmer and player are implicated, any regulation of video games should be sharply limited by the guarantees of the First Amendment.

135. Some might contend that because a player's options are determined by the video game's programmers, the process of playing the game is not truly "expressive." This view does not accurately reflect the vast array of choices involved in sophisticated games. In complex interactive gaming, a player is no more limited by the options of the game than an artist working with commercially distributed paint is limited by the available color selection.