

# Protecting Kids or Attacking the First Amendment? Video Games, Regulation and Protected Expression

JAMES D. IVORY

Assistant Professor

Department of Communication

111 Shanks Hall (0311)

Virginia Polytechnic Institute and State University

Blacksburg, VA 24060

E-Mail: jivory@vt.edu

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*This paper inspects a recent federal court decision, Interactive Digital Software Association v. St. Louis County, Mo., in which the court ruled that video games did not constitute expression meriting First Amendment protection. Via an examination of the history of similar cases in federal courts, the Interactive Digital ruling is here found to be inconsistent with other rulings; an affirmation of this decision in the U. S. Court of Appeals would prolong an unacceptable contradiction.*

*(Author's Note: On June 3, 2003, the U.S. Court of Appeals for the Eighth Circuit overturned the district court's decision in Interactive Digital v. St. Louis County, Mo. This paper was written and submitted before the reversal.)*

Since their advent decades ago, video games have developed into a massive entertainment empire. With \$6.35 billion in sales of video games and related equipment in 2001,<sup>1</sup> the video game industry consistently outgrosses the Hollywood box office.<sup>2</sup> As many as 60 per cent of all Americans play video games,<sup>3</sup> and more than 100

million video game consoles are in use worldwide.<sup>4</sup> It appears that video games are here to stay.

However, with success and proliferation has come criticism. Video games and their potential effects have been publicly vilified for almost as long as they have been a commercial presence. In 1983, United States Surgeon General C. Everett Koop named the games as one of the top three causes of family violence,<sup>5</sup> and video game content has since been scrutinized by media watchdog groups<sup>6</sup> and

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1 Interactive Digital Software Association, *2001 Game Sales and Graphs* (May 2002), at <http://www.idsa.com/2001SalesData.html> (last visited October 18, 2002).

2 John L. Sherry, *The Effects of Violent Video Games on Aggression: A Meta-Analysis*, 27 HUMAN COMM. RES. 409, 410 (2001).

3 *Move Over, Kids – Adults Like Video Games Too*, USA TODAY, March 1, 2001, at 6A.

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4 Digiplay Initiative, *Gaming Facts*, at <http://www.digiplay.org.uk/facts.php> (last visited October 19, 2002).

5 Sherry, *supra* note 2, at 410.

6 *Video games and push-button aggression*, CQ RESEARCHER, March 26, 1993, at 279.

congressional hearings.<sup>7</sup> This inspection has intensified in recent years, with speculative links made between video game play and school shootings in Paducah, Kentucky, in 1997 and Littleton, Colorado, in 1999.<sup>8</sup> Current U. S. Attorney General John Ashcroft has taken suspicion of the negative effects of video games to a new level, suggesting that the “ethic of violence” they support was partly to blame for a 2001 San Diego, California, shooting, despite the fact that video games had not been otherwise linked to the incident.<sup>9</sup>

Despite these opinions, attempts to obtain civil judgments against video game manufacturers have not met with success. Cases brought by victims and family members seeking damages from video game manufacturers and purveyors for their alleged contributions to both the Paducah<sup>10</sup> and Littleton<sup>11</sup> incidents were dismissed by federal courts. A similar suit, in which the mother of a child killed by a playmate “obsessed with”<sup>12</sup> a particular violent video game sued the game’s manufacturer for liability damages, was also dismissed in March of 2002.<sup>13</sup> A significant factor in each of these rulings was the contention that video games enjoy First Amendment protection.<sup>14</sup>

However, existing opinions that video games are protected free speech have not preempted regulation of the entertainment form. Perhaps the most notable recent validation of video game regulation was announced April 19, 2002, in *Interactive Digital Software Association v. St. Louis County, Mo.*<sup>15</sup> In de-

nying a motion for summary judgment against enforcement of an ordinance restricting minors’ access to violent video games without parental consent, the court found that video games contained “no conveyance of ideas, expression, or anything else that could possibly amount to speech.”<sup>16</sup> This opinion’s strong wording provides a description of video games that seems to place them entirely outside the range of First Amendment protection.

The *Interactive Digital* decision is, ostensibly, a curious one: It contradicts not only the aforementioned tort decisions, but also a 2001 Seventh Circuit opinion on a similar ordinance in *American Amusement Machine Association v. Kendrick*.<sup>17</sup> In *American Amusement*, the court was vehement in its advocacy of First Amendment protection for video games, comparing restricted access to video games to curtailment of access to works such as Homer’s *Odyssey*, Dante Aligheri’s *The Divine Comedy*, and Bram Stoker’s *Dracula*.<sup>18</sup> Additionally, the court in *American Amusement* issued a strong warning against restriction of children’s exposure to questionable materials, noting that “the murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion.”<sup>19</sup>

A brief filed by 33 scholars with the U.S. Court of Appeals for the Eighth Circuit in support of the *Interactive Digital* appellants<sup>20</sup> also reveals the significance of the decision; the final holding in the case will be anxiously awaited, and may have massive implications for the position of video games in relation to the First Amendment. Similar ordinances and federal regulations are already under consideration, and one of the attorneys in the *American Amusement* case has predicted a possible Supreme Court ruling on the issue in the near future if the *Interactive Digital* decision is upheld on appeal.<sup>21</sup>

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7 Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 752-53 (1999).

8 David C. Kiernan, Note, *Shall the Sins of the Son Be Visited upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 208-09 (2000).

9 *Wrong Answers*, USA TODAY, March 26, 2001, at 18A.

10 *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 811 (W.D. Ky. 2000), *aff’d*, 300 F.3d 683 (6th Cir. 2002).

11 *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002).

12 *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 169 (D. Conn. 2002).

13 *Id.* at 183.

14 *See, e.g., James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002).

15 *Interactive Digital Software Association v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126 (M.D. Mo. 2002).

16 *Id.* at 1134.

17 *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

18 *Id.* at 576-78.

19 *Id.* at 577.

20 Brief of Amici Curiae Banet-Weiser et al., *Interactive Digital Software Association* (No. 02-3010).

21 Mark Jurkowitz, *Appeals Court Holds Key in Battle Over Regulation of Violent Video Games*, THE BOSTON GLOBE, Oct.

The *Interactive Digital* case appears to be about much more than a few arcades in St. Louis; the First Amendment status of a massively popular entertainment medium may be at stake.

Why did two federal courts reach such contradictory decisions with regard to video games and free speech protection within a span of one year? Is there a fundamental disagreement among the courts regarding the First Amendment protection of video games, or can discrepancies be explained by the circumstances of each case? This paper compares court rulings on video games and free speech protection in an effort to reconcile differences in existing court rulings or indicate flaws in one or more of these decisions.

### **Video Games, Effects Research, and the First Amendment**

For almost as long as video games have been criticized in popular opinion, effects research has sought to ascertain the possible negative effects of children's use of the medium.<sup>22</sup> This comes as no surprise; emerging communication media are typically accompanied by alarm regarding what impact they may have on children.<sup>23</sup> In the case of video games, this concern is exacerbated by survey evidence that children prefer types of video games that typically contain violence.<sup>24</sup>

However, the literature examining possible effects of video game play on children is convoluted, especially where violent video games and aggression are concerned. Some experimental studies find

negative video game effects,<sup>25</sup> others a lack thereof.<sup>26</sup> Even reviews analyzing existing studies are unable to reach a consensus on the issue of whether video games elicit negative effects in their users.<sup>27</sup> A meta-analysis by Sherry, which consolidated existing studies dealing with video games and aggression, found a link between video game play and aggression – but not as strong a connection as has been found with television.<sup>28</sup> Additionally, Sherry notes that concerns such as a “generational” difference between the technology and content of evolving games could not be accounted for in his meta-analysis.<sup>29</sup> Additionally problematic are some studies that have found video game play to have a calming effect on study participants, or findings that a non-violent game was more strongly correlated with player aggression than a violent one.<sup>30</sup>

Despite the lack of consensus in the research on the issue of video game effects, the legal literature teems with calls for restriction of video games. Many of these pleas appear to claim stronger effects of the medium than the aforementioned empirical research can support, picking and choosing from relevant studies to justify their claims. Barton, for example, calls for increased legislative restriction of violent video games, claiming that “the media industry, driven by a lust for profit and a disregard for decency, must be corralled by laws in order to protect the interests of children.”<sup>31</sup> As justification for his pleas, Barton cites statements from organizations such as the American Society of Pediatrics, as well as Lt. Colonel Dave Grossman, “a recognized expert on the psychology of killing.”<sup>32</sup> However, Barton lists only two empirical studies as support for his asser-

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2, 2002, at D1. The U. S. Supreme Court has heard one case significantly involving video games: *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283 (1982). However, this case addressed the right of game players to assemble and the constitutionality of examination of applicants' possible “association with criminal elements” in the licensing of amusement machine establishments; First Amendment protection of video games as speech was not considered.

22 Sherry, *supra* note 2, at 410.

23 Ellen Wartella & Byron Reeves, *Historical Trends in Research on Children and the Media: 1900-1960*, 35 J. COMM. 118, 118-33 (1985).

24 Jeanne Funk, *Reevaluating the Impact of Video Games*, 32 CLINICAL PEDIATRICS 86, 86-90 (1993).

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25 E. g., Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings and Behavior in the Laboratory and in Life*, 78 J. OF PERS. & SOC. PSYCHOL. 772, 772-790 (2001).

26 E. g., Derek Scott, *The Effects of Video Games on Feelings of Aggression*, 129 J. PSYCHOL. 121, 121-40 (1995).

27 *Id.*

28 Sherry, *supra* note 2, at 427.

29 *Id.* at 424.

30 Scott, *supra* note 26.

31 Kevin E. Barton, Note, *Game Over! Legal Responses to Video Game Violence*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 133, 162 (2000).

32 *Id.* at 141.

tion that “significant evidence, nevertheless, suggests that violent video games can function to increase aggressive behavior.”<sup>33</sup>

Dalal’s call for restrictions on the marketing of violent games in venues easily accessible to children is a similar example.<sup>34</sup> Dalal calls such legislation an “essential step” in curbing incidents of youth violence,<sup>35</sup> declaring that “studies have shown that young schoolboys, after playing aggressive video games, exhibit a higher level of physical and verbal aggression than they did prior to playing such games.”<sup>36</sup> However, Daleal cites only one psychological study.

Some who claim negative effects of video games do so without addressing empirical research at all. Dee, in arguing for more restrictions on video games and other violent media content, places recent tragedies at the feet of entertainment providers in no uncertain terms:

If, as a society, we continue to blindly assert First Amendment freedoms without looking carefully at the glorification of violence in a Boy Scout magazine ad, rap lyrics, videogames, pornographic web sites or Hollywood films, will we pay for this “freedom of expression” with the lives of our school children?

Of course, the answer is obvious: yes, we will.<sup>37</sup>

However, Dee eschews use of any empirical studies involving video games in supporting her forceful claim, using instead only a Red Cross report making analogous comparisons between video games and “killing simulators” used to train military personnel.<sup>38</sup>

Similarly, Kiernan argues that the First Amendment should not protect video game manufacturers from tort liability, claiming, “An injured plaintiff should be compensated for the video game industry’s unreasonable behavior that caused the plaintiff’s harm.”<sup>39</sup> Kiernan also uses expert testimony and general theory concerning media violence to support his claim but elects not to cite a single empirical study dealing with video games as evidence.

Others see legal attacks on video games as misdirection of blame for larger societal problems, citing restriction of access to video games as a reprehensible infringement upon the First Amendment that is not yet justified by scientific evidence. Calvert decries restrictions on entertainment media, describing this approach as “the media blame game”<sup>40</sup> and offering a stern warning:

But just as we must stop subscribing to a magic bullet theory of mass communication, so too must we stop looking for a magic bullet answer to societal problems of youth violence. Restricting access to speech will not change our culture of violence, but will only result in a culture that fears speech.<sup>41</sup>

In another article, Calvert notes that laws restricting access to video games “will be about more than just preventing violence. They will be about restricting culture and the First Amendment interests of children.”<sup>42</sup> These arguments appear to stem in part from the fact that Calvert is not particularly swayed by existing evidence of negative effects of video games on children: “[W]hile there may be a critical mass of research and literature on media vio-

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33 *Id.* at 139.

34 Rupal Ruparel Dalal, *Congress Shall Make No Law Abridging Freedom of Speech – Even if it Causes Our Children to Kill?* 25 SETON HALL LEGIS. J. 357 (2001).

35 *Id.* at 383.

36 *Id.* at 364.

37 Juliet Dee, *Basketball Diaries, Natural Born Killers and School Shooting: Should There be Limits on Speech Which Triggers Copycat Violence?* 77 DENV. U.L. REV. 713, 737 (2000).

38 *Id.* at 734.

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39 Kiernan, *supra* note 8, at 250-51.

40 Clay Calvert, *Framing and Blaming in the Culture Wars: Marketing Murder or Selling Speech?* 3 VAND. J. ENT. L. & PRAC. 128, 129 (2000) (addressing primarily a case dealing with rock music, but argument extended to include a number of other media forms including video games).

41 *Id.* at 139.

42 Clay Calvert, *Violence, Video Games, and A Voice of Reason: Judge Posner to the Defense of Kids’ Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 30 (2002).

lence in general, it is clear that this is not yet the case with the specific subject of video game violence."<sup>43</sup>

Calvert is not alone in this disapproval of video game restrictions. Jacobs also mentions video game legislation in his discussion of a "'blame game' . . . in the wake of the Columbine massacre,"<sup>44</sup> and Everett laments "the easy use of video games and the Internet as scapegoats in our national rush to assign blame in the [Littleton, Colorado] tragedy."<sup>45</sup>

The social impact of tort judgments against violent video game manufacturers and purveyors is also questioned. Arguing for immunity of all violent media content (including video games) from tort damages, Ausness makes this claim regarding lawsuits against video game makers: "[T]heir ultimate effect will be to greatly reduce the variety of material that is made available to adult audiences. Therefore, courts should resist the temptation to change existing tort and constitutional doctrines in any way that encourages others to bring these types of lawsuits against media defendants."<sup>46</sup>

The literature, therefore, presents an opaque picture of the issue of video games and aggression. Some find video games to be a dangerous medium in need of restriction; others see such regulation as misdirected and an infringement upon the First Amendment. While neither side of the issue appears to dominate the discussion, all the arguments are voiced strongly.

## Research Questions

Given this marked difference of opinion in the literature regarding application of First Amendment protection to video games, the apparently contradictory decisions in the *American Amusement* and *Interactive Digital* cases might be seen as a reasonable ju-

dicial manifestation of this division. However, there is a need for consistency in the law regarding regulation of what may be the biggest entertainment business in the United States.<sup>47</sup> This paper examines the degree of consistency that does exist by addressing the following research questions:

RQ1: What have federal courts said on the issue of whether video games are protected expression?

RQ2: If they have found video games to be protected expression, how have courts ruled on what regulation of video games is acceptable?

RQ3: Is there a consistent pattern in these rulings on video games and First Amendment protection? If not, are the differences reconcilable?

RQ4: Based on the existing rulings, should the *Interactive Digital* decision be upheld?

These questions will be explored via an analysis of the eight federal cases that have dealt with the issue of video games and free speech protection.<sup>48</sup> Cases dealing with copyright, trademark, breach of agreement and other issues of intellectual property or business activity rather than free speech protection will be excluded from analysis. Additionally, those cases dealing primarily with the regulation of video game devices used for gambling or the viewing of pornography will not be addressed, as regulation of gambling and pornography are outside the scope of this analysis.

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43 *Id.* at 25.

44 Timothy L. Jacobs, Comment, *School Violence: An Incurable Social Ill that Should Not Lead to the Unconstitutional Compromise of Students' Rights*, 38 DUQ. L. REV. 617, 645 (2000).

45 Anna Everett, P. C. *Youth Violence: "What's the Internet of Video Gaming got to do with it?"* 77 DENV. U.L. REV. 689, 690 (2000).

46 Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 3 FLA. L. REV. 603, 670 (2000).

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47 Sherry, *supra* note 2, at 410.

48 These cases are *Interactive Digital Software Association v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126 (M.D. Mo. 2002); *James v. Meow Media, Inc.*, 300 F.3d 683 (6<sup>th</sup> Cir. 2002); *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002); *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7<sup>th</sup> Cir. 2001); *Rothner v. Chicago*, 929 F.2d 297 (7<sup>th</sup> Cir. 1991); *Malden Amusement Co., Inc. v. City of Malden*, 582 F. Supp. 297 (D. Mass. 1983); *America's Best Family Showplace Corp. v. New York*, 536 F. Supp. 170 (E.D.N.Y. 1982).

## Free Speech Protection for Video Games

The two earliest federal cases are consistent in their handling of the issue of free speech protection for video games. In *America's Best Family Showplace Corp v. New York*,<sup>49</sup> the U.S. District Court for the Eastern District of New York evaluated video games' status as protected expression in reviewing the plaintiff's challenge to an ordinance forbidding the operation of more than four video game machines in a business establishment. Despite the plaintiff's claim that video games were "visual and aural presentations on a screen involving a fantasy experience in which the player participates" that were similar to films and thus merited First Amendment protection,<sup>50</sup> the court was unconvinced. The court stated that "video games cannot be fairly characterized as a form of speech protected by the First Amendment,"<sup>51</sup> and thus the regulations "do not implicate First Amendment problems."<sup>52</sup> This ruling was based in large part upon the holding that video games were purely entertainment and contained no informative element.<sup>53</sup>

The issues in *Malden Amusement Co., Inc. v. City of Malden*<sup>54</sup> were very similar to those of the *America's Best* case, as was the decision. In *Malden*, the court rejected a First Amendment challenge to an ordinance restricting the licensing of more than five video game machines to establishments where the games would serve a "purpose accessory to or incidental to only recreational business use"<sup>55</sup> and limiting the total number of machines to 25 for any purpose. The *Malden* court found the *America's Best* analysis "persuasive" enough that no further investigation of the issue of First Amendment protection was deemed necessary.<sup>56</sup>

While the courts in these two cases seemed quick to dismiss video games as a medium of ex-

pression protected by the First Amendment, the Seventh Circuit in *Rothner v. Chicago*<sup>57</sup> was more hesitant on this issue. The court ruled against the plaintiff's claim that an ordinance forbidding the operation of video games by minors during school hours was unconstitutional, but the decision was made without settling the issue of First Amendment protection for video games at all. Unlike the federal district court that heard the case, the *Rothner* appellate court expressed reluctance to consider video games completely outside First Amendment protection: "To hold on this record that *all* video games--no matter what their content--are *completely* devoid of artistic value would require us to make an assumption entirely unsupported by the record and *perhaps* totally at odds with reality."<sup>58</sup> The Seventh Circuit noted, "The judgment of the district court can be affirmed without our reaching this issue,"<sup>59</sup> and upheld the district court's ruling that the regulation was an acceptable time, place, and manner restriction regardless of the possible free speech protection of video games. After the *Rothner* court's skirting of the issue, the rulings in *America's Best* and *Malden Amusement* stood uncontested in the federal courts for several years until another Seventh Circuit decision addressing the issue was handed down in *American Amusement*.<sup>60</sup>

In *American Amusement*, the appellate court struck down an ordinance forbidding video arcades from allowing minors unaccompanied by an adult to play "an amusement machine that is harmful to minors."<sup>61</sup> As mentioned earlier in this paper, the appellate court expressed extreme concern over the limitation of the ideas expressed in video games and likened such restrictions to the control of children's access to information exercised by Nazi Germany and denial of children's access to literary classics, fables, and mythology.<sup>62</sup> In its finding that video games merited First Amendment protection, the

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49 536 F. Supp 170 (E.D.N.Y. 1982).

50 *Id.* at 173.

51 *Id.* at 174

52 *Id.*

53 *Id.*

54 582 F. Supp. 297 (D.Mass 1983).

55 *Id.* at 299.

56 *Id.*

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57 929 F.2d 297 (7<sup>th</sup> Cir. 1991)

58 *Id.* at 303 (emphasis in original).

59 *Supra*, note 17.

60 244 F.3d 572 (7<sup>th</sup> Cir. 2001).

61 *Id.* at 573.

62 *Id.* at 576-78.

court drew a clear comparison between video games and other protected forms of expression:<sup>63</sup>

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. Protests from readers caused Dickens to revise *Great Expectations* to give it a happy ending, and tourists visit sites in Dublin and its environs in which the fictitious events of Ulysses are imagined to have occurred. The cult of Sherlock Holmes is well known. Most of the video games in the record of this case, games that the City believes violate its ordinances, are stories.<sup>64</sup>

This finding is in sharp contrast to the claim in *America's Best* that "a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element."<sup>65</sup> However, it does not stand alone in its disagreement with earlier decisions regarding video games and free speech. In all three of the tort dismissals analyzed here, the courts also found video games to be examples of free speech. The courts in *Sanders v. Acclaim Entertainment, Inc.*, *Wilson v. Midway Games, Inc.*, and *James v. Meow Media, Inc.* all found video games to be protected by the First Amendment, and all cited the *American Amusement* opinion in their decisions. Furthermore, the *Wilson* and *James* courses noted that the very nature of the suits,

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63 Although it upheld the ordinance, the U.S. District Court for the Southern District of Indiana also noted that some video games might be protected expression: "It is difficult for First Amendment purposes to find a meaningful distinction between the Gauntlet game's ability to communicate a story line and that of a movie, television show, book, or -- perhaps the best analogy -- a comic book." *American Amusement Machine Ass'n v. Cottey*, 115 F. Supp. 2d 943, 952 (S.D. Ind. 2000).

64 *Id.* at 577.

65 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

which sought damages for deaths and injuries allegedly caused in part by the messages and expression in the games, implied that the video games involved contained sufficient expression to merit First Amendment protection.<sup>66</sup>

Viewing these judgments in sequence, a general progression can be seen wherein video games were first placed outside the realm of protected expression, then brought under the First Amendment after a period of uncertainty. That trend, however, was broken by the *Interactive Digital* decision, which found that "video games have more in common with board games and sports than they do with motion pictures."<sup>67</sup> Citing several cases dealing with the application of the First Amendment to Bingo and blackjack games, the *Interactive Digital* court ruled that video games did not constitute protected speech.

In the context of the other federal decisions, this finding seems outdated. While the *Interactive Digital* opinion acknowledged the *American Amusement* ruling that video games enjoyed free speech protection, it attached more credence to the older *America's Best* ruling.<sup>68</sup>

### Appropriate Regulation if Protected

For those courts that considered video games to be protected speech, a second issue had to be addressed: What restrictions on this protected speech are acceptable? Here, the cases provide insight on a number of issues because they involved many different methods of regulation.<sup>69</sup>

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66 It should be noted that this holding regarding video games and protected expression is only applicable to the context of the particular cases: *E. g.*, *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6<sup>th</sup> Cir. 2002) ("Our decision here today should not be interpreted as a broad holding on the protected status of video games, but as a recognition of the particular manner in which James seeks to regulate them through tort liability.").

67 200 F. Supp. 2d 1126, 1134 (M.D. Mo. 2002).

68 *Id.* at 1133-1134.

69 As the first two cases in this analysis did not find video games to be protected free speech, they also do not address appropriate regulation of protected speech and are thus not discussed in this section.

Although the *Rothner* court refused to determine whether video games contained protected expression, the court did address the appropriateness of the regulation by noting that the ordinance in question was a legitimate time, place, and manner regulation and would not infringe on video games whether they were free speech or not.<sup>70</sup> However, the ruling in *American Amusement* concerned an entirely different manner of regulation.

In *American Amusement*, the ordinance in question was worded in a way that classified violent video games as obscenity, targeting the type of game

that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under that age, and contains either "graphic violence" or "strong sexual content."<sup>71</sup>

Consequently, the court ruled that it "brackets violence with sex."<sup>72</sup> The appellate court found this type of regulation inappropriate, stating, "Violence and obscenity are distinct categories of objectionable depiction, and so the fact that obscenity is excluded from the protection of the principle that government may not regulate the content of expressive activity neither compels nor forecloses a like exclusion of violent imagery."<sup>73</sup> While the court entertained the notion that violent imagery in video games might also be obscene, it noted that "offensiveness is not the basis on which Indianapolis seeks to regulate violent video games ... The basis of the ordinance, rather, is a belief that violent video games cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence."<sup>74</sup> Obscenity, therefore, was seen as irrelevant to an ordi-

nance dealing with potential harm caused by video games; with obscenity, "offensiveness is the offense," the court said.<sup>75</sup>

The appellate court in *American Amusement* went on to contest the validity of any restriction placed upon violent video games based on their potential for harm with a vigorous attack on the application of the experiments cited as support for the ordinance:

Those studies do not support the ordinance. There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere.<sup>76</sup>

After disqualifying the ordinance's basis in obscenity law, as well as any justification for it based on the medium's potential for harm, the court concluded that it is "unlikely" that any such ordinance would survive a constitutional challenge, unless the games involved were more graphically realistic or lacked narrative elements – and even in these cases, the court only noted that "a more narrowly drawn ordinance might survive a constitutional challenge."<sup>77</sup>

In the tort cases, the relevant issue was whether the intent of the expression in video games was to cause immediate harm. All three opinions concluded that the First Amendment precluded the award of any damages unless the expression met the criteria for restriction defined in *Brandenburg v. Ohio*: speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>78</sup> In each case, the court determined that the intent of the creators and distributors of the games in question failed to meet the *Brandenburg* test and were thus exonerated from tort responsibility by the First Amendment's protec-

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70 929 F.2d 297, 303-04 (7<sup>th</sup> Cir. 1991).

71 244 F.3d 572, 573 (7<sup>th</sup> Cir. 2001).

72 *Id.* at 574.

73 *Id.*

74 *Id.*

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75 *Id.* at 575.

76 *Id.* at 578-79.

77 *Id.* at 579-80.

78 395 U.S. 444, 447 (1969).

tion.<sup>79</sup> The James court's opinion regarding the applicability of the *Brandenburg* test to video games and their effects exemplifies the decisions: "This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test."<sup>80</sup>

Even considering the *Rothmer* court's allowance of a time, place, and manner regulation, these cases finding video games to be free speech therefore advocate no content-based restriction of video games. Once again, however, the *Interactive Digital* ruling is in opposition. While the court did not find video games to be a protected form of speech in this case, the opinion goes on to speculate whether the ordinance in question would apply "even if plaintiffs could establish that the video games are a form of expression."<sup>81</sup> In applying strict scrutiny to the content-based regulation, which forbade minors from accessing violent video games without parental permission, the court in *Interactive Digital* ruled that the ordinance addressed a compelling government interest and was narrowly tailored enough to survive a constitutional challenge.<sup>82</sup>

Interestingly, the primary witness used to support the government interest was psychologist Craig Anderson, just as in *American Amusement*. Unlike the court's assessment in *American Amusement*, however, the *Interactive Digital* opinion found Anderson's research and testimony more compelling: "For plaintiffs to now argue that violent video games are not harmful to minors is simply incredulous. Therefore, the Court finds that the County has compelling interests in regulating the distribution of violent video games to minors."<sup>83</sup> In this manner, the *Interactive Digital* court concluded that the ordinance would survive strict scrutiny even if video games were protected speech – which the court ruled they were not.<sup>84</sup> Once again, this stands in opposition to other rulings addressing the regulation of video

games protected by the First Amendment, especially the *American Amusement* ruling on a very similar ordinance.

### Irreconcilable Differences?

It may first appear that the holdings in *America's Best* and *Malden* that video games are not protected speech cannot be reconciled with later opinions, such as *American Amusement*, *James*, *Sanders*, and *Wilson*, which held that the reverse is true and that such speech should not be subject to tort suits and content-based regulation.<sup>85</sup> However, some of this apparent conflict can be explained by the development of the medium, both in technology and content. As noted above, Sherry finds problems with meta-analysis of video game research because of the "generational" differences in games.<sup>86</sup> This evolution may also explain the concurrent evolution in federal courts' stance on video games through the years; video games have become increasingly more advanced, and thus more capable of expression. In the *Wilson* opinion, the court expands upon this:

In sum, the cases are reconcilable on this point: While video games that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment. ... In short, the label "video game" is not talismanic, automatically making the object to which it is applied either speech or not speech.<sup>87</sup>

Given this view, the inconsistencies in many of the rulings' treatment of video games is not problematic; they merely represent changes in the me-

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79 198 F. Supp. 2d 167, 182 (2002); 188 F. Supp. 2d 1264, 1282 (2002); 300 F.3d 683, 698-699 (2002).

80 300 F.3d 683, 698 (6<sup>th</sup> Cir. 2002).

81 200 F. Supp. 2d 1126, 1135 (M.D. Mo. 2002).

82 *Id.* at 1138-1139.

83 *Id.* at 1138.

84 *Id.* at 1141.

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85 Except in instances where the *Brandenburg* test or strict scrutiny is met; however, the courts in these cases do not indicate any examples, apparently considering this a hypothetical situation.

86 Sherry, *supra* note 2, at 424.

87 198 F. Supp. 2d 167, 181 (2002).

dium over time, and possibly the time required for the medium to gain a higher level of societal acceptance.

However, this evolution of the medium does not explain the *Interactive Digital* ruling, nor do factual differences between *Interactive Digital* and recent cases. Especially in comparison with the most factually similar federal case, *American Amusement*, it appears the diametrical opposition of the *Interactive Digital* court to all its contemporaries' conclusions is not reconcilable. While the court in *American Amusement* – and most other recent cases – found video games to be protected expression all but immune to content-based regulation, the *Interactive Digital* opinion is more similar to federal cases from nearly two decades previous. In the absence of significant differences in the ordinances addressed in *American Amusement* and *Interactive Digital*, the only reasonable conclusion is that one ruling is incorrect.

### Conclusion

When federal cases involving video games and free speech are compared, a pattern emerges. As years go by and the medium matures, the courts tend to be more receptive to recognizing the medium as protected free speech. Similarly, they are more reluctant to uphold regulation of the games that would limit the producers' and purveyors' First Amendment rights. This pattern is steady and slow, involving seven federal cases over almost 20 years.

However, the *Interactive Digital* decision forces this advancement back to its start, despite the fact that one must go nearly that far back in time to find judicial support for the decision. Despite prevailing recent judicial opinion that video games are protected speech and a lack of consensus in the academic research dealing with video games and real-life aggression,<sup>88</sup> the *Interactive Digital* court concluded that video games *are not* protected speech but *do* cause aggression. Though this ruling might have been typical in the early 1980s, it now represents a clear contradiction to the existing climate in relevant cases.

This is a contradiction that should be resolved, and it will be if the *Interactive Digital* decision is overturned on appeal. If not, however, the inconsistency will remain, and its eventual resolution is unknown. If the *Interactive Digital* decision is representative of the shape of things to come, however, the First Amendment will certainly lose some ground in the scope of this protection. The societal implications of such limitations are difficult to ascertain, but we can look to the *American Amusement* decision for one perspective on the issue:

People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble. ... To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."<sup>89</sup>

In light of this comment, it is clear that more than fun and games is at stake in this controversy. While many may look to the possible dangers video games will present to children if the *Interactive Digital* decision is overturned, perhaps we ought to cast our thoughts toward what dangers are presented when such regulations are upheld.

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88 See, e. g., Brief of Amici Curiae at 4-5, Banet-Weiser et al., *Interactive Digital Software Association* (No. 02-3010).

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89 244 F.3d 572, 577 (2002).