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**Communications and Media Law Committee**
**Information Technology Law Committee**

Statement on New York State Legislation Regulating the Sale or Distribution of Video Games Based on Violent Content or Rating

Proposed bills that would regulate the sale or distribution of video games based on violent content or the game's rating are under consideration this session in New York State. Specifically, the Governor of New York has proposed a bill ("the Governor's Bill") that would bar selling or loaning minors video games that include "depictions of depraved violence and indecent images." In addition, Senator Lanza introduced S5888, which would ban the sale or rental of video games "in contravention of the rating affixed thereto." S5888 passed the full Senate on May 21, 2006. The undersigned Committees of the Association of the Bar of the City of New York[1] are extremely concerned about these measures because we believe these measures are unconstitutional. While the Committees appreciate and share the concern about protecting our youth, we believe that the better approach is to pursue constitutional measures, such as an educational campaign for consumers and parents about the existing video game rating system.

Nine federal courts in the past six years have reviewed laws attempting to regulate the sale of video games based on their violent content or rating. *Every* one of these laws has been struck down as unconstitutional. *See Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entertainment Merchants Ass'n v. Henry*, No. 06-675, 2006 WL 2927884 (W.D. Okla. Oct. 11, 2006) (preliminary injunction); *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd* 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (preliminary injunction); *Video Software Dealers Assn v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("*IDSA*"); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ("*AAMA*") (Posner, J.).

[1] The Association of the Bar of the City of New York (the "Association") is a professional association with more than 22,000 members, including judges, prosecutors and defense attorneys.

Video games are fully protected expression under the First Amendment and cannot be regulated as harmful to minors on the basis of "violent" content. *See, e.g., Blagojevich*, 404 F. Supp. 2d at 1076; *IDSA*, 329 F.3d at 959-960. Although the Governor's Bill purports in part to regulate indecent images that are "harmful to minors," it also contains restrictions on video games that include depictions of depraved violence. To the extent that this prohibition plays a meaningful role in defining which games are restricted, it is a content-based regulation that is subject to strict scrutiny. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-27 (2000); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Although the Governor's Bill attempts to provide a new approach to drafting such legislation, every court that has reviewed laws attempting to restrict the distribution of video games based on their violent content has struck such laws for failure to meet the requirements of strict scrutiny. *See e.g.*, *Hatch*, 443 F. Supp. 2d at 1069; *Blagojevich*, 404 F. Supp. 2d at 1072-76; *Granholm*, 426 F. Supp. 2d at 651-55; *ISDA*, 329 F.3d at 958-59; *AAMA*, 244 F.3d at 576-77; *Maleng*, 325 F. Supp. 2d at 1190. Similarly, the Second Circuit, in *Eclipse Enterprises, Inc. v. Gulotta,* overturned a Nassau county ordinance banning the sale of trading cards with pictures and descriptions of heinous crimes or criminals, finding that the restriction violated the free speech clause of the First Amendment. 134 F.3d 63 (2nd Cir. 1997) (*"Eclipse")*.

Under the Supreme Court's standard in *Brandenburg v. Ohio,* violent expressions may only be censored if such speech is "directed to inciting" and is "likely" to cause "imminent" violence. 395 U.S. 444, 447 (1969). The courts have uniformly held that violent video games do not satisfy the stringent requirements of the *Brandenburg* standard. *See, e.g.*, *AAMA*, 244 F.3d at 575; *Foti*, 451 F. Supp. 2d at 831-33; *Blagojevich*, 404 F. Supp. 2d at 1073-74.

The Committees note that the Statement in Support of the Governor's Bill cites Dr. Craig Anderson as a psychological expert whose research has found a connection between playing violent video games and violent behavior. However, a federal district court in Illinois heard testimony from Dr. Anderson in the *Blagojevich* case and found that his research did not establish a causal connection between violent video games and violent behavior. *Blagojevich*, 404 F. Supp. 2d at 1073-74, *see also id.* at 1059-63. Other courts have looked at the same evidence and reached the same conclusions. *See, e.g.*, *Hatch*, 443 F. Supp. 2d at 1069; *Foti*, 451 F. Supp. 2d at 832. Similarly, in *Eclipse*, the Second Circuit found that Nassau County was unable to present evidence demonstrating a link between youth violence and exposure to violent material. 134 F.3d 63 (2nd Cir. 1997). Finally, the courts have rejected the argument that restrictions on video games can be justified as a means to prevent "psychological harm" to minors. *See, e.g.*, *Foti*, 451 F. Supp. 2d at 831; *Blagojevich*, 404 F. Supp. 2d at 1074; *IDSA*, 329 F.3d at 958-59; *AAMA*, 244 F.3d at 578-79; *Maleng*, 325 F. Supp. 2d at 1187.

Courts reviewing this type of legislation have raised additional concerns regarding their constitutionality. Specifically, courts have held that singling out video games from other media containing violent images heightens concern that the bill does not advance its purported interests. *See e.g., AAMA*, 244 F.3d at 579; *Granholm*, 426 F. Supp. 2d at 654. In addition, courts have held such legislation unconstitutional because less speech-restrictive means are available to achieve the legislation's end, such as a consumer ratings awareness campaign or technological parental controls.

*See, e.g.*, *Granholm*, 426 F. Supp. 2d at 654-55. Courts also have held that bills which attempt to define "violence" fail because they are unconstitutionally vague. *See e.g., Maleng*, 325 F. Supp. 2d at 1190; *Blagojevich*, 404 F. Supp. 2d at 1077; *Granholm*, 426 F. Supp. 2d at 655.[2]

Finally, the fact that S5888 incorporates the Entertainment Software Ratings Board's (ESRB) existing voluntary rating system does not make it constitutional. To the contrary, by codifying the ESRB's voluntary ratings, the proposed law would violate due process by unlawfully delegating legislative authority to a private entity. *See, e.g., Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995); *State v. Watkins*, 191 S.E. 2d 135, 143-44 (S.C. 1972), *vacated and remanded on other grounds, Watkins v. South Carolina*, 413 U.S. 905 (1973); *Potter v. State*, 509 P.2d 933, 935 (Okla. Ct. Crim. App. 1973). Similarly, laws which were enacted shortly after the Motion Picture Association of America ("MPAA") implemented a private motion-picture rating system in 1968 were invalidated by courts because they attempted to incorporate the MPAA ratings into law. *See, e.g., Motion Picture Ass'n of America v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1135 (E.D. Wis. 1970); *Drive In Theatres v. Huskey*, 305 F. Supp. 1232 (W.D.N.C. 1969), *aff'd*, 435 F.2d 228 (4th Cir. 1970); *cf. Watkins*, 191 S.E.2d 143-44 (striking down portion of obscenity law that created affirmative defense for films bearing the MPAA's earlier Code Seal of Approval); *Potter,* 509 P.2d at 935 (same). Just last year, in *ESA v. Hatch*, a federal District Court in Minnesota rejected state legislation which sought to incorporate ESRB ratings into the law, declaring such a delegation of authority a violation of the First and Fourteenth Amendment. *Hatch*, 443 F. Supp. 2d at 1070-1071.

The Committees are concerned that the passage of such a bill would impose unnecessary costs on New York taxpayers. Since a statute that singles out constitutionally protected speech is a violation of civil rights, prevailing plaintiffs who invalidate the law are entitled to an award of court costs and attorneys' fees. Thus, taxpayers would not only bear the cost of defending an invalid law, but also the cost of a successful challenge. In the past six years, federal district courts have granted over $1.6 million in attorneys' fees in video game regulation cases, including $510,000 in the *Blagojevich* case, $180,000 in the *Granholm* case, $91,000 in the *Foti* case, $350,000 in the *Maleng* case, $318,000 in the *AAMA* case and $180,000 in the *IDSA* case. Preceding the video game cases, in the 1997 *Eclipse* case decided by the Second Circuit, attorneys' fees in the amount of $155,000 were awarded to the plaintiffs for their successful challenge of a Nassau County ordinance banning the sale of trading cards with pictures and descriptions of heinous crimes or criminals.

The Committees would like to reiterate our concern about the constitutionality of the bills described above. We urge state lawmakers to instead pursue other constitutional approaches to protecting our youth, such as a consumer and parent education campaign.

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[2] *See also Violence in the Media: A Position Paper*, by the Committee on Communication and Media Law, Association of the Bar of the City of New York. Vol. 52, No. 3 The Record 1997 (Committee Report surveying attempts to regulate violence in the media and applicable constitutional limitations).

Respectfully Submitted,

Communications and Media Law Committee
Information Technology Law Committee

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