

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ENTERTAINMENT SOFTWARE
ASSOCIATION AND ENTERTAINMENT
MERCHANTS ASSOCIATION,

Plaintiffs,

vs.

CHARLES C. FOTI, JR., in his official
capacity as Attorney General of the State of
Louisiana; and DOUG MOREAU, in his
official capacity on behalf of himself as
District Attorney for the Parish of East
Baton Rouge, and on behalf of a class of
similarly situated individuals in their official
capacities,

Defendants.

CIVIL ACTION NO. 06-431-JJB-CN

SECTION "D"

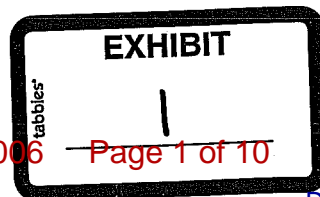
Judge James J. Brady

DECLARATION OF DOUGLAS LOWENSTEIN

Pursuant to 28 U.S.C. § 1746, I, Douglas Lowenstein, under penalty of perjury state as follows:

1. I am currently employed as President of the Entertainment Software Association ("ESA"). I have been the President of the ESA (formerly known as the Interactive Digital Software Association) since June of 1994.

2. The ESA is the only U.S. trade association exclusively dedicated to serve and promote the business and public affairs interests of companies that publish entertainment software used for video game consoles (such as Nintendo GameCube, Microsoft Xbox, and Sony Playstation 2), personal computers, wireless, and the Internet. One such interest that the ESA promotes is these companies' right to publish and distribute works of expression that are



protected under the First Amendment to the United States Constitution and similar provisions of the constitutions of the various States. The ESA's membership includes a number of entities that distribute and/or supply video games and related software to owners and operators of sales and rental outlets within Baton Rouge and throughout the State of Louisiana.

3. As a result of my duties as President of the ESA, I have personal knowledge of the facts stated in this declaration.

The ESRB Rating System

4. The Entertainment Software Rating Board ("ESRB") is a self-regulatory body established by the ESA to independently rate the content of interactive entertainment software for all platforms.

5. In 1994, the ESRB created a rating system for computer and video games. In a September 2000 report, the Federal Trade Commission ("FTC") called the ESRB rating system the "most comprehensive" of industry-wide media rating systems. *See* FTC, Marketing Violent Entertainment to Children, at 37 (September 2000), available at <http://www.ftc.gov/reports/violence/vioreport.pdf> ("2000 FTC Report"). Senator Joe Lieberman has called the ESRB system a model for other entertainment industries to follow, and the president of the National PTA calls the ESRB rating system "an extremely useful and informative tool" and urges parents to check the ratings every time they buy video games for their families. *See* Exhibit A. The Henry J. Kaiser Family Foundation's research found that parents say that among all entertainment rating systems (TV, movies, music and games), the ESRB ratings are the most "useful." *See* Kaiser Family Foundation, Parents, Media and Public Policy, at 16 (Fall 2004), available at <http://www.kff.org/entmedia/upload/Parents-Media-and-Public-Policy-A-Kaiser-Family-Foundation-Survey-Report.pdf> ("Kaiser Report"). In its reports on the rating systems of the video game, movie, and music industries, the FTC has found that the video game industry

does a *better* job than its media counterparts (DVD's, CD's) in ensuring that unaccompanied minors are unable to buy age-inappropriate material. FTC, Marketing Violent Entertainment to Children at 10, 18, 26-27 (July 2004), available at <http://www.ftc.gov/os/2004/07/040708kidsviolencerpt.pdf>. And the FTC's most recent mystery shopper audit of retailers shows rapid improvement in voluntary efforts to enforce store policies not to sell M-rated games to children under 17, having reached parity with the enforcement levels the film industry has achieved after decades of efforts to not sell tickets to see R-rated movies in theatres to children under 17. FTC, "Undercover Shop Finds Decrease in Sales of M-Rated Video Games to Children" (March 30, 2006), available at <http://www.ftc.gov/opa/2006/03/videogameshop.htm>.

6. The ESRB rating system was created as part of the industry's commitment to empower parents and other consumers to make informed decisions based on the general content and nature of games that they may buy, rent, or play. The rating system was designed to provide credible, reliable, and easily understood information about games to consumers. Like the movie rating system, the ESRB rating system is entirely voluntary; neither the ESA nor the ESRB requires video game publishers to submit their games to the ESRB for review, even though nearly all such publishers do so. The ESA is not, and has never been, involved directly or indirectly in the issuance of ratings by the ESRB, or in the ESRB's activities related to enforcement of its rating and marketing guidelines. The ESRB is funded in part by fees that it charges companies, which submit products to the ESRB for ratings.

7. The purpose of the ESRB rating system is to give parents and consumers information about the content of interactive entertainment software products so that they can make informed purchase and rental decisions. For any given game, the rating system offers

both: (i) an actual rating in one of six categories for age appropriateness of content; and (ii) short descriptive phrases called “content descriptors” that give additional information about a game’s content. A copy of the ESRB’s rating system, including both the rating categories and the glossary of content descriptors, is attached as Exhibit A.

8. Under the ESRB system, games designated “EC” (Early Childhood) contain content that may be suitable for users age 3 and older, games designated “E” (Everyone) contain content that may be suitable for users age 6 and older, games designated “E10+” (Everyone Ten and Older) contain content that may be suitable for users age 10 and older, games designated “T” (Teen) contain content that may be suitable for users age 13 and older, games designated “M” (Mature) contain content that may be suitable for users age 17 and older, and games designated “AO” (Adults Only) contain content that the ESRB suggests should only be played by users 18 and older.

9. The ESRB rating system is dynamic, and is responsive to changes in the marketplace and to feedback from parents and customers. For example, the ESRB recently amended its rating system to add the new “E10+” rating, after consultations with academics and child development experts, and has made numerous additions and changes to the content descriptors it now uses, which now total over 30.

10. The ESRB also assists video game publishers and retailers in educating parents and other consumers about video games. Among other things, the ESRB makes available to video game publishers standardized graphics for video game packaging, including the trademarked ESRB rating symbols and content descriptors, as well as signs and labels alerting consumers to “check the ratings.” These ESRB-distributed labeling templates are widely used by video game publishers. These standardized materials, as used and adapted by video game

publishers and retailers, represent the video game industry's collective message of how best to inform and describe the ESRB system to parents and other customers. The value of these materials as an educational tool for parents is particularly important, as the FTC has found that parents are involved in 83% of video game purchases for minors. *See* 2000 FTC Report at 42. Further, a recent report from the Kaiser Foundation has found that more parents (53%) find the video game rating system "very useful" than any other rating system, including the rating system for movies. *See* Kaiser Report at 16.

The Louisiana Statute

11. In my capacity as President of the ESA, I have remained informed about the issues and processes concerning the recently enacted R.S. 14:91.14, also known as Act # 441 of the 2006 Regular Legislative Session (hereinafter, the "Act"), which was signed into law on June 15, 2006.

12. The Act imposes criminal penalties on anyone who sells, leases, or rents to anyone under the age of 18 a "violent" video game as defined by the Act. The video games proscribed by the Act are those that meet three criteria: "(1) The average person, applying contemporary community standards, would find that the video or computer game, taken as a whole, appeals to the minor's morbid interest in violence. (2) The game depicts violence in a manner patently offensive to prevailing standards in the adult community with respect to what is suitable for minors. (3) The game, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." Act, § 91.14(A). A person who violates the Act is subject to fines in the range of one hundred to two thousand dollars, and/or up to one year of imprisonment, with or without hard labor. *Id.*, § 91.14(B)(3).

13. Some of the video games created, published, distributed, and/or made available to the public by the ESA's members may be deemed by law enforcement officials in the State of

Louisiana to meet the statutory definition of games that are prohibited to be sold, leased, or rented to minors. Should the Act take effect, some retail establishments will likely sell or rent fewer copies of certain games because those games can no longer be sold or rented to minors under the Act, while other retailers may choose not to stock some games altogether – for adults or children – for fear of being subjected to the penalty for selling games that may be deemed covered by the Act to individuals under age 18. In either case, because the Act restricts the sale of ESA members’ products, it will prevent the expression of ESA members from reaching a wide range of willing recipients.

14. The Act unfairly singles out video games for government penalties, while other similar media containing depictions of “violence” – including movies, television, and magazines – are not subject to government regulation.

The Existence of Less Restrictive Alternatives

15. Anticipating the Act’s impact on the ESA members’ First Amendment rights, the ESA attempted to work with the Legislature prior to the passage of the Act to implement less speech-restrictive, constitutional means of achieving the Legislature’s goals.

16. To this end, on May 10, 2006 and May 30, 2006, representatives of the ESA and its members testified in the House Administration of Criminal Justice Committee and the Senate Judiciary A Committee, respectively. ESA representatives explained that the Act was unconstitutional because it infringed on individuals’ First Amendment rights and presented written materials about the Act’s constitutional flaws. ESA representatives also explained that the ESRB ratings system provides a reliable, independent guide for parents and consumers to determine whether they find particular video games suitable for their children. Further, ESA representatives described the efforts the industry has undertaken to educate parents and other

consumers about video games and the ESRB rating system. Educating parents and the public about the ESRB rating system would be an alternative means of achieving the Legislature's goals, for, as the FTC has found, parents are involved in 83% of video game purchases for minors. *See* 2000 FTC Report at 42.

17. The ESA has also explained that the availability of technological parental controls make the Act's censorship particularly unjustified. All three of the next-generation game consoles manufactured by Microsoft, Nintendo, and Sony will include parental controls allowing parents to limit a child's access to games based on the games' ESRB rating, an option that Microsoft's latest console already offers. This technology allows parents to choose to monitor and control the content of video games played by their children. The controls are similar in concept to the V-Chip used in televisions, and offer parents a technological tool to control their children's access to entertainment that is not yet available for devices such as DVD players and portable music players. While the Act was being considered, representatives of the ESA and its members disseminated information about this parental control technology.

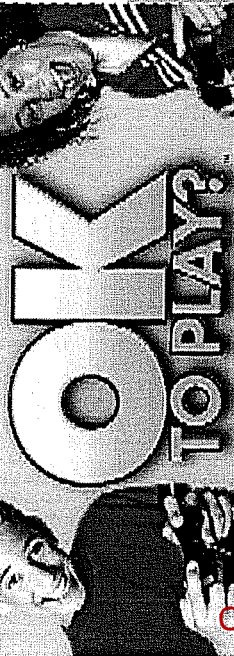
18. The Legislature rejected these offers to work together with the ESA and members of the video game industry, refusing to consider less speech-restrictive alternatives in lieu of enacting the Act's criminal prohibitions. Although informed of the Act's constitutional failings, the Legislature and the Governor nonetheless chose to enact the Act into law, rather than to explore less speech-restrictive means of achieving their goal of preventing certain video games from being disseminated to minors.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on June 16, 2006.

A handwritten signature in black ink, appearing to read "Douglas Lowenstein", written over a horizontal line.

Douglas Lowenstein



OK TO PLAY?

CHECK THE RATINGS ON EVERY COMPUTER & VIDEO GAME BOX

Rating symbols on the front of the box:

Early Childhood — may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.

Everyone — may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.

Everyone 10+ — may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.

Teen — may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and/or infrequent use of strong language.

Mature — may be suitable for ages 17 years and older. Titles in this category may contain intense violence, blood and gore, sexual content, and/or strong language.

Adults Only — should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.

Rating Pending — title has been submitted to the ESRB and is awaiting final rating. (This symbol appears only in advertising prior to a game's release.)

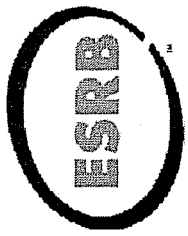
10+ Content descriptors are found on the back of the box. (See reverse side of this detachable pocket guide for a complete listing of content descriptors.)



Helpful Tips for Parents

- ▶ **Check the ratings.** Use both the rating symbol and content descriptors to select the most appropriate game for your child. Go to the ESRB website (www.esrb.org) before you head out to the stores.
- ▶ **Consider your child's unique personality, maturity and abilities.** Every child is different, and parents should use their judgment in deciding which games are appropriate for their children.
- ▶ **Use parental controls.** Newer platforms offer parents the ability to limit the type of content their children encounter.
- ▶ **Be cautious with online-enabled games.** Games that let users play with other people over the Internet sometimes contain live chat or other user-generated content that is not part of the ESRB rating.
- ▶ **Be aware of "mods" that can significantly change a game.** Content in many PC games can be altered through downloadable programs called "mods." As with online-enabled games, this content is not a part of ESRB ratings.
- ▶ **Play video games with your children.** Watch what they are playing and talk about games with them and others as often as possible.
- ▶ **Don't stop at the ratings.** Game reviews and "demos" that allow you to sample games are broadly available online and in game enthusiast magazines.

For more information and resources for parents, visit www.esrb.org

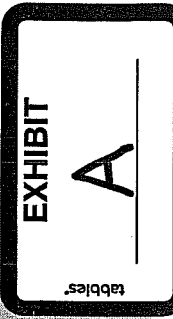


ENTERTAINMENT SOFTWARE RATING BOARD

WWW.ESRB.ORG

OK TO PLAY?

USING THE RATING SYSTEM FOR COMPUTER AND VIDEO GAMES HELPS PUT THE CONTROL IN YOUR HANDS



ESRB CONTENT DESCRIPTORS & DEFINITIONS

What Others Have To Say

"An overwhelming majority of the time (82%), parents agree with the ratings assigned by the ESRB, while another 5 percent of the time they thought that the ratings were too strict."

PETER D. HART RESEARCH ASSOCIATES, COMMISSIONED BY THE ESRB, NOVEMBER 2005

"The ESRB rating system is an extremely useful and informative tool. We urge parents to check the ratings every time they buy video games for their families."

ANNA WESELAK, NATIONAL PTA PRESIDENT

"Parents said that among all entertainment rating systems (TV, movies, music, and games), the ESRB ratings are the most useful, with 91% finding them 'very useful' (53% to 'somewhat useful' (38%)."

THE KAISER FAMILY FOUNDATION, SEPTEMBER 2004

"The electronic game industry's self-regulatory system is the most comprehensive of the three industry systems studied by the Commission. It is widely used by industry members and has been revised repeatedly to address new challenges, developments, and concerns regarding the practices of its members."

U.S. FEDERAL TRADE COMMISSION, SEPTEMBER 2000

"The ratings system makes it crystal clear whether or not the content of the video game is appropriate for young children."

U.S. SENATOR HERB KOHL (D-WI)

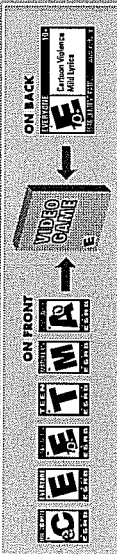
"I appreciate that parents want to purchase their children these exciting games. I understand that it's easy to just grab whatever's on the shelf, but I encourage all parents to check a game's rating to make sure that what they're giving is OK to play."

U.S. SENATOR GEORGE ALLEN (R-VA)

About the ESRB Rating System

In order to make informed purchase decisions, parents should check the ESRB rating on every computer and video game box. The Entertainment Software Rating Board (ESRB) independently applies ratings information and enforces advertising guidelines for computer and video games adopted by the interactive entertainment software industry.

The ESRB rating system has two parts: rating symbols, which are printed on the front of game packages, and content descriptors, which are printed on the back. Rating symbols suggest age appropriateness for the game, and content descriptors indicate elements in a game that may have triggered a particular rating and/or may be of interest or concern. Here is an illustration of the two parts:



Parents and other consumers can search for rating information before they go shopping by visiting the ESRB's website at www.esrb.org.

About Entertainment Software Rating Board (ESRB)

The ESRB is a non-profit, self-regulatory body established in 1994 by the Entertainment Software Association (ESA). ESRB independently applies ratings, enforces advertising guidelines, and helps ensure responsible online privacy practices for the interactive entertainment software industry.

Alcohol Reference:	References to and/or images of alcoholic beverages
Animated Blood	Cartoon or pixelated depictions of blood
Blood	Depictions of blood
Blood and Gore	Depictions of blood or the mutilation of body parts
Cartoon Violence	Violent actions involving cartoon-like characters. May include violence where a character is uninjured after the action has been inflicted
Comic Mischief	Scenes depicting slapstick or gross vulgar humor
Crude Humor	Moderately vulgar antics, including bathroom humor
Drug Reference	References to and/or images of illegal drugs
Edutainment	Content of product provides user with specific skills, development or reinforcement learning within an entertainment setting. Skill development is an integral part of product
Fantasy Violence	Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life
Informational	Overall content of product contains data, facts, resource information, reference materials or instructional text
Intense Violence	Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death
Language	Mild to moderate use of profanity
Lyrics	Mild references to profanity, sexuality, violence, alcohol, or drug use in music
Mature Humor	Vulgar and/or crude jokes and antics including "bathroom" humor
Mild Violence	Mild scenes depicting characters in unsafe and/or violent situations
Nudity	Graphic or prolonged depictions of nudity
Partial Nudity	Brief and mild depictions of nudity
Real Gambling	Player can gamble, including betting or wagering real cash or currency
Sexual Themes	Mild to moderate sexual references and/or depictions. May include partial nudity
Sexual Violence	Depictions of rape and/or other violent sexual acts
Simulated Gambling	Player can gamble without betting or wagering real cash or currency
Some Adult Assistance May Be Needed	Early Childhood Descriptor only
Strong Language	Profanity and explicit references to sexuality, violence, alcohol, or drug use
Strong Lyrics	Profanity and explicit references to sex, violence, alcohol, or drug use in music
Strong Sexual Content	Graphic depictions of sexual behavior, possibly including nudity
Suggestive Themes	Mild provocative references or materials
Tobacco Reference	Reference to and/or images of tobacco products
Use of Alcohol	The consumption or use of alcoholic beverages
Use of Drugs	The consumption or use of illegal drugs
Use of Tobacco	The consumption or use of tobacco products
Violence	Scenes involving aggressive conflict

Additionally, online games that include user-generated content (e.g. chat, maps, skins) carry the notice "Game Experience May Change During Online Play."

WWW.ESRB.ORG