

Legislative Analysis



LIMIT ACCESS TO VIDEO GAMES

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4702 as enrolled
Public Act 104 of 2005
Sponsor: Rep. Phil Pavlov

Senate Bill 416 as enrolled
Public Act 108 of 2005
Sponsor: Sen. Alan L. Cropsey

House Bill 4703 as enrolled
Public Act 105 of 2005
Sponsor: Rep. Tom Pearce

Senate Bill 463 as enrolled
Public Act 107 of 2005
Sponsor: Sen. Gerald Van Woerkom

House Committee: Judiciary
Senate Committee: Judiciary

Second Analysis (8-22-06)

BRIEF SUMMARY: House Bill 4702 and Senate Bill 463 would add video games to the obscenity laws, and House Bill 4703 would require information regarding a video game rating system to be posted where video games are sold or rented. Senate Bill 416 would prohibit knowingly disseminating to a minor an ultra-violent explicit video game, create a civil penalty for a violation, and create an affirmative defense for a person who acted in good faith. [Note: Part II of Senate Bill 416, regarding ultra-violent matter, was struck down as being unconstitutional by a federal district court on March 31, 2006. See Background Information.]

FISCAL IMPACT: The bills would have an indeterminate fiscal impact on the state and local units of government, depending on how they affected numbers of and sentences for people held responsible for state civil infractions, found guilty of misdemeanors, or found guilty of felonies. Depending on circumstances, offenders sentenced for criminal offenses may receive probation, a period of incarceration, a fine, or some combination thereof. The following table shows how the revenues and costs of various penalties would affect the state and local units of government.

Responsible for/Guilty of:	Fine	Court-ordered Costs ("Minimum State Costs")	Costs of Incarceration	Costs of Probation Supervision
State Civil Infraction	To local library	\$10 to state Justice System Fund	Not applicable	Not applicable
Misdemeanor	To local library	\$40 to state Justice System Fund	Local costs of incarceration in county jail; costs vary by county	Local.
Felony	To local library	\$60 to state Justice System Fund	Can be sentenced to jail or state prison. State prison: average appropriated FY 2004-05 cost of approximately \$29,000 per prisoner per year. Actual cost varies by location and security level.	State. Average FY 2004-05 cost of parole and probation supervision of \$5.42 per offender per day, or \$1,977 annually.

THE APPARENT PROBLEM:

Some video games contain violent and/or sexually explicit images that are not suitable for young children. Though some studies reveal benefits to game players such as increased eye-hand coordination and better spatial and visual skills, other studies have noted increased aggression in behavior in children and adults who played violent video games. In addition to concern with the long-term effects on children and adolescents from violent video games, there is a growing concern regarding nudity and lewd acts that are being portrayed in some games.

Most if not all video games are rated based on the suitability of the content for different age groups. A game rated M for Mature, according to the rating system by the Entertainment Software Rating Board (ESRB), may be suitable for persons ages 17 or older; M-rated games may contain mature sexual themes which can include mild to moderate sexual references and/or depictions – including partial nudity. The Adults Only (AO) rating by the ESRB (and ratings such as an NC-17 by other organizations) are suitable only for adults and contain graphic depictions of sex and/or violence.

Parents can use the ratings to decide whether a particular game is appropriate for their children. However, especially in the case of adolescents, a parent is not always with a child who is buying or renting a video game. Despite many parents' efforts, these games continue to fall into the hands of even young children. For example, a May 4, 2005 press release by Governor Granholm reported that an undercover investigation in six counties found that children as young as nine years old were able to purchase video games rated M or NC-17 at 26 of 58 stores.

Several bills were introduced in the House of Representatives and the Senate to address the issues of access to violent and sexually explicit video games.

THE CONTENT OF THE BILLS:

The bills would amend two different laws to address video games. House Bill 4702 and Senate Bill 463 pertain to video games that contain **sexually explicit** performances and visual representations. House Bill 4703 would require retailers to post information regarding a video game rating system. Senate Bill 416 primarily addresses **ultra-violent explicit video games** and would create civil and criminal penalties for prohibited acts, provide an affirmative defense to allegations of a violation, and include legislative findings regarding the impact on children of exposure to ultra-violent explicit matter. The bills have an effective date of December 1, 2005. The Senate bills are tie-barred to each other and to the House bills. Part II of Senate Bill 416, regarding ultra-violent matter, was struck down as being unconstitutional earlier this year. For further discussion of the court ruling, see the [Background Information](#) section.

"Video game" would be defined in the bills to mean an object or device that stores recorded data or instructions generated by a person who used it, and, by processing that data or instruction, creates an interactive game capable of being played, viewed, or

experienced on or through a computer, gaming system, game console, or other technology. Specifically, the bills would do the following:

House Bill 4702 and Senate Bill 463

House Bill 4702 and Senate Bill 463 would both amend Public Act 33 of 1978 (MCL 722.673), which pertains to disseminating, exhibiting, or displaying sexually explicit matter to minors. (The provisions of the two bills were not impacted by the recent litigation and are fully enforceable.) "Sexually explicit matter" is defined under the act to mean sexually explicit visual material, sexually explicit verbal material, or sexually explicit performance. The bills would add video games to the list of presentations in the definition of "sexually explicit performance" and the list of visual representations in the definition of "sexually explicit visual material" that depict nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse.

In addition, Senate Bill 463 would define the following terms: "computer," "computer network," "computer program," "computer system," and "device."

[Under the act, disseminating sexually explicit matter to a minor is a felony punishable by imprisonment for not more than two years and/or a fine of not more than \$10,000. Facilitative misrepresentation, which involves knowingly making a false representation that a person is the parent or guardian of a minor, or that a minor is 18 years of age or older, with the intent to facilitate the dissemination of sexually explicit matter to that minor, is a misdemeanor punishable by up to 93 days imprisonment and/or a fine of not more than \$5,000.]

House Bill 4703

House Bill 4703 would add a new section to the Michigan Penal Code (MCL 750.143a) to require a video game retailer (a person who sold or rented video games to the public) to post a sign in a prominent area within his or her retail establishment. (The provisions of House Bill 4703 were not impacted by the recent litigation and are fully enforceable.) The sign would have to provide information about a rating system or notify consumers that a rating system is available to aid in the selection of a game. The retailer would have to make information explaining the video game rating system available to consumers on request. A violation of the bill would be a state civil infraction. The retailer could be ordered to pay a fine of not more than \$1,000.

The bill would define "rating system" to mean any video game rating system shown on the exterior packaging of a video game when it was sold or rented. In addition, the bill would amend the title of the act to include in the title summary that the act also prescribes remedies.

Senate Bill 416

The bill would amend Public Act 33 of 1978 (MCL 722.671 et al.) as follows.

Part I Amendments. The bill would amend Part I, entitled Sexually Explicit Matter, which prohibits disseminating sexually explicit matter to a minor, to specify that the prohibitions contained in Part I would not apply to a medium licensed and regulated by the Federal Communications Commission; an Internet service provider or computer network service provider that was not selling the sexually explicit matter being communicated but that provided the medium for the communication; or a person who provided a subscription multichannel video service under terms of service requiring the subscriber to be not less than 18 years of age at the time of the subscription and to prove he or she was not less than 18 years of age through the use of a credit card, the presentation of a government-issued ID, or other reasonable means for verification of the subscriber's age. (The amendments to Part I were not impacted by the recent litigation.)

Part II Amendments. The bill would also add Part II (Ultra-Violent Explicit Video Games) to present legislative findings, prohibit a person from knowingly disseminating to a minor an ultra-violent explicit video game harmful to minors, create penalties, and provide an affirmative defense for those acting in good faith. For the purposes of Part II, "minor" would mean a person less than 17 years of age. (On March 31, 2006, a federal district court struck down the provisions that were added by Part II as unconstitutional under the First and Fourteenth Amendments; therefore, they are not enforceable.)

Legislative findings. The bill would list the following findings:

- That published research overwhelmingly finds that ultra-violent explicit video games are harmful to minors because minors who play them are consistently more likely to exhibit violent, asocial, or aggressive behavior and have feelings of aggression.
- That spokespersons of national health association have concluded that studies point to a causal connection between media violence and aggressive behavior in some children, and that the effects of media violence can be long lasting.
- That, according to law enforcement officers, minors are capable of purchasing, and do purchase, ultra-violent explicit video games.
- That minors have acted out ultra-violent explicit video game behaviors by victimizing other citizens.
- That the state has a legitimate and compelling interest in safeguarding the physical and psychological well-being of minors; preventing violent, aggressive, and asocial behavior from manifesting itself in minors; and directly and substantially alleviating the real-life harms perpetrated by minors who play ultra-violent explicit video games.

"Ultra-violent explicit video game" would mean a video game that continually and repetitively depicted extreme and loathsome violence. "Extreme and loathsome violence" would mean real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings, and would include actions causing death; inflicting cruelty; dismemberment, decapitation, maiming, disfigurement, or other mutilation of body parts; murder; criminal sexual conduct; or torture.

Prohibited actions and penalties. Under the bill, a person could not knowingly disseminate to a minor an ultra-violent explicit video game that was harmful to minors. "Disseminate" would mean to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to do the same. "Harmful to minors" would mean having all of the following characteristics:

- Considered as a whole, appeals to the morbid interest in asocial, aggressive behavior of minors as determined by contemporary local community standards.
- Is patently offensive to contemporary local community standards of adults as to what is suitable for minors.
- Considered as a whole, lacks serious literary, artistic, political, educational, or scientific value for minors.

A person would knowingly disseminate an ultra-violent explicit video game to a minor if he or she knew both the nature of the video game and the status of the minor to whom the video game was disseminated. Knowing the nature of the ultra-violent explicit video game means the person either was aware of the game's character and content or recklessly disregarded circumstances suggesting its character and content. Knowing the status of a minor would mean a person either was aware that the individual to whom the dissemination had been made was a minor or recklessly disregarded a substantial risk that he or she was a minor.

A person who violated the prohibition would be responsible for a state civil infraction and could be ordered to pay a fine of not more than \$5,000 for a first violation, a fine of not more than \$15,000 for a second determination of responsibility, and a fine of not more than \$40,000 for a third or subsequent determination of responsibility. In imposing a fine under this provision, the court would have to consider the scope of the defendant's commercial activity in disseminating ultra-violent explicit video games to minors.

The sanctions for disseminating would not apply to a parent or guardian who disseminated the video game to his or her own child or ward, to an immediate family member of the minor who disseminated the video game to the minor in the immediate family member's own residence or to the minor in the minor's own residence, to an individual who disseminated a video game to a minor who was a guest in the individual's residence, or to any person who disseminated the matter for a legitimate medical, scientific, governmental, or judicial purpose.

Falsely representing oneself as the parent or guardian of a minor, or falsely representing that a minor was 17 or older, with the intent to facilitate the dissemination to the minor of an ultra-violent explicit video game that is harmful to minors, would be a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$15,000, or both. A person would knowingly make a false representation as to the age of a minor if the person either was aware that the representation was false or recklessly disregarded a substantial risk that the representation was false.

A person who had managerial responsibilities for a business renting or selling ultra-violent explicit video games that are harmful to minors could not knowingly permit a minor not accompanied by a parent or guardian to play or view the playing of an ultra-violent explicit video game. A violation would be a misdemeanor punishable by up to 93 days' imprisonment and/or a fine of up to \$25,000.

A conviction, sentence, or determination of responsibility for a violation of Part II would not preclude a conviction, sentence, or determination of responsibility for a violation of any other law of the state arising from the same transaction.

"Good Faith" Affirmative Defense. The bill would specify that it would be an affirmative defense to an alleged violation under Part II (ultra-violent matter) that a person acted in good faith. Except as provided below, good faith would exist if, at the time the alleged violation occurred, all of the following conditions were satisfied:

- The minor showed the person identification that appeared to be valid and that contained a photograph and date of birth purporting to show that the minor was at least 17 years old, or the service terms of the Internet provider of a seller or rental enterprise that sold or rented ultra-violent video games over the Internet required a purchaser or renter to be at least 17 and the material was purchased or rented over the Internet, with a credit card, and sent to the purchaser's or renter's home or made directly available through the Internet to the purchaser or renter.
- The person did not have independent knowledge that the minor was under 17.
- The person complied with a rating system established by the pertinent entertainment industry that did not conflict with Part II.

For a person with managerial responsibility for a business enterprise, good faith would exist if, at the time the alleged violation occurred, the business had a policy that its employees were required to comply with a rating system described above, trained its employees to follow that policy, and enforced the policy.

BACKGROUND INFORMATION:

Definitions in the Act.

The act's definition of "sexually explicit visual material" is as follows: a picture, photograph, drawing, sculpture, motion picture film, or similar visual representation that depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse, or a book, magazine, or pamphlet that contains such a visual representation. An undeveloped photograph, mold, or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.

The act defines "sexually explicit performance" as a motion picture, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse. Also, the act

defines the term “harmful to minors” using a three-part test: (1) that the matter, considered as a whole, appeals to the prurient interest of minors as determined by contemporary local community standards; (2) that the matter is patently offensive to contemporary local community standards of adults as to what is suitable for minors; and (3) that the matter, considered as a whole, lacks serious literary, artistic, political, educational, and scientific value for minors.

The Entertainment Software Rating Board has created a rating system for video and computer games that is similar to movie ratings. For example, EC (early childhood) could be suitable for ages 3 and older, where T (teen) may be suitable for ages 17 and older; titles rated T could contain mature sexual themes, more intense violence, and/or strong language. A game rated AO (adults only) would be suitable only for adults as it could contain graphic depictions of sex and/or violence. Detailed information on the categories and content descriptors can be found on ESRB's website: www.ESRB.org.

Entertainment Software Association v Jennifer M. Granholm.

After Senate Bill 416 was signed into law as Public Act 108 of 2005, but before its effective date of December 1, 2005, the Entertainment Software Association (ESA) and Michigan Retailers Association filed a motion for summary judgment in federal district court claiming that Part II of PA 108, which proposed to regulate the dissemination of ultra-violent explicit video games, violated the free speech protections of the First Amendment and was unconstitutionally vague under the Fourteenth Amendment of the U.S. Constitution. On November 9, 2005, the court granted the plaintiffs' motion for preliminary injunction; the preliminary injunction prevented the state from enforcing Part II. On March 31, 2006, holding that PA 108 failed "to withstand the challenge that it is unconstitutionally vague," the same court once again ruled in favor of the plaintiffs and the injunction became permanent. (*Entertainment Software Association v Jennifer M. Granholm*, USDC docket No. 05-73634)

First Amendment protections. In deciding the merits of the plaintiffs request for summary judgment, the judge noted that the "notion that video games are protected free speech under the First Amendment is becoming widely adopted in Circuit Courts around the United States." (District Courts are the federal trial courts and Circuit Courts are the federal appeals courts. A party losing in Circuit Court could appeal the case to the U.S. Supreme Court.) In general, creative expressions are considered to be constitutionally protected free speech under the First Amendment. The defendant (the Governor, the Attorney General, and the Wayne County Prosecutor) argued that the "interactive functional element, which is not present in other forms of electronic media, can be distinguished and should not be considered protected speech." The court, however, found the functional aspects of a video game to be impossible to separate from the expressive and therefore ruled that video games were protected by the First Amendment.

Though courts have determined that children "are entitled to a significant measure of First Amendment protection" [quoting *Ernoznik v City of Jacksonville*, 422 U.S. 205, 212 (1975)], a previous Supreme Court case established that what may be protected under the

First Amendment when directed to adults may not be protected when directed to children [*James v Meow Media Inc.*, 300 F.3rd 683 (6th Cir. 2002) citing *Sable Communications v F.C.C.*, 492 U.S. 115 (1989)]. But, in order to support its claim that PA 108 did not violate the First Amendment, the state had to meet the standard of strict scrutiny by proving the law was necessary to further a compelling state interest and that its claims (that children have aggressive feelings or engage in aggressive behavior by playing video games containing violent images) were supported by substantial evidence.

In supporting its conclusion that the state did not meet the strict scrutiny standard, the court noted that PA 108 did not regulate other comparable forms of violent media from children, and that video games represented a small fraction of media-related violence to which minors are exposed. Moreover, laws need to be narrowly tailored to restrict only that which needs to be restricted in order to reach the stated goals – one of which was to keep ultra-violent video games from being sold or rented to minors. The wording of PA 108, however, made retailers the party responsible for determining if a specific video game would trigger the prohibition on disseminating it to a minor. The court recognized that the act therefore would have a chilling effect on video game retailers; if they could not determine the content of a video game in advance, they would have to avoid any game with any potential of triggering the act's civil and criminal penalties, which could then deny constitutionally protected free speech to both minors and adults.

The *ESA* court also stated that the defendants "failed to consider less restrictive ways of achieving their interests," such as campaigns to educate parents about rating systems used by the video game industry. As to supporting its claims with "substantial evidence" that violent games negatively impacted those minors who played them, the court noted that the state offered the same evidence used by the State of Illinois to defend a similar law; however, an Illinois federal district court had previously ruled that the State of Illinois did not support its claims with substantial evidence and the law was declared unconstitutional. [*Entertainment Software Association v Blagojevich*, 404 F.Supp2d 1051 (E.D. Ill. 2005)]

Therefore, the court held that PA 108 could not withstand the strict scrutiny test because "the State is unable to prove that it 'materially advances the State's purported goals, and that it does so in a narrowly tailored way.'" [quoting *R.A.V. v City of Paul*, 505 U.S. 377, 395 (1992)]

Fourteenth Amendment. Previous U.S. Supreme Court rulings have held that the Constitution requires laws to be sufficiently definite so that people are able to know and understand what conduct is and isn't prohibited. In regard to the definitions contained in Public Act 108, the *ESA* court ruled that the act's definitions lacked precision and would "subject Michigan retailers to steep civil and criminal liability if they guess wrongly about what games the Act covers." This could lead to retailers self-censoring or restricting access "to any potentially offending game title." If, in turn, authors and game designers gave a wider berth to a perceived unlawful zone than what was necessary to enable retailers to avoid triggering the act's penalties, then adults as well as minors would be deprived of access to expressions otherwise protected as free speech. Thus, to the

court, Public Act 108 failed "to withstand the challenge that it is unconstitutionally vague".

ARGUMENTS:

For:

House Bill 4702 and Senate Bill 463 address the problem of retailers selling or renting video games to minors that contain sexually explicit scenes. It does not address games considered to be violent. By specifically listing "video game" in the definition of sexually explicit performance and sexually explicit visual material, knowingly selling, renting, or lending a video game to a person 17 years of age or younger that contained images deemed as sexually explicit matter harmful to minors would subject a retailer (or anyone else) to the penalties outlined in the act – a felony punishable by up to two years imprisonment and/or a fine of not more than \$10,000. This is a better approach than other proposed bills that would have made it a crime to sell or rent games specifically rated Mature or Adult Only to minors; reportedly, that type of approach has raised constitutional questions over the legality of placing a private industry standard in statute.

Passage of the bills won't relieve parents of their responsibility to be aware of the content of the games their children play, but perhaps store owners and their employees will be less likely to sell or rent games containing nudity and sexual themes to children and teens when they realize the penalties that could be incurred.

Response:

The statute that House Bill 4702 and Senate Bill 463 would amend is typically used for controlling the sale and access to magazines and adult videos considered pornographic. Case law has established what constitutes sexually explicit material that is harmful to minors. However, where it is easy for a retailer to flip through a magazine to see if there is objectionable material or to scan a movie to do the same, the content of a video game is not as easy to determine. It can take days or months to complete the various levels in a video game and so retailers may not be aware of a game's content. Plus, there are currently over 800 video game titles with a rating of Mature, most of which would not rise to the level of being sexually explicit and perhaps a couple of dozen (primarily computer games) that would be rated AO and not suitable for persons under 18. And, some privately distributed games are not rated at all. Senate Bill 416 allowed as an affirmative defense for ultra-violent video games, that complying with rating guidelines would constitute compliance with the law. Perhaps House Bills 4702 and Senate Bill 463 should provide such an affirmative defense as well for sexually explicit video games.

For:

House Bill 4703 would require retailers who sell or rent video games to post a sign either with information about industry rating systems or saying that information on rating systems is available to customers upon request. A similar measure was enacted in California last year. The rating systems reflect the content of the video games and therefore help a parent determine whether a particular game is appropriate for his or her child. Some surveys reveal that only about half of parents understand the rating systems;

if information were readily available at the point of sale, parents and children could make informed choices.

For:

Senate Bill 416 specifically addresses the issue of ultra-violent explicit video games. The bill's aim was to define terms, clearly delineate when a person's actions would trigger penalties, and provide an affirmative defense for retailers and others who acted in good faith. The bill aimed at encouraging retailers to utilize industry rating systems. The bill, along with the other bills in the package, sought to incorporate a "community" approach to protecting children under 17 years of age from potentially harmful video games. The bills will not supplant parents as the primary individuals responsible for educating and protecting their children, but this is one area where it does take "a village to raise a child" as the popular saying goes.

Controversy over the impact on children from the exposure to such video games continues, but many studies have shown violent or aggressive behaviors can follow playing games that graphically depict violence. And, many of these games do disproportionately show violent acts against women and minorities. Even if a small percentage of children were negatively affected for either a short time or a long time after playing violent video games, decreasing access to such games would still have a positive effect on them, their families, and society.

Response:

The provisions of Senate Bill 416 that pertain to ultra-violent explicit video games were struck down earlier this year by a federal district court as violating free speech rights and being unconstitutionally vague. Similar attempts by other states to legislate the sales and rentals of video games considered to be overtly violent to minors have also been struck down by state and federal courts.

Moreover, in the last few years, many retailers have voluntarily instituted policies aimed at decreasing sales to minors of games rated for adult and mature audiences. The most recent "Video Game Report Card" released by the National Institute on Media and the Family revealed that minors were unsuccessful 66 percent of the time in their attempts to purchase Mature rated games as compared to just 45 percent the previous year. More time should be given to industry members to continue to develop and institute effective policies rather than taking a legislative approach.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Marilyn Peterson

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