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## Amendment bars law curbing violent video games

I recently had the good fortune to audit a short course titled The First Amendment Confronts New Technology, taught by professor Michael P. Seng of The John Marshall Law School. The irony is that the course was being presented in China, a country not known as a wellspring of free expression. The course was taught to American students on a summer abroad program in Beijing, so we did not gain any insights into what a typical Chinese law student would think about the First Amendment. But Beijing certainly presents an interesting venue for thinking about the First Amendment.

Hearing about, and to some extent experiencing, censorship while in China gave me a new perspective when I analyzed some recent Supreme Court cases that give a frustratingly broad reading to the constitutional concept of free speech. Just in the past year, the court has struck down governmental efforts to restrict “crush videos” (movies with graphic depictions of animal cruelty in which living animals are maimed, mutilated, tortured or killed) in *U.S. v. Stevens*, 130 S. Ct. 1577 (2010) and has struck down restrictions on protests staged near military funerals in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). Most recently, the court ruled that the First Amendment prohibits a state from enacting a law prohibiting the sale of violent video games to minors in *Brown v. Entertainment Merchants Association*, 2011 WL 2518809 (June 27, 2011). Though unpopular here in the States, when reading these cases in China one develops a greater appreciation of what the court is trying to protect.

In recognition of professor Seng’s First Amendment course, I decided it would be appropriate to write about the Supreme Court’s most recent foray into governmental restrictions on freedom of expression. While the First Amendment is not precisely an “intellectual property” issue, First Amendment principles often appear in copyright and trademark cases. And because “expression” is the focal point of First Amendment cases, many of these cases involve copyrightable subject matter, such as movies, literature or pictorial works. A case in point is the court’s recent decision, in *Brown*, which involves a very pervasive type of copyrighted work – video games.

In *Brown*, an association of video game companies challenged a California law that prohibits the sale or rental of violent video games to minors. The statute (signed into law by then-Gov. Arnold Schwarzenegger, formerly known as “The Terminator”) covers games which include “killing, maiming, dis-



### Inside IP Law

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membering or sexually assaulting an image of a human being,” but only if the game appeals to a “deviant or morbid interest of minors” that is offensive to prevailing community standards and lacks “serious literary, artistic, political or scientific value for minors.” This language closely tracks that of laws found permissible in restricting pornographic content, and California obviously felt that if these safeguards are sufficient to allow regulation of pornography, they should suffice to allow regulation of graphically violent video games for minors. But the Supreme Court did not see it that way and held that the law did not comport with the First Amendment.

The court first explained that video games qualify for First Amendment protection. Though the First Amendment is aimed at protecting discourse on public matters, Justice Antonin G. Scalia warned that “it is difficult to distinguish politics from entertainment and dangerous to try.” Like books, plays and movies, “video games communicate ideas — and even social messages ...” That is enough to qualify for First Amendment protection. Scalia reminded us that “aesthetic and moral judgments about art and literature ... are for the individual to make, not for the government to decree, even with the mandate or approval of a majority.”

There are exceptions to the First Amendment’s broad restrictions on governmental control over the content of speech, but they are very limited. Obscenity and “fighting words” have long been recognized as categories of unprotected speech. California sought to have violent video games treated as another such exception. But the court rejected this argument, noting that in the *Stevens* “crush video” case, supra, the court held that it would not create new categories of unprotected speech without persuasive evidence that the restriction is part

of a long “tradition of proscription.” The court said there has been no such tradition restricting children’s access to depictions of violence. In the words of Scalia, our traditional children’s literature contains “no shortage of gore.” To illustrate, Scalia observes that “ ‘Grimms’ Fairy Tales’ ... are grim indeed,” noting that Cinderella’s stepsisters have their eyes pecked out by birds and that Hansel and Gretel kill their captor by baking her in an oven! Whether the analogy of violent children’s literature (the court also mentioned William Golding’s “Lord of the Flies”) applies equally to interactive video games is a dubious proposition. The conduct of Hansel and Gretel seems qualitatively different than that in a “first person shooter” video game, where the player can shoot someone in the face and watch the blood pool. Though Scalia’s analogy may be inept, the court’s real point is that it will not create new categories of unprotected speech in the absence of a longstanding tradition of such restrictions.

In a concurring opinion, Justice Samuel A. Alito describes how some of these video games are truly depraved. “Victims by the dozens are killed with every imaginable implement ... [They] are dismembered, decapitated, disemboweled, set on fire and chopped into little pieces. They cry out in agony and beg for mercy ... Severed body parts and gobs of human remains are graphically shown.” The majority opinion counters by saying that Alito recounts these scenes to disgust us, but “disgust is not a valid basis for restricting expression.”

The court concluded that violent video games are protected content and that California failed to show a compelling government interest to justify the restriction. The enforcement of the statute was therefore enjoined.

I suspect that some of the games California sought to restrict would not be allowed in China. In 2004, according to the Xinhua News Agency, the Chinese Ministry of Culture set up a committee to screen imported online video games before they enter the Chinese market. Games would be banned from importation for, among other things, violating basic principles of the constitution, threatening national unity or disturbing the social order.

I think the scenes described by Alito could certainly be said to “disturb the social order” and would result in censorship of the game in China. But that is China; in America, our jurisprudence tolerates some degree of disturbance of the social order to ensure that our freedom of expression is properly preserved.