

ENTERTAINMENT LAW

A New Game Plan

By Guylyn Cummins

On Feb. 20, 2009 the 9th Circuit Court of Appeals struck down a California law banning the sale or rental of "violent video games" to minors and requiring such games to be labeled "18" (the legal age for adults). While this decision may surprise some California lawmakers and parents, its holding is fully consistent with substantial U.S. Supreme Court precedent entitling minors to a significant measure of First Amendment protection, and leaving parents with the duty to supervise "appropriate" content.

The lawsuit to invalidate California Civil Code Sections 1746 through 1746.5 (the Violent Video Games Act) was filed by several video software associations against California's governor and other elected officials. The act was sponsored by Sen. Leland Yee, D-San Francisco, a child psychologist, and signed into law on Oct. 7, 2005, by Gov. Schwarzenegger.

The act prohibited the selling or renting video games labeled as "violent" to minors. Violators were subject to a civil penalty of up to \$1,000 per violation.

The act defined a "violent video game" as any game where the range of options available to the player includes killing, maiming, dismembering or sexually assaulting an image of a human being if those are acts depicted in one of two ways:

"Either in manner that appeals to deviant or morbid interests of minors, is patently offensive to what is suitable to minors according to community standards, and where the game as a whole lacks serious literary, artistic, political or scientific value for minors; or, in a manner that enables the player to virtually inflict serious injury upon images of human beings or characters with substantial human characteristics in an especially heinous, cruel or depraved manner that involves torture or serious physical abuse to the victim."

The first method borrowed legal doctrine from obscenity laws. Obscenity is not protected speech under the First Amendment as it is deemed to have no value to society, i.e., to be without serious literary, artistic,

political or scientific value. The second method borrowed language from federal death penalty jury instructions to define "cruel," "depraved," "heinous" and "serious physical abuse" to include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

The act also required each "violent video game" imported into or distributed into California to be labeled with "18" in large lettering on the front of the package.

To justify passage of the act, California asserted it served two compelling interests: preventing violent, aggressive and anti-social behavior; and preventing psychological or neurological harm to minors who play violent video games.

The video game associations urged the court to strike down the act as violating minors' rights guaranteed by the First and 14th amendments. The court so ruled.

The court first struck down the act's ban on sales or rentals of "violent video games" to minors as an invalid content-based restriction on expressive speech. Video games are a form of expression protected by the First Amendment, and the act sought to restrict expression based on game content, i.e., violence.

Like other courts before it, the court adopted the "strict scrutiny" standard of review for the act, and not the less protective "variable obscenity standard" urged by California. The court noted the obscenity standards have been limited to non-protected, sex-based expression — not violent content that is protected by the First Amendment — and refused to go "where no other court had gone" before.

The court held the act could not survive strict scrutiny under the First Amendment, both because California failed to prove any compelling interest supported its enactment and because other less restrictive alternatives were available to protect minors. The court first looked to the breadth of the content of video games potentially affected by the act, noting it was highly diverse and included games like "Grand Theft Auto: Vice City," "Postal 2" and "Duke Nukem

3D," which show myriad ways in which characters can kill or injure their adversaries. The court also noted that some of these games have extensive plot lines that parallel historic events or place the player in a position to evaluate and make moral choices.

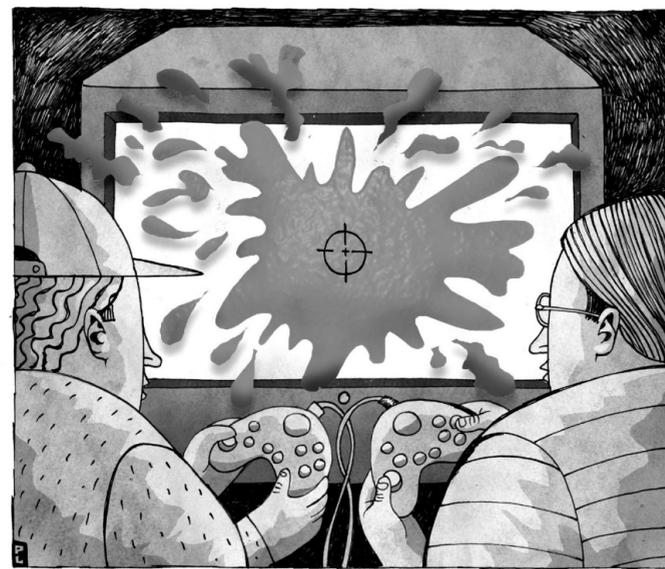
The court next noted the video game industry itself has a voluntary rating system to provide consumers and retailers with knowledge about the content of video games. The Entertainment Software Rating Board, an independent, self-regulated body, rates the content of games voluntarily submitted to it with one of six age-specific ratings, ranging from early childhood to adults only (18 and over). It also assigns each game one of 30 content descriptors, like "animated blood," "blood and gore," "cartoon violence," "crude humor," "fantasy violence," "intense violence," "language," "suggestive themes" and "sexual violence."

In applying strict scrutiny, the court noted that the Supreme Court has held that minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination and protective materials to them.

Content-based regulations are also presumptively invalid. Where restrictions on protected speech are not "narrowly tailored" to promote a compelling governmental interest, or a less restrictive alternative would serve the government's purpose, the regulation cannot stand.

Here, the court rejected California's argument that the act was supported by the compelling interest of protecting children playing violent video games from "actual harm to the brain." While acknowledging there is an abstract compelling interest in protecting the physical and psychological well-being of minors, the court ruled California failed to prove the harm was real and that the act would in fact alleviate that harm in a direct material way. The court also underscored that the Supreme Court has held government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

The studies California relied on to sup-



port its compelling interest were faulty. They themselves even contained disclaimers that significantly undermined the inferences drawn by California in support of its psychological harm rationale. The relative paucity of literature also showed a "glaring empirical gap" in video game violence research due to the lack of longitudinal studies. Furthermore, nearly all of the research California proffered was based on correlation — not evidence of causation — and therefore failed in methodology to prove California's claimed interest. While a state is not required to demonstrate a "scientific certainty," it must do more than California did to meet its burden of showing a compelling interest.

Even were a compelling interest shown by California, however, less restrictive alternative existed to protect minors. The industry itself has implemented enforcement methods like ratings, and parental controls on modern gaming systems could serve the government's purpose. Additionally, an enhanced education campaign directed toward retailers and parents concerning the industry rating system could help achieve California's asserted interest of protecting minors.

The court additionally struck the act's "18" labeling requirement as unconstitutional. While freedom of speech protections generally prohibit the government from tell-

ing people what they must say, courts have upheld a few commercial speech restrictions that require the inclusion of "purely factual and uncontroversial information" in advertising. Compelled disclosures must be justified by the need to dissipate the possibility of consumer confusion or deception and be "reasonably related" to the government's interest in preventing that confusion or deception.

Here, instead of requiring the disclosure of purely factual information, the act unconstitutionally forced video game manufacturers to carry California's subjective opinion, a message with which the industry disagrees. Additionally, because the Act cannot constitutionally characterize video games as "violent" and beyond First Amendment protections for minors, the "18" label did not convey accurate factual information, as there is no state-mandated age threshold for the purchase or rental of video games. The mandated "18" label therefore conveyed only a false statement that certain conduct is illegal when it is not, and California has no legitimate reason to force retailers to affix false information to their products.

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For Artists With Original Works, It's Buy Now or Pay Later

By Matthew W. Clanton

For those in the entertainment industry, the Academy Awards provided somewhat of a respite from all the bad news lately. Now that the Oscars are over, it's back to reality. The pressure to cut production costs for media works is larger than ever. One expense that should not be slashed, however, is the expense of registering a copyright in the work soon after it is created — whether that work is a written script, motion picture, a television episode, a commercial or a song. Considering that the standard Copyright Office filing fee for registration is between \$35 (if filing electronically) and \$45 (if filing the old fashion way on paper, which many still do), registration arguably provides a substantial dollar-to-dollar return on investment.

In this economic environment, is it really necessary to spend the time and money to register soon after a work is published? It's a fair question. The U.S. Copyright Act of 1976 (as amended) does not require express registration to secure a copyright in a work. The simple act of fixing the work in any tangible medium of expression is all that is required. You can even use the "(c)" symbol without formally registering a copyright. But these statutory perks do little to protect the intrinsic value of the work itself.

The Overarching Benefits

There are definite benefits to registering one's work after publication. For instance, early registration ensures that the jurisdictional requirements for bringing a copyright infringement claim are satisfied. Unlike in other countries, a plaintiff must first register the infringed work with the U.S. Copyright Office before bringing a lawsuit in U.S. federal court. 17 U.S.C. Section 411. There are also statutory benefits for registering early, including statutory damages (in lieu of actual damages) and attorney fees (subject to the court's discretion). 17 U.S.C. Sections 412, 504-505. In this regard, early registration — at least within three months of publication — can arguably be viewed as a kind of cheap form of multi-media insurance for copyright owners who may one day need to protect their works. As an added bonus, registering within five years of a work's publication serves as prima facie evidence of the validity of the copyright itself and the facts stated

in the certificate. 17 U.S.C. Section 410. Those who wait until after the five-year window leave the validity of their alleged copyright subject to the discretion of the court.

Unfortunately, copyright registration is all too often addressed at the eleventh hour when litigation is imminent. This typically entails a mad rush to complete the copyright registration form, track down the correct deposit material, and hand deliver the materials to the Copyright Office for processing — all under the pressure of "we've got to file the lawsuit now!" Since many courts require that the certificate be "in hand" as opposed to merely pending, and since the Copyright Office is currently experiencing a 12 to 13 month backlog on paper filings (and a shorter four- to six-month processing time for electronic filings), claimants who do not want to wait a seeming eternity to bring suit are forced to file on a "special handling" basis to speed up the processing time. The special handling fee is presently \$685, in addition to the \$35 to \$45 registration filing fee, meaning that the copyright owner has just spent more than 15 times the filing fees it probably would have spent had it simply filed when the work was initially published.

The Reconstruction Problem

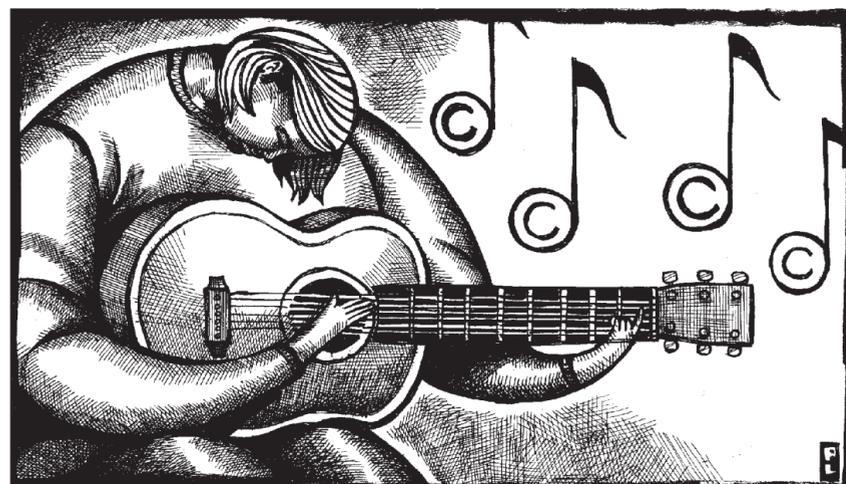
Early registration also potentially avoids an even larger issue — the ravages of father time and the risk of misplacing the original work itself. Copyright registration requires, among other things, the deposit of the original work or a bona fide copy with the Copyright Office. 17 U.S.C. Section 408. At first blush, this seems fairly straightforward — just produce the work. But delaying registration for a long period of time can make tracking down originals or "bona fide" copies extremely difficult, particularly in the case of original software programs that undergo frequent changes revisions. See, e.g., *Tavory v. NTP Inc.*, 495 F. Supp. 2d 531 (E.D. Va. 2007), where copyright registration in a software program was held invalid; deposit copy was reconstructed, was not the original version or copied from the original version, and did not function as the original version of the software. When registration is finally attempted, neither the original work nor an actual "bona fide" copy may be available, leaving the plaintiff in the tight spot of having to "reconstruct" the work

from memory. Relying on a reconstructed work poses significant risks to the lawsuit long before trial — much to the disappointment of clients who may blame the lawyer for failing to warn them of this possible outcome.

The U.S. deposit requirement serves two key purposes: to provide objective evidence that a work is copyrightable and to build a reliable evidentiary record that can be used to test infringement claims. The Copyright Office does not normally delve into questions of whether the work is an original, a bona fide copy or even a reconstructed copy. In theory, reconstructing a work from memory may allow the claimant to complete the registration process (assuming the deposit is filed in good faith) and overcome the jurisdictional hurdle to filing a lawsuit. But you can bet that the issue will be the subject of extensive discovery. Courts are increasingly reluctant to accept reconstructions because of an underlying concern for protecting the integrity of the U.S. copyright system. Basing an infringement claim on the claimant's "memory" of the salient facts in the case (the characteristics of the infringed work) might be viewed as too imprecise, especially if reconstruction occurs after the claimant views the alleged infringing work.

Consider, for instance, the 9th Circuit's decision in *Seiler v. Lucasfilm Ltd. et al.*, 808 F.2d 1316 (9th Cir. 1987). There, the plaintiff alleged that the Imperial Walker battle machines featured in "Star Wars: Episode V — The Empire Strikes Back" infringed on plaintiff's science fiction creatures called Garthian Striders. Unfortunately, the plaintiff's case was based on "reconstructions" of his works that he made after the film had already been released. The 9th Circuit affirmed summary judgment to Lucasfilms, holding that the reconstructions failed to satisfy the "best evidence" rule. See also *Kodadek v. MTV Networks Inc.*, 152 F.3d 1209 (9th Cir. 1998), which affirmed summary judgment against a plaintiff who alleged "Beavis and Butt-Head" series infringed on his characters after it was discovered that the plaintiff reconstructed his works by drawing them from memory after seeing the series.

The 1st Circuit similarly dismissed a copyright infringement claim in *Torres-Negron v. J&N Records LLC*, 504 F.3d 151 (1st Cir.



2007). The plaintiff wrote a song and recorded it for a friend who was in a band. Both the original words and the cassette were turned over to the band and never copied, retained or copyrighted. Approximately 11 years and several recordings, band iterations and record releases later, the plaintiff decided to register his copyright in the song. Since the plaintiff did not have the original recording and never retained any copies, he was forced to "reconstruct" the lyrics and re-recorded himself singing the song from memory. The 1st Circuit held that the plaintiff's registration certificate was invalid because it failed to comply with the deposit requirement, noting that the requirement could only be satisfied by submitting the original work or an actual copy made from the original. See also *Coles v. Stevie Wonder*, 283 F.3d 798, 802 (6th Cir. 2002), which held that the plaintiff's registration was invalid because the deposit copy, a song that the plaintiff claimed he had written in 1982, was merely "reconstructed" from memory as part of his registration in 1990.

Not all reconstructions will be held invalid. A reconstructed copy may serve as a valid deposit if it was reproduced from a "bona fide" copy of the original work. The reconstructed copy must be made by directly referring to the bona fide copy of the original. In that event, the reconstructed copy could serve as a valid deposit even if it contains minor errors or discrepancies from the bona fide copy. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000). But as pointed out by the 9th Circuit, there must

first be a bona fide copy, one that is "virtually identical to the original and ... produced by directly referring to the original." If there is not, the proffered deposit and resulting copyright registration may run the risk of being declared invalid.

The Transaction Angle

Aside from litigation, early registration also serves important commercial interests. The "eleventh hour filing" scenario may not be as exciting as in litigation, but delaying registration until a deal is imminent raises similar issues. From a due diligence perspective, verifying that all copyrights in an IP portfolio are registered is vital to verifying the value of the deal for all the reasons enumerated above.

From a transactional perspective, copyright registration substantiates the seller's claim of valid copyright ownership. Motion picture studios and record producers will (and rightly should) demand that the would-be licensee or seller of a work represents and produces evidence of valid copyright ownership as a condition of doing business. Companies wishing to acquire stock or assets of other businesses will (and rightly should) demand to see evidence of copyright registrations for all creative works that are going with the deal. Producing a valid copyright certificate (as well as a clear chain of title) is often the only objective way to verify that the seller truly owns the work(s) in question. "Getting around to" registration when the work is ready to be licensed or the underlying business sold does a great disservice to

one's IP portfolio and suggests poor business management. If the passage of time renders it impossible to find the original work or a bona fide copy, the perceived value of the work may be impaired.

Fortunately, the above scenarios can easily be avoided. Copyright creators or owners need only promptly register their copyrights after creation, keep originals or bona fide copies safely tucked away for easy retrieval, and ensure that corporate retention records adequately ensure that originals and bona fide copies are retained. At the very least, copyright creators and owners should retain one original copy of every work, and any related materials, which can then be used to make supportable copyright filings at a later date should litigation or other business needs arise.

The recession certainly makes the budget process difficult. But from a value-preservation standpoint, copyright registration is just as, if not even more, important now than in better economic times. Dollar for dollar, it offers an important array of arsenals to protect the value of one's creative work. It all comes down to a simple question: Do you believe that your work (and the time and effort to create it) is worth \$35 to \$45? If so, the expenses associated with registration may well be worth it, budget pressures notwithstanding.

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