

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Empowering Parents and Protecting Children ) MB Docket No. 09-194  
in an Evolving Media Landscape )  
 )

**COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION**

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February 24, 2010

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The Entertainment Software Association (“ESA”)<sup>1</sup> submits these comments to reiterate its view that the Commission lacks jurisdiction and expertise to regulate the entertainment software industry and video games (including video game consoles and the industry’s video game rating system), and to caution that government efforts to regulate the medium would not withstand First Amendment scrutiny. For the sole purpose of aiding the Commission in its fact-gathering role, the ESA also is providing information about the industry’s unquestionable success in empowering parents in preventing their children who use video games from accessing inappropriate content and about the important pro-social role that video games play in consumers’ lives.

These comments elaborate and expand upon the pleadings that the ESA filed regarding the Commission’s statutorily-mandated Child Safe Viewing Act (“CSVA”) Report.<sup>2</sup>

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<sup>1</sup> The ESA is a trade association of video game publishers committed to achieving and maintaining product quality in the entertainment software industry, and ensuring that games are marketed, advertised, and sold responsibly. The ESA, which is comprised of twenty-seven members, represents virtually all major video game publishers in the United States.

<sup>2</sup> Comments of the Entertainment Software Association, Implementation of the Child Safe Viewing Act, Examination of Parental Control Technologies for Video or Audio Programming, *Notice of Inquiry*, MB Docket No. 09-26 (Apr. 16, 2009) (hereinafter “ESA CSVA Comments”); (continued...)

In its CSVA comments and reply comments, the ESA: (1) described the entertainment software industry's parental control technologies and tools, including the industry's comprehensive rating system; (2) explained how these parental control technologies and tools are widely understood and used by parents; (3) established that the Commission lacks jurisdiction, whether direct or ancillary, to regulate video game content, consoles, or rating systems; and (4) demonstrated why adoption of a universal ratings system would be ineffective and contrary to the public interest. Because the ESA's CSVA comments and reply comments have been incorporated into the record of this proceeding,<sup>3</sup> where appropriate we have cited to the relevant portions of those materials so as to avoid duplication.

## **I. SUMMARY**

For the reasons identified in the ESA's earlier filings and elaborated upon below, the Commission can claim no regulatory authority or expertise regarding the operation of the entertainment software industry, consumer usage of video games, or the effectiveness of the video game rating system that has been developed and enforced by the Entertainment Software Rating Board ("ESRB") for over a decade.<sup>4</sup> Neither can the Commission establish that regulation of aspects of the video game industry is reasonably necessary for or related to the exercise of responsibilities it clearly does have under the Communications Act. Simply, the

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Reply Comments of the Entertainment Software Association, Implementation of the Child Safe Viewing Act, Examination of Parental Control Technologies for Video or Audio Programming, *Notice of Inquiry*, MB Docket No. 09-26 (May 18, 2009) (hereinafter "ESA CSVA Reply Comments").

<sup>3</sup> Empowering Parents and Protecting Children in an Evolving Media Landscape, *Notice of Inquiry*, MB Docket No. 09-194, ¶ 3 (Oct. 22, 2009) (hereinafter *Notice*).

<sup>4</sup> The ESRB is a non-profit, self-regulatory body established in 1994 by the Entertainment Software Association. The ESRB assigns computer and video game content ratings, enforces industry-adopted advertising guidelines and helps ensure responsible online privacy practices for the entertainment software industry.

Commission does not have statutory authority, whether direct or ancillary, to regulate video game content or to augment, supplant, or extend the industry's video game rating system.

The Commission surely cannot circumvent the limits of its jurisdiction or expertise simply by categorizing an expansive range of platforms, devices, and content as “electronic media.” The Commission does not have authority to regulate “electronic media” *per se*. Rather, the Commission's jurisdiction is circumscribed to defined categories of media (e.g., common carrier, radio, television, and cable) and varies both in nature and degree depending on the specific medium involved. Video games, no matter how delivered, do not fall within any of the Commission's regulatory mandates.

Indeed, regulation is beyond Commission authority even with respect to video games that are delivered or played in whole or in part via the Internet or other wired or wireless transmission systems. The Commission's limited jurisdiction over the Internet and other communications platforms for certain purposes does not constitute a grant of *carte blanche* authority over those who utilize those platforms. For example, the Commission could not, and presumably would not, claim to have authority to regulate what products are sold on Amazon's or eBay's websites, and how these products are sold, simply because those companies sell products via the Internet. The entertainment software industry is no less peripheral to any Commission jurisdiction or responsibility, and is no less alien to its expertise.

Even if the Commission could find some jurisdictional basis to regulate video games — which it cannot — efforts to regulate either video game content or the ESRB's rating system would not withstand First Amendment scrutiny. Video game content and the ESRB's rating system receive the fullest panoply of the First Amendment's protections. Governmental efforts to restrict, categorize, or otherwise characterize this content are necessarily inconsistent

with the First Amendment, and all efforts by governmental bodies to exercise such authority over video games have been struck down by the courts. Given the important benefits that video games offer all users, including children (who make up only a quarter of all video game users), and the entertainment software industry's creation of widely-available and easy-to-use parental control technologies and tools, the Commission could not in any event establish a constitutional basis or justification to regulate video game content or the ESRB's rating system.

This is not to suggest that the current rating system utilized by most video game device manufacturers and publishers necessarily resolves all issues regarding appropriate use of these products. The entertainment software industry, like all media, is confronting major technological and usage changes that challenge the current system. But the public will be best served if the industry is permitted to use its expertise to continue building upon and adapting its already successful system of parental control technologies and tools to address the challenges presented in the new media marketplace. The ESA and the ESRB, as well as others in the entertainment software industry, have developed a wide variety of parental control technologies and tools that parents understand and regularly use. Regulatory intervention would seriously frustrate the industry's efforts to respond as the new media market continues to evolve.

As discussed below, public harm would result from the imposition of a new or different system upon the dynamic electronic media environment. The ESA urges the Commission to reject illusory proposals to develop and adopt some kind of universal ratings system, a step that would be inconsistent with consumer experience and expectations, and with the public interest.

Notwithstanding the Commission's lack of authority and expertise to regulate the entertainment software industry, the ESA is providing in these comments the information the

Commission has requested about the video game industry and ways in which video games benefit users in order to assist the Commission in its fact-gathering role. Contrary to some misperceptions, the average video game player is 35 years old and has been playing video games for twelve years, and nearly half of video game users are women. While adults are by far the largest demographic of video game users, the vast majority of video games sold in 2009 (83 percent) were rated E (Everyone), E10+ (Everyone 10 and older), or T (Teen); only 17 percent were rated M (Mature).<sup>5</sup>

Research has consistently established and underscored the significant benefits that video games offer consumers, including children. Against that background, speculative, unscientific pronouncements about the possibility that video game usage may cause antisocial behavior or unhealthy eating habits are just that; as study after study and court after court have found, there is no basis in fact for any such conclusions.

**II. THE COMMISSION’S JURISDICTION DOES NOT ENCOMPASS “ELECTRONIC MEDIA,” IN GENERAL, AND THE COMMISSION LACKS STATUTORY AUTHORITY AND EXPERTISE TO REGULATE THE ENTERTAINMENT SOFTWARE INDUSTRY, IN PARTICULAR.**

The Commission’s *Notice* speaks throughout about “electronic media” and, more specifically, seeks information on children’s “electronic media” use. But the Commission does not define what it means by “electronic media” for the purposes of the *Notice*, and usage of the term throughout the *Notice* varies.<sup>6</sup> The *Notice* does provide, however, numerous examples of “electronic media” that indicate the Commission may consider the term to include a broad range

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<sup>5</sup> See <http://www.theesa.com/facts/index.asp>.

<sup>6</sup> Compare *Notice* ¶ 2 (characterizing television, mobile devices, and the Internet broadly as “electronic media”), with *Notice* ¶ 3 (characterizing television, mobile devices, and computers more narrowly as “media platforms”).

of platforms, devices, and content, such as: television broadcasting; video devices, including television receivers and video cassette recorders; video content, including broadcast and non-broadcast television programming, videos, DVDs, and pre-recorded shows; radio broadcasting; audio devices, including radio receivers, CD players, tape players, iPods, and MP3 players; audio content, including radio programming, CDs, tapes, and MP3s; mobile phones and other wireless devices; wireless text messages; Internet transmissions; personal computers; online applications and content, including blogs, social networking sites, and other websites; nonnetworked devices; advertising content; video game consoles and portable gaming devices; and video game content. To the extent that this list is intended, for any purpose, to mark out the perimeters of Commission jurisdiction, the end result is breathtaking.

The Commission, of course, cannot circumvent the limits of its jurisdiction and expertise simply by categorizing an expansive range of platforms, devices, and content as “electronic media.” The Commission’s enabling statute does not itself use the term “electronic media,” but rather focuses on specific media, and it shapes the Commission’s jurisdiction around their specific characteristics. It is undisputed, for example, that the Commission has authority, in varying degrees, to regulate common carriers and broadcast television stations. However, many of the media segments identified in the *Notice*’s laundry list of electronic media forms fall far outside the Commission’s statutory purview.

Neither the Commission nor any other observer has suggested that the Commission’s jurisdictional reach or expertise extends to the entertainment software industry’s creative or distributional activities. For decades, video game content has been made available through traditional retail distribution channels, and video games continue largely to be distributed in this way. Those distribution channels make no use of any element over which the

Commission has responsibility. To be sure, the entertainment software industry is changing, as game players are increasingly able to access and utilize games over the Internet, through portable electronic devices and other methods. But these changes do not provide the Commission with authority to regulate that content, any more than the fact that Barnes and Noble now sells electronic versions of children’s books on the Internet would authorize the Commission to regulate the content of the books, restrict the delivery of these books to certain platforms, or require that Barnes and Noble (or some other third-party) rate or otherwise label books that contain content that some parents might find objectionable. Likewise, the Commission cannot expand its jurisdiction to cover the entertainment software industry simply because video game content, consoles, and the ESRB’s video game rating system have some Internet-enabled or broadband components. This is especially true in light of the dynamic nature of change in the entertainment software industry today. As the D.C. Circuit has warned, exercise of jurisdiction must be constrained over industries characterized by “[r]apid technological advances, demand shifts, and changes in entrepreneurial judgments.”<sup>7</sup>

Finally, the doctrine of ancillary jurisdiction similarly offers no independent basis for Commission regulation of video game content, consoles, or rating systems.<sup>8</sup> The ancillary jurisdiction doctrine requires that the subject of the inquiry be “reasonably ancillary” to the Commission’s effective performance of its statutory responsibilities and requires a clear and logical nexus between the subject of the inquiry and other regulatory authority.<sup>9</sup> But there is no

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<sup>7</sup> *Wold Comms., Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984).

<sup>8</sup> *See generally* ESA CSVA Comments, at 3–8.

<sup>9</sup> *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979) (“Our holding . . . sustained the Commission’s authority to regulate cable television with a purpose affirmatively to promote (continued...)”).

nexus between video games and the Commission’s statutory responsibilities, and the courts have consistently construed the Commission’s ancillary powers narrowly so as not to authorize regulations that implicate content.<sup>10</sup> For example, in rejecting the Commission’s argument that its ancillary jurisdiction supported the adoption of rules requiring video description of content to aid the visually impaired, the D.C. Circuit concluded this “very frail argument . . . completely ignores the fact that video description regulations significantly implicate program content. . . . [T]he very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content.”<sup>11</sup>

### **III. GOVERNMENT REGULATION OF VIDEO GAME CONTENT OR THE ESRB’S RATING SYSTEM WOULD NOT WITHSTAND FIRST AMENDMENT SCRUTINY.**

Not only would government regulation of video game content and the ESRB’s video game rating system be unauthorized under the Communications Act of 1934, as amended, but it would be unconstitutional as well. Video game content is entitled to the same full First Amendment protections as motion pictures, books, and other comparable forms of media. The judicial authority so holding is unanimous and overwhelming.<sup>12</sup> To be sure, there are superficial

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goals pursued in the regulation of television broadcasting; and the plurality’s analysis of the origination requirement stressed the requirement’s nexus to such goals.”).

<sup>10</sup> See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (“the Commission was not delegated unrestrained authority”); *Am. Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002).

<sup>11</sup> *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 803, 805 (D.C. Cir. 2002).

<sup>12</sup> See, e.g., *Interactive Digital Software Ass’n v. St. Louis County, Missouri*, 329 F.3d 954, 956–58 (8th Cir. 2003); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F. 3d 572, 577–79 (7th Cir. 2001); *James v. Meow Media, Inc.*, 300 F.3d 683, 695–96 (6th Cir. 2002); *Video Software Dealers Assn’ v. Maleng*, 325 F. Supp. 2d 1180, 1184–85 (W.D. Wash. 2004); *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 829–30 (M.D. La. 2006); *Entm’t Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065, 1068 (D. Minn. 2006); *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. (continued...)

differences among all forms of media. In the case of video games, each product contains interactive elements, and a growing number of video games permit the introduction of user-generated content. If anything, these characteristics enhance the claim of First Amendment protection for video games because they involve the user's own exercise of his or her free speech rights.

The First Amendment clearly prevents the government from restricting speech based on judgments about which types of constitutionally protected expressive works — whether books, movies, or video games — are “good” or “bad” for members of the public, including children.<sup>13</sup> Commission regulation attempting to impede any user's access to video game content would therefore be contrary to basic First Amendment principles.

To the extent that Commission regulation would burden certain video game content, the regulation would be deemed to be a content-based restriction subject to strict scrutiny,<sup>14</sup> and therefore would be presumptively invalid.<sup>15</sup> To overcome that presumption, the government would need to: (1) prove that the regulation is necessary to serve a compelling government interest, (2) demonstrate that the regulation is narrowly tailored to serve that interest,

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2d 646, 651 (E.D. Mich. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1184–85 (W.D. Wash. 2004).

<sup>13</sup> See, e.g., *Am. Booksellers Ass'n Inc. v. Hudnut*, 771 F.2d 323, 331–32 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (finding that the government may not suppress ideas regardless of its belief about effects on listeners).

<sup>14</sup> See, e.g., *Interactive Digital Software Ass'n*, 329 F.3d at 958 (holding that an ordinance applying to graphically violent video games was a content-based restriction). The Commission cannot avoid this result by arguing that violent video games constitute obscenity for minors. Every court to have considered the question has held that restrictions on sexually explicit material cannot be applied to allegedly violent video games. See, e.g., *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009); *Interactive Digital Software Ass'n*, 329 F.3d at 959–60; *Am. Amusement Mach. Ass'n*, 244 F.3d at 576; *Maleng*, 325 F. Supp. 2d at 1185–86.

<sup>15</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

and (3) establish that there are no less restrictive alternatives available to achieve such interest. In applying this test, courts demand “substantial evidence” that “the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>16</sup>

No Commission regulation of video game content or the ESRB’s rating system could pass such scrutiny. Courts have routinely invalidated on First Amendment grounds state laws imposing content restrictions or content-based labeling requirements on the sale or rental of video games to children.<sup>17</sup> The same analysis would render any effort to impose a government-sanctioned rating system on video games unconstitutional.<sup>18</sup> Even assuming that the Commission could demonstrate a compelling government interest for the regulation of video game products — which it cannot — less restrictive means are available to address any alleged concerns.<sup>19</sup> As described below, a variety of effective parental control technologies and tools are available in the marketplace, including the ESRB’s widely accepted rating system, to assist parents in making choices about what video games are appropriate for their children. Consequently, Commission regulation in this context would be both unnecessary and unconstitutional.

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<sup>16</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 666 (1994) (plurality op.).

<sup>17</sup> See, e.g., *Schwarzenegger*, 556 F.3d 950; *Entm’t Software Ass’n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006); *Interactive Digital Software Ass’n*, 329 F.3d 954; *Am. Amusement Mach. Ass’n*, 244 F.3d 572; *Entm’t Merchants Ass’n v. Henry*, CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm’t Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

<sup>18</sup> See, e.g., *Schwarzenegger*, 556 F.3d 950.

<sup>19</sup> See, e.g., *id.*

**IV. GOVERNMENT INTERVENTION IS UNNECESSARY BECAUSE THE ENTERTAINMENT SOFTWARE INDUSTRY, THROUGH ITS SELF-REGULATORY EFFORTS, ALREADY AIDS PARENTS' DECISIONS ABOUT SAFE AND APPROPRIATE USES OF DIGITAL MEDIA.**

As Commissioner McDowell recently stated, the “Commission’s No. 1 goal should be to do no harm”<sup>20</sup> — an especially appropriate observation in this context, where Commission oversight or regulation of the entertainment software industry would not only run afoul of important constitutional and regulatory restrictions, but also would hamper the industry’s successful implementation of a widely recognized and effective self-regulatory regime. Because not all video game content is appropriate for all video game users, the entertainment software industry has designed this system to provide parents with a comprehensive variety of parental control technologies and tools.

**A. The Entertainment Software Industry’s Rating System Is Comprehensive, Effective, Understandable, Widely Adopted, and User Friendly.**

The Federal Trade Commission, which actively monitors the entertainment industries’ self-regulatory efforts to address the marketing of violent entertainment to children, praised the ESRB’s rating system in its December 2009 Report, concluding that “the electronic game industry continues to have the strongest self-regulatory code” among the media that offer product ratings.<sup>21</sup> There are a number of important reasons for that conclusion.

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<sup>20</sup> Commissioner Robert M. McDowell, “The Best Broadband Plan for America: First, Do No Harm,” Free State Foundation Keynote, at 3 (Jan. 29, 2010).

<sup>21</sup> Federal Trade Commission, Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries, at iii (Dec. 2009) (hereinafter “FTC 2009 Report”).

1. *Parents Find the ESRB's Rating System To Be Easy To Understand and Use.*

The ESRB's rating system includes several features that parents find easy to use and helpful when making decisions about which video games to purchase or rent for their children. The system includes six rating symbols indicating age appropriateness (e.g., E-Everyone or M-Mature), and, where applicable, over 30 different content descriptors (e.g., violent references, strong language, or alcohol reference) for describing what type of content in the game may have triggered a rating category assignment or content that might concern a parent. Video game publishers must display the assigned age rating symbol on the front of each video game package, while content descriptors are included on the back of the video game package, alongside the age rating symbol. In addition, detailed rating summaries, which provide a deeper level of pertinent information for each product rated since July 2008, can be found on the ESRB's website or through a free mobile application.<sup>22</sup>

Parents find this system easy to understand and use because it provides a standardized, legible, and concise label on the video game packaging, on websites, and in advertisements for the game. Ninety-two percent of video game users under the age of 18 report that their parents are present when they purchase or rent games.<sup>23</sup> Approximately 94 percent of parents say ESRB's ratings are "moderately" to "very easy" to understand,<sup>24</sup> and the 2009 FTC

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<sup>22</sup> These features are described in detail in ESA's earlier comments. *See* ESA CSVA Comments, at 13–14 and attachments.

<sup>23</sup> *See* <http://www.theesa.com/facts/index.asp>.

<sup>24</sup> Peter D. Hart Research Associates, *Awareness & Use* (March 2008); Federal Trade Commission, *Marketing Violent Entertainment To Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, at 29 (April 2007), <http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf>.

Report commended the ESRB on its rating summaries, saying that they “should prove useful to parents.”<sup>25</sup>

2. *The ESRB’s Rating System Is Comprehensive.*

While there are many online and print resources that generally discuss video game content, the ESRB’s rating system is the only video game rating system in the United States. No other entity except the ESRB assigns ratings to all games published on each of the major game consoles and dedicated handheld devices, requires those ratings to be displayed on all product packaging and advertising, and has the contractual authority to sanction game publishers that fail to comply with content disclosure and marketing guidelines. As described in the ESA’s comments on the Commission’s CSVA Report, this system is widely supported by video game publishers, manufacturers, and retailers.<sup>26</sup>

A high volume of video game content is rated. For example, the ESRB assigned 1,791 ratings in 2009. And because the major video game console and handheld device manufacturers require that games published to operate on their systems carry an ESRB rating, all games published on dedicated consoles and handheld devices and sold in major U.S. retail outlets carry an ESRB rating.

The ESRB’s rating system covers multiple distribution platforms. The ESRB rates games developed for the major in-home video game consoles, including the Microsoft Xbox 360, Nintendo’s Wii console, and the Sony PlayStation 3, as well as portable video game devices like the PlayStation PSP/PSPgo and the Nintendo DS and Nintendo DSi systems. The ESRB also rates games developed for the Windows Vista and Windows 7 operating systems.

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<sup>25</sup> FTC 2009 Report, at 30.

<sup>26</sup> See ESA CSVA Comments, at 8–17.

The ESRB has also rated many games distributed solely online and through mobile or wireless devices. And in response to the explosive growth of Internet-enabled video games and post-release downloadable content, described in detail below, the ESRB has numerous policies in place to ensure that publishers inform consumers about the nature of the content they post and market online.

It is significant that the ESRB rates products prior to final manufacture.<sup>27</sup> This pre-release approach ensures that parents are provided rating information on each rated game's packaging and in all of its marketing materials at or prior to the time the game is available for purchase. This information is also available to parents and other consumers on thousands of websites, including the ESRB site, and through the ESRB's mobile ratings search application.<sup>28</sup>

In addition, the ESRB rating system imposes the most extensive set of content disclosure and advertising and marketing guidelines of all media rating systems, and compliance is actively monitored and enforced through fines and other sanctions. The Federal Trade Commission's 2009 Report praised the entertainment software industry's performance, concluding that the "industry did not specifically target M-rated games to teens or T-rated games to younger children and that compliance with the ESRB code was high in all media."<sup>29</sup>

Furthermore, major game retail outlets have voluntarily adopted and agreed to enforce policies not to sell or rent mature games (rated M) to children without a parent's permission or presence. The Federal Trade Commission found in its 2009 Report that "retailers

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<sup>27</sup> See [http://www.esrb.org/ratings/ratings\\_process.jsp](http://www.esrb.org/ratings/ratings_process.jsp).

<sup>28</sup> See <http://www.esrb.org/mobile/>.

<sup>29</sup> FTC 2009 Report, at iii.

are strongly enforcing age restrictions on the sale of M-rated games, with an average denial rate of 80%,” and that “nearly all retailers use systems to prompt cashiers to request photo ID.”<sup>30</sup>

3. *Parental Awareness and Adoption of the ESRB’s Rating System Is High.*

The careful design and ubiquity of the ESRB rating system has, not surprisingly, led to its widespread use. Studies show that parents consistently rely on it when choosing games for their children and families. As many as 89 percent of parents with children who play video games are aware of the ESRB’s rating system, and 76 percent of such parents check the rating every time or most of the time when buying and renting games.<sup>31</sup> In addition to the game’s rating category, many parents also rely on the ESRB’s content descriptors;<sup>32</sup> approximately 6 in 10 respondents report that they check the content descriptors every time they purchase or rent a game.<sup>33</sup>

**B. The Entertainment Software Industry Has an Established Track Record of Technological Innovation To Help Ensure Safe and Appropriate Access to Video Games.**

Parental controls are available on the current generation of each of the major video game consoles and handheld devices and the Microsoft Windows operating system. These parental controls allow parents to specify the categories of games that their children may use or to block games by ESRB rating. They also provide parents with a simple means to manage a

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<sup>30</sup> FTC 2009 Report, at iv.

<sup>31</sup> Peter D. Hart Research Associates, *Awareness & Use* (March 2008); Federal Trade Commission, *Marketing Violent Entertainment To Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, at 27 (April 2007), <http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf>.

<sup>32</sup> The rating symbols and content descriptors are described in detail in the ESA CSVA Comments and attachments.

<sup>33</sup> Peter D. Hart Research Associates, *ESRB 2009 Ratings Awareness and Use Study*, at 1-2 (June 17, 2009); FTC 2009 Report, at 23 n.143.

child's access to other system features, such as online services. Approximately 76 percent of parents with children under the age of 18 report that these parental controls are useful.<sup>34</sup>

Some video game platforms allow parents to restrict or track the amount of time children spend using or playing video games, and how and when they play. The Microsoft Xbox 360, for example, includes a "family timer" that allows parents to set a limit on how long the console may be used on a weekly or daily basis, and Microsoft's Windows Vista and Windows 7 operating systems similarly allow parents to specify when and for how long the computer system may be operated.

In addition, console manufacturers have developed platforms that allow parents to manage their child's access to online features and services and to control with whom their children may interact online. For instance:

- The Sony PlayStation 3 offers an Internet Browser Start control, which restricts use of the system's Internet browser by requiring a password to start it, and the PlayStation Network offers additional protection for use of other online features, such as the PlayStation Store.<sup>35</sup>
- Microsoft includes several options for controlling a child's online actions through the Microsoft Xbox LIVE services for the Xbox 360. For instance, parents may require parental approval of a child's list of online friends, specify which types of online communications are allowed (e.g., text, voice, or video), and limit the child's exposure to content created by other members of the Xbox LIVE community.<sup>36</sup>
- The Windows Vista and Windows 7 operating systems allow parents to tailor their child's online experience by blocking categories of content or specific websites.<sup>37</sup>

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<sup>34</sup> Entertainment Software Association, *Essential Facts about Games and Violence*, [http://www.theesa.com/facts/pdfs/ESA\\_EF\\_Violence\\_2008.pdf](http://www.theesa.com/facts/pdfs/ESA_EF_Violence_2008.pdf).

<sup>35</sup> See <http://www.us.playstation.com/PS3/Features/ParentalControls>.

<sup>36</sup> See <http://www.xbox.com/en-US/support/familysettings/live/xbox360/xboxlivecontrols.htm>.

<sup>37</sup> See <http://windows.microsoft.com/en-us/windows7/products/features/parental-controls>.

- Parents can set parental controls on Nintendo’s Wii console to control certain features such as blocking access to the Internet Channel and to control a child’s ability to send and receive messages to and from the Wii Message Board.<sup>38</sup>
  - The Nintendo DSi parental controls allow parents to restrict the use of PictoChat and DS Download Play, the exchange of photographs taken by the Nintendo DSi Camera over a local wireless network, access to the Internet via the Nintendo DSi Browser, and access to certain user-generated content.<sup>39</sup>
- C. Media Literacy in the Entertainment Software Market Is High Due To the Entertainment Software Industry’s Active Engagement With Parents, Teachers, and Children.**

The ESA agrees with the Commission that media literacy is a critical component in any program empowering parents in their efforts to protect their children in the new media environment. As a result of the work of the ESA, ESRB, and others in the entertainment software industry, media literacy in the entertainment software marketplace is strikingly high — as the survey data summarized above demonstrate.

The ESA is a major supporter of the Web Wise Kids’ Program, which teaches children about essential safety and privacy concerns — such as social networking, blogging, online dating, bullying, cyberstalking, and identity theft — in order to raise their media awareness.<sup>40</sup> Because each program is designed specifically for use with children in classrooms, the Web Wise Kids’ Program helps raise media literacy among teachers as well.

The ESA also works through the ESRB to raise media literacy. As part of the ESRB’s mission to “empower consumers, especially parents, with the ability to make informed decisions about the computer and video games they choose for their families,”<sup>41</sup> the ESRB has

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<sup>38</sup> See [http://www.nintendo.com/consumer/systems/wii/en\\_na/settingsParentalControls.jsp](http://www.nintendo.com/consumer/systems/wii/en_na/settingsParentalControls.jsp).

<sup>39</sup> See [http://www.nintendo.com/consumer/systems/dsi/en\\_na/settingsParentalControls.jsp](http://www.nintendo.com/consumer/systems/dsi/en_na/settingsParentalControls.jsp).

<sup>40</sup> See <http://www.webwisekids.org/>.

<sup>41</sup> <http://www.esrb.org/about/index.jsp>.

developed a strong track record that is described in the ESA's comments on the CSVA Report.<sup>42</sup> The ESRB continues to undertake extensive outreach efforts – for example, through public service announcements on television, and other advertising in print, online, and in stores. The ESRB also relies upon partnerships with parent-focused organizations and media outlets, such as the national PTA and *Good Housekeeping* and *Parenting* magazines, to disseminate information about how to use its rating system.<sup>43</sup>

In addition, many video game publishers, console manufacturers, and retailers have launched their own Internet safety websites and media literacy programs. Many also have entered into partnerships with government officials and non-governmental organizations to promote online child safety.<sup>44</sup>

In sum, self-regulation is working — and working exceedingly well — in the entertainment software industry. Indeed, the Federal Trade Commission has praised the entertainment software industry for its comprehensive and successful system of self regulation.<sup>45</sup> And parents' overwhelming adoption of the ESRB's rating system, and their access to the entertainment software industry's other parental control technologies and tools, indicate that free market forces are working to provide the kind of protection that the Commission contemplates for children using media.

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<sup>42</sup> ESA CSVA Comments, at 10–11.

<sup>43</sup> <http://www.esrb.org/about/education.jsp>.

<sup>44</sup> For example, working with the Boys & Girls Clubs of America, Microsoft developed the StaySafeOnline Program for Kids, an easy, child-friendly animated guide to the Internet. *See* <http://www.staysafeonline.com/default2.htm>.

<sup>45</sup> FTC 2009 Report, at iii.

## V. A UNIVERSAL RATINGS SYSTEM WOULD CAUSE SIGNIFICANT HARM TO THE PUBLIC INTEREST.

In its *Notice*, the Commission asks whether “the creation of a uniform rating system that would apply to various platforms [would] be an appropriate objective.”<sup>46</sup> The answer to this question, we think, is resoundingly “no.” As the D.C. Circuit has cautioned, the Commission should avoid imposing “an inflexible regulatory regime” that could have the effect of stifling marketplace innovation in industries, like the entertainment software industry, that are characterized by “[r]apid technological advances, demand shifts, and changes in entrepreneurial judgments.”<sup>47</sup> This observation is not merely an expression of a legal reservation; it reflects the important practical insight that governmental efforts to modify successful private programs in a dynamic industry can only freeze the industry’s ability to respond to marketplace changes and ultimately will reduce the programs’ effectiveness.

In any event, the concept of a universal ratings system suffers from a fatally flawed assumption: that there is, or should be, uniformity in the ways various constituents in the distribution chain of content-based products — whether publishers, manufacturers, providers, or consumers — create, manufacture, distribute, access, engage with, and understand all

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<sup>46</sup> *Notice*, ¶ 48. It appears that the Commission has limited any consideration of multiple ratings requirements to television programming and the V-chip technology. *See Notice* ¶ 49. To the extent that the Commission is considering similar requirements for other media, however, the ESA reiterates its view that any requirements for game devices, publishers, or retailers to accommodate and display multiple ratings would be contrary to the public interest. As described in the ESA CSVA Reply Comments, third-party entities that purport to provide alternative video game ratings to the ESRB rate a very small percentage of the games published each year, use a variety of untested criteria that are neither transparent nor widely explained to consumers, have no control over game packaging or advertising, and lack pre-release access to game content and locked content. Consequently, mandating that game devices provide access to multiple systems would result in consumer confusion and misinformation that could dramatically undermine the efficacy of the ESRB rating system. *See ESA CSVA Reply Comments*, at 5–7.

<sup>47</sup> *Wold Comms., Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) (addressing satellite design and marketing).

entertainment media. That notion is fundamentally and generally inconsistent with ESA's experience, particularly with respect to consumers who consciously make their entertainment decisions based on the unique characteristics of each particular medium. Consumers, in fact, choose to use and interact with media in a variety of different ways and bring a range of different expectations to each medium. Because the concept of a universal ratings system cannot effectively address the extraordinary range of consumer choices and expectations for each medium, adoption of a universal ratings system would necessarily be ineffective and contrary to the public interest.

**A. A Universal Ratings System Cannot Account for the Complexity and Ongoing Evolution of the New Media Environment.**

The Internet's explosive growth is creating a new media environment that provides the public with new forms of media-rich content and unlimited opportunities for expression, education, entertainment, and political discourse. This explosion reflects the creative and technological health of the entertainment software industry and the extraordinary range of expressive speech reflected in its products. But like many media industries, including the entertainment software industry, this technological transition presages confrontation with a range of new challenges. For example:

- **Content must be made available in a wide variety of formats and on multiple media platforms.** To remain relevant in the marketplace, publishers must provide content in a wide variety of formats — for example, as packaged products sold in traditional retail outlets, in downloadable files, through Internet browsers, via mobile devices, in virtual worlds, and on social networking sites. Massively multiplayer online (“MMO”) games, such as *Warhammer Online* or *Everquest 2*, and virtual world games have become highly popular in recent years. In addition, new business models for delivering games in smaller pieces have

resulted in the online availability of potentially millions of game add-ons that provide new game levels and offer virtual goods of all kinds. Social games, such as *Pet Society*, integrate features of social networking sites, and puzzle and other simple casual games, such as *Bejeweled* or *Solitaire*, are played by hundreds of millions of people on their home computers or mobile devices. Some gaming websites even provide players with tools with which to build their own games and share them with other players.

Not surprisingly, consumers increasingly expect that game content will be made available over a variety of media platforms. Accordingly, video game publishers are likely to make a particular video game available on different media platforms, many of which are not specific to video game use. For example, a video game publisher is likely to develop multiple versions of a particular game title so that the game can be played on different video game consoles (e.g., Sony's PlayStation 3, Nintendo's Wii, or Microsoft's Xbox 360), different operating systems (e.g., Microsoft's Windows 7 and Windows Mobile, Apple's OS X Snow Leopard, Google's Android), and different web browsers (e.g., Microsoft's Internet Explorer 8 or Mozilla's Firefox).

- **There is growing demand for user-generated content.** One of the defining characteristics of the new media environment is the ability of users to create and distribute their own content and to comment on or otherwise interact with more traditional forms of media. Video game users increasingly demand and use features that allow them to create and share user-generated content, such as audio or text chat options or customized game add-ons. Players of many video games have created millions of new avatars and other game accessories and have even developed and posted their own full-feature video games to share with other players.

- **New methods for delivering content have emerged.** Content is being distributed to consumers through a variety of new delivery methods. While, as we have noted, prepackaged video games are still largely sold through traditional brick-and-mortar and online retailers, video game content is increasingly available for download directly to the user's video game console, personal computer, mobile phone, and other portable devices. Today, video games also may be delivered through the user's web browser or accessed through a cloud computing service, where the video game is played through dedicated servers.

- **Various business models are emerging for making content available to consumers.** Just as newspapers and television networks are working to develop new business models for the new media environment, the entertainment software industry is creating new business models to support the development and distribution of video game content. For example, in addition to traditional retail sales, video game publishers are making video game content available through subscription- and advertiser-based business models. And some publishers offer the basic components of a game at no cost and support it instead through micro-transactions, where users purchase virtual goods or additional tools as they advance through various game levels. Increasingly, a combination of such approaches is being used to support a particular video game title.

- **The new media environment is constantly evolving.** The new media market is still immature. Rapid innovation continues to occur — affecting the forms of content available to consumers, the ways in which consumers may generate and share content, the delivery methods used to distribute content, the platforms through which consumers access content, and the business models that support content creation and distribution. To a significant

extent, the forms that creation and distribution will ultimately take will depend less upon what is technologically possible and more upon the choices and preferences of consumers.

- **The new media marketplace is global.** Content creators have an international customer base. In the context of the entertainment software industry, many video game publishers develop their games for a global market, and in-game interactions (*e.g.*, micro transactions for game add-ons) can occur among players located around the world.

In sum, numerous stakeholders across multiple industries are participating in the creation and distribution of content in a rapidly changing new media environment in which consumer preferences are not yet fully expressed or developed. This environment is far from mature, and neither industry nor the government can predict with any certainty what business models will succeed and which new technologies will emerge as dominant. A government-mandated universal ratings system could neither adequately account for nor adapt to evolving consumer preferences and technological, competitive, and economic developments. Such a system would almost certainly stifle growth and innovation in the video game marketplace at the very time when flexibility, speed, and creativity are most needed.

**B. Imposition of a Universal Ratings System Would Impede the Entertainment Software Industry's Ability To Develop Innovative and Flexible Parental Control Technologies and Tools That Can Address These New Media Challenges.**

The ESA and its members are acutely aware that the technologies and controls that have worked effectively for packaged goods and traditional game play need to be rethought in an environment that permits game use on all kinds of new devices and even changes the nature of game content across many different platforms. However, the industry is best positioned to take on this task. The ESRB has been rating video games for approximately 15 years and has

updated its system many times during that period as the industry has evolved. Moreover, it is particularly well attuned to the needs of consumers, especially parents.

With its extensive experience and insight, the ESRB is studying these issues and already has taken important steps to introduce enhancements that address Internet-related aspects of video game content, marketing and distribution. For example, the ESRB assigns an online rating notice that publishers display on online-enabled games capable of exposing players to unrated user-generated content.<sup>48</sup> The ESRB also has policies in place to ensure that accurate and complete consumer disclosure is provided for downloadable content that is made available after a video game has been released. And game publishers are prohibited from placing ads for M-rated games on Internet sites with a 45 percent or more under-17 audience. Similarly, game publishers are required to check a person's age prior to that person's viewing a demo, trailer, or video for a Mature or Adults Only-rated game posted on the publisher's website.

In addition to the ESRB's efforts, ESA members and other industry constituents also are working to respond to the rapidly changing new media environment. For example, Xbox XNA, which provides consumers the tools to create their own video games and make them available for the entire XNA community to play, allows members of the XNA community to rate user-submitted games.<sup>49</sup> These and other similar measures are important steps designed to address the evolution of the entertainment software industry, and unitary regulation necessarily would hinder their implementation.

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<sup>48</sup> See [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp).

<sup>49</sup> See <http://creators.xna.com/en-US/>.

**C. A Universal Ratings System Would Create Consumer Confusion and Dissatisfaction Because It Cannot Account for Divergent Medium-by-Medium Consumer Expectations.**

Even in the traditional video game marketplace, modification of or substitution for the current rating system would harm the public's interest in effective product ratings. Parents rely heavily on the ESRB's rating system when making decisions about their children's video game usage, and approximately 90 percent of parents have confidence that the ESRB's ratings accurately describe game content.<sup>50</sup> As we have shown, parents have developed clear expectations about the criteria that are used to rate video games, the consistent application of those criteria, where they can obtain information about a particular game's rating, and what the particular rating means.

Ratings do not exist in a vacuum. Whether for a movie, a video game, music, television, or some other medium, any rating must satisfy user expectations about the particular medium. For example, a parent may expect that a rating system for music will focus on language, while a video game rating system would take into account interactive visual elements as well. Similarly, parental expectations for how a rating system will apply to motion pictures will be different from their expectations for an interactive video game rating system.<sup>51</sup> These expectations vary depending on parental attitudes, sensitivities, and concerns about each of the

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<sup>50</sup> Peter D. Hart Research Associates, *Awareness & Use* (March 2008); Federal Trade Commission, *Marketing Violent Entertainment To Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, at 27 (April 2007), <http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf>.

<sup>51</sup> As explained in Section II, the First Amendment analysis is the same for these media despite such differences in parental expectations.

different media.<sup>52</sup> Just as consumer expectations differ from medium to medium, the ratings criteria, and the application of those criteria, will differ as well.

Based on years of experience with the ESRB's rating system and the ratings systems of other entertainment industries, parents have come to know what to expect, for example, from a Teen-rated video game compared to a PG-13 movie. Adoption of a new universal ratings system — or application of the ESRB's rating system and protocols to other media (or vice versa) — would necessarily cause massive consumer confusion and uncertainty. Parents would not initially, and might never, understand the new ratings or the criteria by which these ratings are assigned. The Commission (or some other entity that would oversee the universal ratings system) would need to undertake a massive consumer education campaign to ensure that parents are informed about the Commission's new rules and how the new universal ratings system would operate. It is unlikely that parents interested in video game ratings would ever come to trust a new universal ratings system in the same way that they currently trust the ESRB system itself.

The differing consumer expectations that have evolved over time also may explain why there is scant consumer demand for creation of a universal ratings system. According to a 2004 survey conducted by the Kaiser Family Foundation of parents with children ages 2 to 17, 57 percent of parents responded that they preferred the status quo when asked whether there should be a single ratings system for television, movies, video games, and music.<sup>53</sup>

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<sup>52</sup> See Pew Research Center, *Support for Tougher Indecency Measures, But Worries About Government Intrusiveness*, at 10 (Mar. 2005), <http://people-press.org/report/241/support-for-tougher-indecency-measures-but-worries-about-government-intrusiveness>.

<sup>53</sup> Kaiser Family Foundation, *Parents, Media and Public Policy*, at 8 (Fall 2004), available at <http://www.kff.org/entmedia/upload/Parents-Media-and-Public-Policy-A-Kaiser-Family-Foundation-Survey-Report.pdf>.

**D. A Universal Ratings System Would Undermine the Unparalleled Effectiveness of the ESRB's Video Game Rating System.**

Application of a new universal ratings system, or of another media's ratings and rating criteria to video games, would seriously dilute important aspects of the ESRB's rating activities. Because rating systems are designed to provide information specific to the product and user experience, a rating system for other forms of media would not work effectively for video games. For example, the ESRB's rating system is unique in having: (1) an online rating notice to inform parents that an online-enabled game may expose players to user-generated content; (2) post-release downloadable content policies to govern micro-transactions, patches, expansion packs, and other downloadable content that is made available after a video game's release; (3) a locked-out content policy to require the disclosure and evaluation of pertinent non-playable content that is contained in the video game's code base; and (4) a requirement that each game title must have distinct submissions (and ratings) depending on the content contained in each version of the video game on different platforms.

ESA makes no claim that any ratings system for any other expressive medium requires any of these features — that question is beyond its expertise, just as it is beyond the Commission's — but ESA is confident that the industry's plan works far better for video games than would any imposed by an outside party.<sup>54</sup>

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<sup>54</sup> The adoption of a new universal ratings system also would create a number of practical problems. For example, millions of video game consoles and video games have been designed to allow parents to control their children's access to and use of video game content based on the ESRB's rating system. These existing devices and video games would become obsolete if a new universal ratings system were established. Adoption of a new universal ratings system also would require a different standardization of the metadata used in digital media where ratings information is embedded. Video game publishers would need to rewrite a substantial amount of code so that the new universal ratings system could be implemented. Such a requirement would be costly and impractical for game publishers and device manufacturers, especially given the (continued...)

## VI. VIDEO GAMES OFFER CHILDREN MANY IMPORTANT BENEFITS.

The *Notice* seeks additional information on a number of issues related to children's use of electronic media, including: children's media use and trends in children's media consumption;<sup>55</sup> the benefits of children's media use;<sup>56</sup> and whether potential risks, such as alleged increases in violence or obesity, have been substantiated.<sup>57</sup> Notwithstanding the ESA's position that Commission regulation of the entertainment software industry would be unauthorized, unconstitutional, and contrary to the public interest, ESA responds below to the questions raised in the *Notice* for the sole purpose of assisting the Commission in its fact-gathering capacity.

Of the millions of Americans of all backgrounds who use and play video games, only 25 percent are under the age of 18. The average game player is 35 years old and has been playing games for twelve years, and the average age of the most frequent game purchaser is 39 years old.<sup>58</sup> Approximately 40 percent of all game players are women. Players range from core game players who use video games as their main form of entertainment, to casual players, for whom video games are a secondary form of entertainment. For example, consumers register 200

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increasing proliferation of different media formats and distribution methods. Moreover, thousands of retail outlets would need to revise in-store signage and merchandise displays, which currently inform customers about ESRB ratings, to include information about the universal ratings system. And all major retailers would need to modify their internal data infrastructures that currently utilize ESRB ratings to ensure enforcement of store policies not to sell Mature-rated games to unaccompanied minors. Similarly, thousands of websites would need to begin displaying a new rating for video games, while still displaying ESRB ratings for legacy games, which would result in massive consumer confusion.

<sup>55</sup> See *Notice*, ¶¶ 11, 14.

<sup>56</sup> See *id.* ¶¶ 23, 25.

<sup>57</sup> See *id.* ¶¶ 29–30.

<sup>58</sup> See <http://www.theesa.com/facts/index.asp>.

million visits at casual game websites per month to play online games like *Solitaire* or *Tetris*. And notwithstanding the fact that adults are by far the largest demographic of video game users, a great majority of video games sold in 2009 (83 percent) were rated E (Everyone), E10+ (Everyone 10 and older), or T (Teen); only 17 percent were rated M (Mature).<sup>59</sup>

As described below, video games offer all users, including children, many important benefits — developing learning skills, promoting cognitive and social development, and fostering increased civic engagement. Contrary to the unfounded claims that are cited in passing in the *Notice*, there is no evidence of a causal relationship between video game content and anti-social behavior of any kind by game users, and there is no meaningful evidence that video games contribute to childhood obesity.

**A. Video Game Use Promotes Childhood Learning, Development, and Civic Engagement.**

The ESA agrees with the Commission that children derive important benefits from media use. The Commission's *Notice* identifies several positive impacts that media use has on children, including (1) facilitating access to educational content; (2) improving technological literacy; (3) developing skills in the creation of content; (4) facilitating new forms of communication with family and friends; (5) improving health through telemedicine; and (6) removing barriers for children with disabilities.<sup>60</sup> The ESA would add that video game play promotes childhood learning, development, and civic engagement:

- **Children learn through video game use.** Thousands of educational video games are designed to help children learn a variety of subjects, including mathematics, science, history,

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<sup>59</sup> *See id.*

<sup>60</sup> *Notice* ¶¶ 6, 17.

and world geography. We identify three that are in many ways typical of this genre: *The Oregon Trail* teaches children about American history and 19th century pioneer life by allowing them to assume the role of a wagon chief who leads settlers across the country via this American landmark; *Learn Science* teaches the basic principles of light and sound, physics, the human body, biology and geography; and *Personal Trainer: Math* enables children to practice addition, subtraction, multiplication, and division problems.

- **Video game play helps develop children’s cognitive skills.** The Commission cites important research that video games have positive educational benefits for children.<sup>61</sup> Video games facilitate learning because they intermix instruction and demonstration, which is a more effective learning technique than the “memorize-and-regurgitate style” found in most classrooms.<sup>62</sup> Intellect-training games, such as *Brain Age: Train Your Brain in Minutes a Day*, also have been shown to have a positive impact on behavior and on learning when played during school.<sup>63</sup> Video games also help children learn how to follow directions and how independently to create a plan of action to reach a desired goal. Video games help develop memory and logic skills; games such as *SimCity* have been shown to improve students’ problem-solving and analytic skills.<sup>64</sup>

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<sup>61</sup> See Ann My Thai, et al., The Joan Ganz Cooney Center at Sesame Workshop, *Game Changer: Investing in Digital Play To Advance Children’s Learning and Health* (June 2009), available at [http://www.joanganzcooneycenter.org/pdf/Game\\_Changer\\_FINAL.pdf](http://www.joanganzcooneycenter.org/pdf/Game_Changer_FINAL.pdf).

<sup>62</sup> See James Paul Gee, *What Video Games Have To Teach Us about Learning and Literacy* (2003).

<sup>63</sup> See Entertainment Software Association, *Video Games and Education*, <http://www.theesa.com/gamesindailylife/education.pdf>.

<sup>64</sup> See *id.*

- **Video games promote children’s physical and social development.** A 2005 study concluded that video games can provide “children with the opportunity to negotiate society’s rules and roles, allowing children to experiment with aggression in a safe setting without real world consequences.”<sup>65</sup> Video games also have been found to develop fine motor and spatial skills, as well as reflex and reaction times.<sup>66</sup> Many games teach children to work cooperatively by encouraging players to work together to reach a specified goal. For example, in the popular game *Rock Band*, each user plays a different instrument and must work cooperatively with others to complete various songs. And when children play video games with their friends and family, they also learn critical communication and social skills; approximately 65 percent of game-playing teens play with others in the room with them, and 27 percent play games with others through the Internet.<sup>67</sup>

- **Families use video games to bridge the generation gap and bring family members closer together.** Among parents who play video games, 80 percent play with their children, and two-thirds believe that video games have brought their families closer together.<sup>68</sup> When asked why they play video games with their children, many parents responded that game

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<sup>65</sup> Dorothy E. Saloni-Pasternak, “The Next Level of Research on Electronic Play: Potential Benefits and Contextual Influences for Children and Adolescents,” *HUMAN TECHNOLOGY*, at 1, 5–22 (2005).

<sup>66</sup> See A. Lager & S. Brenberg, “Health Effects of Video and Computer Game Playing — A Systematic Review of Scientific Studies,” *NATIONAL SWEDISH PUBLIC HEALTH INSTITUTE* (2005).

<sup>67</sup> Pew Internet & American Life Project, *Teens, Electronic Games, and Civics*, at 26–27 (2008), available at [http://www.pewinternet.org/~media/Files/Reports/2008/PIP\\_Teens\\_Games\\_and\\_Civics\\_Report\\_FINAL.pdf](http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Teens_Games_and_Civics_Report_FINAL.pdf) (hereinafter “Pew Video Game Study”).

<sup>68</sup> Entertainment Software Association, *Games and Families*, <http://www.theesa.com/gamesindailylife/families.pdf>.

play provides a good opportunity to socialize with their children or to monitor game content (78 percent and 63 percent, respectively).<sup>69</sup>

- **Video games include civic gaming experiences that promote social and political engagement.** Many video games require a child to learn about a problem in society; explore a social issue; think about moral or ethical issues; make decisions about how a community, city or nation should be run; help or guide other players; or organize game groups or guilds.<sup>70</sup> Indeed, several organizations have developed video games that raise children's awareness of difficult global issues such as hunger, disease, and war. To educate children about world hunger, the United Nations World Food Programme created *Food Force*, in which players become humanitarian workers stationed on a fictional famine-stricken island. One year after its launch, the game had been used by more than four million players worldwide. In addition, University of Southern California students created *Darfur Is Dying* to raise awareness about genocide in Sudan, and high school students participating in a Global Kids of New York after-school project created *Ayiti: The Cost of Life*, a video game that focuses on poverty in Haiti.

Video games are being used to educate children on a wide variety of social issues as well. For example, *Missing* recruits players to rescue a boy who mistakenly agreed to meet a predator who misrepresented himself in an online chat room, and *AirDogs* teaches players the repercussions of illegally downloading software and explains the life-long legal and social consequences that can result from online crimes. Video games, such as *Super Mario Sunshine* and *Chibi-Robo: Park Patrol*, raise awareness of environmental challenges by having players

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<sup>69</sup> *Id.*

<sup>70</sup> Pew Video Game Study, at 41.

improve the environment around them by revamping a rundown park and cleaning up a vandalized island.

Video games also are being used to promote civic engagement. *President Forever 2008 + Primaries*, for example, requires players to manage all aspects of a candidate's election campaign. Organizations and individuals also have begun using video games for political purposes, creating games that highlight important or divisive political issues.

A study conducted by the PEW Internet & American Life Project found a strong positive relationship between these kinds of civic gaming experiences and higher levels of civic and political engagement by those who play such games. For example, among teens who had the most civic gaming experiences, 70 percent reported going online to get information about politics or current events; 70 percent reported having raised money for charity in the past 12 months; 69 percent reported being committed to civic participation; and 61 percent reported an interest in politics.<sup>71</sup>

**B. There Is No Causal Relationship Between Video Game Content and Violent Behavior By Game Users.**

The *Notice* cites a single survey of approximately 1,000 youth ages 8 to 18 that concluded that children who spend more time playing video games are “more likely to get into physical fights.”<sup>72</sup> But numerous studies and common sense have debunked the myth that there is any causal link between video games and violent behavior by users of video games. Statistics suggest, for example, that the vast majority of video games do not contain significant violent

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<sup>71</sup> *Id.* at 44 (2008).

<sup>72</sup> *Notice* ¶ 30 (citing Suzanne Martin and Koby Oppenheim, “Video Gaming: General and Pathological Use,” 6 HARRIS INTERACTIVE TRENDS & TUDES 1 (March 2007), available at [http://www.harrisinteractive.com/news/newsletters/k12news/HI\\_TrendsTudes\\_2007\\_v06\\_i03.pdf](http://www.harrisinteractive.com/news/newsletters/k12news/HI_TrendsTudes_2007_v06_i03.pdf)).

content. The majority of video games sold in 2009 were rated E (Everyone) or E10+ (Everyone 10 and older), and only 17 percent were rated M (Mature).<sup>73</sup>

Recent research concluded that there is not “a causal or correlational link between violent media and subsequent aggression in viewers.”<sup>74</sup> In addition, a 2008 study found that neither randomized exposure to violence in video games nor previous real-life exposure to violence in video games caused any differences in aggression.<sup>75</sup> Another study examined correlations between trait aggression, violent criminal acts, and exposure to both video games having violent elements and family violence. Results indicated that trait aggression, family violence, and male gender were predictive of violent crime, but that exposure to violent video games was not.<sup>76</sup>

A recent review of research purporting to show that violent content has a negative effect on youth concluded that there is no causal link between media violence and violent crime: “The question addressed here is . . . whether the effect has been demonstrated convincingly in the scientific literature — and the answer is ‘not so far.’”<sup>77</sup> Other experts have concluded that

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<sup>73</sup> See <http://www.theesa.com/facts/index.asp>.

<sup>74</sup> Christopher J. Ferguson & John Kimburn, “The Public Health Risks of Media Violence: A Meta-Analytic Review,” 154 *JOURNAL OF PEDIATRICS* 759–63 (2009).

<sup>75</sup> See Christopher J. Ferguson, et al., “Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation?” 35 *CRIMINAL JUSTICE & BEHAVIOR* 311–32 (2008).

<sup>76</sup> See Christopher J. Ferguson, et al., “Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation?” 35 *CRIMINAL JUSTICE & BEHAVIOR* 311–32 (2008).

<sup>77</sup> Dr. Joanne Savage, “Does Viewing Violent Media Really Cause Criminal Violence? A Methodological Review,” 10 *AGGRESSION AND VIOLENT BEHAVIOR* 99 (2004).

there are “many inconsistencies in the reported amount of research into media violence,”<sup>78</sup> and that “the research on the effects of violent video games have been inconsistent and equivocal.”<sup>79</sup> Most of the research on electronic play has been criticized as unreliable because it focuses on “possible negative effects for children and adolescents, and contextual factors such as socioeconomic status and culture are rarely considered.”<sup>80</sup> In sum, “the research data don’t support the simplistic claims being made about a causal relationship between violent video games and real-world violence perpetrated by the broad range of teenagers who play them.”<sup>81</sup>

Courts have carefully scrutinized the scientific evidence offered to support the supposed connection between violent video games and real-world violence and have repeatedly rejected such claims.<sup>82</sup> As the Ninth Circuit recently summarized, “[n]one of the research

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<sup>78</sup> Raymond Boyle & Matthew Hibberd, “Review of Research on the Impact of Violent Computer Games on Young People,” STIRLING MEDIA RESEARCH INSTITUTE (2005).

<sup>79</sup> Beth Donahue-Turner & Amiram Elwork, “Constitutional Combat: Psychological Evidence Used To Restrict Video-Game Violence,” (2009).

<sup>80</sup> Dorothy E. Salonijs-Pasternak, “The Next Level of Research on Electronic Play: Potential Benefits and Contextual Influences for Children and Adolescents,” HUMAN TECHNOLOGY, at 1, 5–22 (2005).

<sup>81</sup> Lawrence Kutner & Cheryl K. Olson, *Grand Theft Childhood: The Surprising Truth about Violent Video Games, and What Parents Can Do*, at 190 (2008); see also K. Sternheimer, “Do Video Games Kill?” 6 CONTEXTS 13–17 (Winter 2007), <http://www.theesa.com/facts/STERNHEIMERCONTEXTSARTICLE.pdf>; C.J. Ferguson, “Evidence for Publication Bias in Video Game Violence Effects Literature: A Meta-Analytic Review,” AGGRESSION AND VIOLENT BEHAVIOR, at 17 (2007); A. Lager & S. Brenberg, “Health Effects of Video and Computer Game Playing — A Systematic Review of Scientific Studies,” NATIONAL SWEDISH PUBLIC HEALTH INSTITUTE (2005).

<sup>82</sup> See, e.g., *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1073-74 (N.D. Ill. 2005) (finding that research came “nowhere close” to making the necessary showing that playing video games caused minors to act violently), aff’d 469 F.3d 641 (7th Cir. 2006); *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 652 (E.D. Mich. 2006) (“The research conducted by the State has failed to prove that electronic games have ever caused anyone to commit a violent act, let alone present a danger of imminent violence . . . the State’s research fails to prove that ultra-violent electronic games are ‘likely’ to produce violent behavior in children.”); *Entm’t Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065, 1069 (D. Minn. 2006) (finding no “causal link between (continued...)”).

establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. In fact, some of the studies caution *against* inferring causation.”<sup>83</sup>

**C. Research Indicates That Video Games Do Not Contribute To Obesity, and Many Games Promote a Healthy Lifestyle.**

The *Notice* also cites a consumer survey of approximately 1,000 youth ages 8 to 18 that concluded that children who spend more time playing video games are more likely to be “physically heavier.”<sup>84</sup> But recent research discredits the suggestion that video games contribute to obesity. For example, a study of college-aged males found that “prolonged electronic game play is not directly linked to obesity.”<sup>85</sup> Moreover, a survey of 7,000 *EverQuest 2* players found that video game players actually were physically healthier than the general population.<sup>86</sup>

In addition, there are many games on the market today — such as *Wii Fit Plus*, *My Fitness Coach 2: Exercise and Nutrition*, and *EA Sports Active* — that encourage players to adopt a healthy lifestyle that involves regular exercise. For example, in the video game *Wii Fit Plus*, players perform yoga poses to help tone muscles and improve posture, play balance games

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the playing of video games and any deleterious effect on the psychological, moral or ethical well-being of minors”); *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 832 (M.D. La. 2006) (evidence of harm is “tenuous and speculative” and “could hardly be called in any sense reliable”).

<sup>83</sup> *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009)

<sup>84</sup> *Notice* ¶ 30 (citing Suzanne Martin and Koby Oppenheim, “Video Gaming: General and Pathological Use,” 6 HARRIS INTERACTIVE TRENDS & TUDES 1 (March 2007), available at [http://www.harrisinteractive.com/news/newsletters/k12news/HI\\_TrendsTudes\\_2007\\_v06\\_i03.pdf](http://www.harrisinteractive.com/news/newsletters/k12news/HI_TrendsTudes_2007_v06_i03.pdf)).

<sup>85</sup> Elizabeth Wack & Stacey Tantleff-Dunn, “Relationships Between Electronic Game Play, Obesity, and Psychosocial Functioning in Young Men,” 12 CYBERPSYCHOLOGY & BEHAVIOR 241–244 (2009).

<sup>86</sup> Dmitri Williams et al., “Who Plays, How Much, and Why? Debunking the Stereotypical Gamer Profile,” 13 JOURNAL OF COMPUTER-MEDIATED COMMUNICATION 993–1018 (2008).

to develop their sense of balance, engage in strength training workouts to build and tone muscles, and perform aerobic exercises to tone the body. The game measures users' Body Mass Index, creates a personally-tailored workout program of gradually more challenging exercises, tracks the user's progress, and offers encouragement to help the user meet his or her fitness goals. As the *Notice* itself notes, online games can be successful at promoting healthy food choices and encouraging children to eat better.<sup>87</sup>

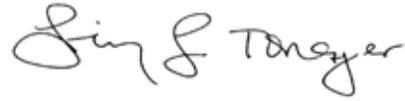
## CONCLUSION

The entertainment software industry's system of parental control technologies and tools is comprehensive and effective. Parents find it to be easy to understand and, most important, use it regularly when making decisions about what video games are appropriate for their families. Government mandated regulations that would supplant, modify, or extend the industry's system necessarily would raise profound constitutional and jurisdictional issues and, just as seriously, would hamper the industry's ongoing efforts to develop innovative tools to address the dynamic challenges arising in the new media environment. The ESA urges the Commission to stay the regulatory hand — not simply because it lacks either the expertise or legal authority to act, but also because action would be, at best, ineffective, and, more likely, destructive of the very goals it is seeking to achieve.

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<sup>87</sup> *Notice* ¶ 18 (citing Tiffany A. Pempek and Sandra L. Calvert, "Tipping the Balance: Use of Advergaming To Promote Consumption of Nutritious Foods and Beverages by Low-Income African American Children," 7 ARCHIVES OF PEDIATRICS & ADOLESCENT MEDICINE 633 (2009)).

Respectfully submitted,



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Dated: February 24, 2010