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Representing the Adult Entertainment Industry

By Clyde DeWitt

If you are expecting to read here about wild parties with X-rated starlets, you will be greatly disappointed. Alas, for every such beauty with whom the author has interacted in his career as an adult entertainment lawyer, there were 100 clients that would more closely resemble a taller version of Danny DeVito. However, roughly 25 years of representing most of the components of the adult entertainment industry has given a perspective on all of this that those outside the adult arena perhaps never see.

Just what is the adult entertainment industry?

The adult entertainment industry is enormous – it is erotic entertainment in every medium, from the Internet to prerecorded DVDs to magazines to gentlemen's clubs (nee "strip joints"), but includes every other medium that conveys either "erotica" or "sleaze," depending on your view of such things.

The adult entertainment industry is significantly larger than most believe. For example, a recent pronouncement of RIAA, bemoaning being clobbered by

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I Couldn't Watch the Ball Because I Was Watching the Ferris Wheel in Centerfield

By Kenneth R. Swift

Baseball and litigation are two of America's favorite pastimes. And ever since fans began paying money to watch the games, the paths of both pastimes have been intertwined, with most cases involving a fan being hit by a foul ball. This article will explore whether some of the long-standing legal rules that have governed foul ball case law should be altered to correspond to changes that modern stadiums and the business of baseball have made to fans' viewing experience.

The first part of this article will review the historical development of "foul ball" law and how the application of the doctrine of assumption of risk to foul ball cases has resulted in almost a complete defense for stadium owners. The

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Latin Entertainment Media

By Gary A. Watson and Toni Y. Long

This article is about the Latin entertainment industry in the United States and why it is expanding explosively. Specifically, we will analyze several unique factors concerning the Latino population in America that affect consumption of movies, television and music. Also, we will examine the entertainment industry landscape as it pertains to America's Latino population.

There are several significant aspects of the Latino population in America that influence the expenditures made for tickets to movies, for TV viewing and for the purchase of recorded music. Those factors include the overall size of the Latino population, the various nationalities, the use of Spanish- or English-language media, the growing youth market within the Latino population and the ever-increasing buying power of Latinos in America.

The size of America's Latino population

The size of the Latino population in America has grown steadily over the past several years. All signs indicate that it will continue to rise. As a result, the Latino population has become and will continue to be, America's largest minority group. According to Standard and Poor's conservative estimates, the

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Representing the Adult Entertainment Industry

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file-sharing, tagged the record industry at $12 billion annually.[1] Perhaps equally the victim of file-sharing, the adult entertainment industry has been estimated at a staggering $10-14 billion every year,[2] although its output is considerably more difficult to measure. So, where does the industry generate those billions in annual revenue? Read on.

Traditionally, much of the production of sexually explicit motion pictures has emanated from a part of Los Angeles north of the Santa Monica Mountains called Chatsworth. A Hollywood-type tour bus could cruise past a significant percentage of the triple-X video companies in a half-hour tour of that area, pointing out one nondescript, industrial-park-type building after another from which countless adult videos are collected by UPS every week.

The manufacturers of adult videos, presently recorded in the dying VHS format and the booming DVD format, crank out a dizzying 12,000-plus *titles* every year. The millions on millions of pieces find their way to mail-order companies, which sell untold numbers of them on their e-tail Internet sites and to retail video stores, which sell an increasing number every year and rent them a staggering 600 million times. Take a second to comprehend how many 600 million is – several for every American adult!

Distribution of adult motion pictures at the brick-and-mortar level is almost entirely from two sources. Most controversial are the so-called "adult bookstores," emporia that feature the entire spectrum of adult products including videos, magazines, books, "lotions and potions" and "adult novelties," a line of products that is remarkably successful for reasons that nobody has ever thoroughly explained. "Adult bookstores" usually also include those little cubicles in the back room, where depositing quarters allows private viewing of a short portion of an adult video (although, these days, most accept only paper currency).

The source of adult material likely most familiar to this audience is the "mom and pop" video store, a slowly vanishing breed that attempts to compete in the main part of their stores with the Blockbusters of the world. But the mom and pops also include "adults only" sections, which are their real profit centers and without which they generally never could compete with the chains – which all proclaim to be too moral to include adult fare. Often, adult will represent only perhaps 15 percent of the inventory and 10 percent of the floor space of a mom and pop, but half or more of its profit.

Video on demand poses a serious threat to mom-and-pop stores.

Then there are businesses that once were called "strip joints," now "gentlemen's clubs." They have graduated in the last 25 years from seedy places featuring strippers with missing teeth to multimillion-dollar palaces with valet parking, first-class steaks and attractive showgirls. The latter is without doubt the reason why "lap dance" is now found in the dictionary.[3]

Finally, the last decade has witnessed an explosion of the Internet. The first incarnation of adult Web sites was the proliferation of TGP (thumbnail-gallery-post) sites. Rapidly emerging now are Internet "video on demand" (VOD) sites, facilitated by new technology that allows real-time viewing of motion pictures over the Net. VOD, by the way, poses a serious competitive threat to mom and pop.

Other categories of businesses might be considered "adult entertainment," but are not particularly pervasive, maybe because they enjoy little or no First Amendment protection. They include massage parlors, swing clubs, lingerie modeling, body-painting studios, "in-call" and "out-call" services, escort services, nudist camps, bondage parlors, adult hotels and almost any other category of commercial endeavor related to sex that one can imagine. While the ones in those categories all have legal concerns of their own, they are beyond the scope of this article.

Each component of the adult entertainment industry has its own set of legal problems and its own colorful history. Representing them indeed has brought into the office an interesting array of characters and their legal problems.

Books, magazines and motion pictures

Professor Harold Hill threateningly asked worried mothers of River City: "Does your son have a dime novel hidden in the corn crib?"[4] Here begins the story of technology facilitating erotica and censors trying to suppress it. As printing became economically feasible, so, too, did printing pornography. And, as the technical means of reproducing pornography expanded, more so did the demand; and, so, too, did bands of censors seeking to do away with all of it.

Anthony Comstock, who led crusaders for moral decency shortly after the Civil War, succeeded in pushing through Congress the Comstock Act (which, albeit amended a few times, remains on the books[5]), prohibiting use of the mails to distribute anything fitting a laundry list of definitions, including obscene, indecent, immoral, etc.

However, it was not until the 1950s that the pornographers and the censors began to lock horns in earnest and the business of being an adult entertainment lawyer came into its own. In 1957, the late Stanley Fleishman urged the Supreme Court that even the most obscene speech was protected by the First Amendment. After all, he argued, the First Amendment says, "Congress shall make no law . . ." abridging the freedom of speech; and "no law" means just what it says – no law. Period!

The result – the famous *Roth v. United States* decision[6] – created a need for adult entertainment lawyers. And Fleishman (who was the founder of the author's firm, and would go on to argue a dozen other adult-entertain-

ment cases before the high court) became perhaps the nation's first adult entertainment lawyer. The court there defined what has been accurately described as the "dim and uncertain line" between constitutionally protected speech and criminal activity.[7]

That line, as it turned out, was so dim and so uncertain that an entire cottage industry evolved, defending the criminal obscenity cases that were filed by the score during those years. The adult entertainment lawyers of the day came into criminal courts across the country with stacks of files under their arms, doing what they could to defend their clients against seriatim obscenity charges. Many of their clients found themselves arrested on a weekly – or even daily – basis, but often earning a bundle of money in the process.

The most important thing that adult entertainment lawyers of that era accomplished, however, was to stand up and proclaim that their clients were not purveyors of smut but, rather, regular publishers who did nothing of which they should be ashamed. The anchor of that approach, of course, was Hugh Hefner, who confounded America by credibly advancing the proposition that classic literature, important political issues, the business world and a variety of other sophisticated topics could be integrated with, albeit artistic, nude photography and erotic humor.

A combination of the pill, the sexual revolution, Hugh Hefner and the small but important group of adult entertainment lawyers (then, "obscenity lawyers"), all coupled with the Supreme Court's inability to reconcile what erotic speech was protected by the First Amendment and what was not, led to an explosion of outlets for racy magazines, ranging from *Playboy* to nudist magazines to, in some markets, something called "32-page glossies" (which consist of just what you would expect).

By 1970, so-called "adult bookstores" had proliferated extensively; Los Angeles alone had some 250 of them.[8] But in 1972, the New York City premiere of "Deep Throat" started in motion a series of events that would change America's view of erotica. People lined up around the block to witness 63 minutes of hard-core sex and admitted to their friends having done so.

But "Deep Throat" was more than just sex; it was a feature-length, well-written comedy, hurtling miles past the standards of any hard-core motion picture before it. It brought a new genre of movie onto the American landscape, as articles about it were everywhere in the mainstream press and commentary about it went from Johnny Carson to the nightly news. The sexual revolution had found its way into the American landscape, as was shown by juries, many of which were unwilling to return guilty verdicts in many trials involving "Deep Throat."

Meanwhile, significant voices complained that street crime was running rampant, while prosecutors and police departments were wasting limited time and resources on dirty movies. So the focus of the censors had to change. And although obscenity prosecutions continued with mixed success, keeping adult entertainment lawyers busy with armloads of obscenity cases, the front was beginning to move. The political shift had taken the pressure off prosecutors in major metropolitan areas to eradicate sexually explicit materials altogether, but everyone loudly complained if there was a smut shop or adult theater nearby.

Adult entertainment lawyers were busy with armloads of obscenity cases.

In 1972, Detroit amended its anti-skid-row ordinance, which had imposed distance requirements separating enumerated businesses, including saloons, hotels, motels, pawnshops, pool halls, second-hand stores, taxi dance halls and shoeshine parlors.[9] Detroit's theory was that concentration of certain types of businesses caused a deterioration of the quality of the neighborhood. The city's 1970 amendment added adult businesses to the "skid row" list, which in 1976 the Supreme Court approved against a First-Amendment challenge in *Young v. American Mini Theatres*.[10] Adult entertainment lawyers suddenly were catapulted into the fields of land use and governmental regulation.

On the heels of the court's approval of the Detroit ordinance, copycat ordinances popped up all over the United States; the fact that *Young* was a plurality decision left plenty of fodder for litigation. The regulatory attack on adult businesses exploded, as local governments across the country enacted varying degrees of adult entertainment regulations, arising from the impetus of groups pushing for "decent literature" (they later evolved to nominally protecting "family values" or protection of children, presumably because they discovered that the notion of censorship did not always sit so well with the public).

As a result of the proliferation of regulatory ordinances, adult entertainment lawyers were gradually transplanted from the criminal courts to the civil courts, filing an endless series of creative constitutional challenges to local ordinances, fueled in part by The Civil Rights Attorney's Fees Awards Act of 1976,[11] mandating that the losing local government pay attorneys' fees in such cases.

The 1980s were a paradoxical time. On the one hand, the election of Presidents Reagan and Bush No. 1 brought along a profoundly more conservative federal bench, the Meese Commission (deputized to do away with porn and cause a dramatic rise in federal obscenity prosecutions), new federal anti-obscenity laws and a Department of Justice committed to enforcing them.

On the other hand, consumption of hard-core pornography during the 1980s exploded. During the 1980s, the VCR moved from being a toy for the wealthy to a standard household appliance. Recall that when the VCR was first introduced, Hollywood did everything it could to stop it, including Universal Studio's Supreme Court case attempting to designate the Betamax as an illegal, copyright-

infringement machine.[12] Hollywood wrongly believed that VCRs would dilute attendance at motion picture theaters; it turned out, as everyone knows, that they created a huge secondary market for motion pictures.

Indeed, it was adult that fueled the original VCR boom. Video rental at the outset of the 1980s was relatively inconsequential. Adult probably grew faster than Hollywood. By the end of the decade, Blockbuster was on the scene but, elsewhere, rentals of hardcore, X-rated videos had run into the hundreds of millions, stabilizing at over a half billion annually.

Clinton's election stopped federal obscenity prosecutions cold.

Thus, paradoxically, while the Republicans during the 1980s embarked on an unprecedented war on porn, American viewing of sexually explicit videos skyrocketed. And with the government's unlimited taxpayer funding clashing with the substantial resources of the adult video industry – fueled by exploding consumption – adult entertainment lawyers had no shortage of challenges. They were fighting on all fronts – obscenity cases against video manufacturers and distributors; regulation by local governmental bodies designed to take the profitability out of adult; and, in the news media, which always loves to cover a knock-down, drag-out battle about its favorite topic – sex – especially during sweeps weeks.

The 1992 election of President Clinton stopped federal obscenity prosecutions cold. But at the same time, the NIMBY ("not-in-my-backyard") forces were harnessing municipal regulatory powers to regulate adult businesses – to death in some cases. The 1990s saw range wars over the existence of adult businesses, which continue to this day. Adult entertainment lawyers have a practice that, at least insofar as the adult video business is concerned, primarily involves battling cities for the survival of adult retail outlets.

But the Bush No. 2 administration's promise to gear up obscenity prosecutions again coupled with Congress' supporting funding portends resumption of FBI raids on the adult video production and distribution network.

As the adult motion picture industry evolved – from the perceived seedy, 1960s businesses occupying run-down theaters and adult bookstores with yellow facades and flat-black interior walls, to a legitimate industry – much changed from the standpoint of the adult entertainment lawyer. The focus not only migrated from the criminal courtroom to the civil one, but the businesses were increasingly being operated like businesses, having normal corporate structures and accounting practices, protecting intellectual property and the like.

In response, the adult entertainment lawyer evolved from a specialized criminal defense lawyer to a lawyer well-rounded in an array of disciplines, still including criminal defense, but also municipal law, land use, intellectual property and general business law. But always looming were obscenity laws, with ever-sharper teeth.

Dirty dancing

At least since Little Egypt appeared at the Chicago World's Fair in 1893, erotic dancing has been a controversial topic in America. During the 1950s and '60s, erotic dancers began exposing themselves on a more regular and complete basis and, for the first time, it was not limited to surreptitious stag parties. Because most public indecency statutes only applied to nudity *that might offend someone* (after all, there were restrooms and locker rooms to contend with), why couldn't Carol Doda drop her top (an activity of which she made a career) at the Condor Club in San Francisco, where nobody was offended? In those days, whether topless dancing violated public indecency or obscene performance laws was the issue *du jour*.

With few exceptions, however, early strip clubs were for the most part not very classy places, at least going into the 1970s. But then, along came the Henry Ford of strip clubs, one Michael J. Peter, a brilliant entrepreneur, 1973 graduate of perhaps the finest hotel and restaurant management school in the country at Cornell and a veteran of managing the up-scale discos that were so popular in those days.

As Peter tells the story, when he was running a disco in Florida he noticed as he drove about town a ramshackle building advertising erotic or exotic dancers – whatever they called them then. What impressed him most about this downtrodden place was the array of spit-shined, luxury automobiles in the parking lot and the fact that, when the owners of those very vehicles came into the disco *he* was running, they dropped unprecedented tips. Peter describes checking the place out: He was greeted by some leg-breaker, who plainly was from the bottom of the local gene pool. After paying an impressive admission fee, Peter was escorted to a table, across a pitch-dark business that was no classier than its exterior. He was then greeted by a "too-fat-to-wear-that" woman with a missing front tooth who, to his amazement, asked if he would like an up-close-and-personal "dance" for a tall fee.

The brilliant guy that Peter has always been, he quickly figured out that if a room full of these old business geezers driving Cadillacs and with executive salaries would pay that kind of money to be amused in this rat trap, imagine the potential of offering the same kind of entertainment in a beautifully appointed, marble-and-brass club, with attractive entertainers, first-class food, valet parking and all of the other accoutrements of a five-star environment. And with his background in fine dining and entertainment, he was just the man for the job.

Thus was born the "upscale gentlemen's club." And, because there was little about Peter's operation (quickly operations) that was subject to any intellectual property protection, the business model grew like wildfire. Clubs popped up around the country – particularly, oddly enough, in the conservative areas of Florida and

Texas – and donned monikers including "gold," "platinum," "diamond," in lieu of the likes of "Joe's Galloping Jugs."

The multimillion-dollar business of upscale gentlemen's clubs begat "table dances," "couch dances" (neither the tables nor the couches danced), lap dances, VIP rooms and a bundle of income for a great many investors. It also probably was a greater source of breast-implant surgery than every other source, combined.

Litigation continued over First Amendment protection of topless/nude dancing and local regulations, particularly the business-killing ordinances that require the dancers to remain some number of feet from the customers and prohibit direct tipping. But the business model for upscale gentlemen's clubs gave rise to a whole new field of endeavor for adult entertainment lawyers – employment law. Many clubs categorized the dancers as independent contractors instead of employees. Independent contractor status, however, has come into increasing disfavor with most departments of labor and taxing authorities, so litigation arose over that issue from coast to coast.

So, now, employment law was added to the adult entertainment lawyer's existing arsenal of skills in the areas of criminal defense, municipal law, land use, intellectual property and general business law.

Enter the Web

The explosion of the Internet during the 1990s dramatically altered the life of adult entertainment lawyers. During the early days of the Web, materially all of the operators of adult Web sites came to it from the computer world, not from adult entertainment. Few of them consulted with lawyers before establishing their businesses and the few that did were probably misled by lawyers who knew nothing about the Web (at that point, who did?) and even less about adult entertainment and intellectual property.

Early Web sites were nothing more than TGP galleries and they were incredibly slow by today's standards, with almost all of the customers operating on dial-up connections. But it was a gold mine for a time. Webmasters would simply obtain merchant processing from wherever they could (often just using a brick-and-mortar account they already had); steal the pictures from Usenet; post them; and the money flowed in.

Many acquired cute domain names, often at the expense of owners of famous trademarks, probably the most notorious of which was *whitehouse.com*, a porn site that parlayed the name of a famous national landmark into considerable traffic from people interested in a tour of 1600 Pennsylvania Avenue (and traffic is the source of all things good in the adult Internet world).

Countless times, Webmasters who came up through the world of science and not entertainment would come into a lawyer's office, cease-and-desist letter in hand, proclaiming, "but this is public domain because it was on Usenet"; or "why can't I use this domain name – I know it's a famous trademark, but I got it first." These 20-somethings had no idea that people went to jail for sending "Deep Throat" to Memphis and many could not figure out what was wrong with posting to the entire world pictures that appeal to only zoophiles. Meeting those clients – incredibly young kids making gobs of money – was sometimes remarkably amusing.

Traffic is the source of all things good in the adult Internet world.

Another component of the evolution of adult Internet was the fact that there was much pressure on the credit card companies to stop facilitating all of this Internet porn. There also was massive fraud – charge-backs, where the customer denies authorizing the charge and the credit-card network reverses the payment. Whether the source was the political pressure or the charge-backs or some combination of the two (there is much debate about this), the result was a crackdown on adult Web sites, with many irrevocably losing their ability to get merchant processing, the life blood of the Internet. The adult entertainment lawyer thus became a banking lawyer, along with everything else.

As everyone knows, the 1990s transformed the Internet from a geek toy to a critical element of mainstream commerce. But the Internet was a copyright-infringement machine. And as it surfaced as such and its popularity exploded, owners of intellectual property realized that they needed to begin protecting their goodies. Everyone from popular men's magazines (whose photo spreads were regularly being ripped off) to movie stars (whose dated, unclad images were a favorite for the many "celebrity sites" that existed then) was coming after the TPG sites.

Adult entertainment lawyers now were trademark and copyright lawyers, too, much more so than in the video milieu. They fell into cutting-edge stuff, such as cybersquatting, trademark infringement by initial-interest confusion from meta tags, so-called "deep linking" and more. Also, the continuous enactment of legislation involving the Internet, coupled with court decisions written by judges who were learning about the Internet for the first time, turned adult entertainment lawyers into perpetual CLE students, a phenomenon that continues to this day.

The obscenity and indecency issues where the Internet is concerned have largely flummoxed everyone, including the Supreme Court. Since the 1973 *Miller* decision, obscenity has been a function of local community standards and of the work taken as a whole. But, the Supreme Court now has recognized "the impact caused by differences in community standards across the country, restricting Web publishers from openly displaying a significant amount of material that would have constituted protected speech in some communities across the country but run afoul of community standards in others."

As Justice Kennedy noted in a recent decision involving the Web, the court must answer "the vexing question of what it means to evaluate Internet material 'as a whole,' . . . when everything on the Web is connected to everything else."[13]

What the emergence of the VCR accomplished in terms of making Americans comfortable with sexually explicit fare is dwarfed by what the Internet has done. The half-billion rentals of hard-core VHS and DVD movies now is eclipsed by the literally millions of hard-core Web pages. Much like the collision between the Reagan/Bush No. 1 administrations and the video industry, adult entertainment lawyers are now experiencing the Bush No. 2 administration squaring off against adult Internet.

It's not who you know; it's who knows you.

With this new batch of clients, the adult entertainment lawyer must add obscure topics such as banking law, cybersquatting, trademark infringement by initial-interest confusion from meta tags, "deep linking" and the intricacies of the Digital Millennium Copyright Act to employment law, criminal defense, municipal law, land use, intellectual property and general business law.

Observations

There is nothing like this business. Unbeknownst to many, it has its trade publications (*Adult Video News*, for the adult video industry, *AVN Online* and *Klixxx* for the adult Internet industry and *Exotic Dancer Bulletin* for the gentlemen's clubs), its trade shows (Adult Entertainment Expo, Internext, AMNE[14] and the Gentlemen's Club Expo, among others) and every other facet of a well-organized industry – even dancers seeking to unionize.

For the lawyers, though, as the story goes in Hollywood, it's not *what you know*; it's not *who you know*; it's *who knows you*. And, also, as in Hollywood, if you don't get results, even if they "remember they called you 'Al'," you quickly can find yourself "standing in line, just waiting for bread."[15] It is all about results.

From the first generation of adult entertainment lawyers, who sought to maintain a First Amendment barrier between their clients and the hoosegow, the role of the adult entertainment lawyer has expanded exponentially. It now demands expertise not just on constitutional law, the First Amendment and the law of obscenity and erotic expression, generally. Equally important today are the array of topics addressed daily by entertainment lawyers in general, along with the many others that have cropped up that are unique to various types of adult entertainment.

Increasingly, the adult entertainment lawyer is finding a significant role to play with the traditional mainstream entertainment industry, which now finds itself confronted by the bread and butter issues of the adult entertainment industry. That is perhaps best punctuated by the 2004 Super Bowl, which in three, quick seconds was catapulted into the realm of adult entertainment.

All in all, this has been a fascinating career; and, hopefully, more years will come. After all, the war between those who want to furnish a salivating market with erotica and the censors wanting to stop it will never end – the front continues to move back and forth, but the war will never end.

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Endnotes

1. RIAA's published statistics show roughly $11.8 billion in recording shipments in 2003. The Recording Industry Association of America's 2003 Yearend Statistics, 1330 Connecticut Ave., NW, Suite 300, Washington, DC 20036.
2. F. Rich, "Naked Capitalists: There's No Business Like Porn Business," *New York Times*, May18, 2001 (Estimating pornography as generating between $10 and $14 billion in annual sales).
3. *The American Heritage Dictionary of the English Language*, Fourth Edition (Houghton Mifflin Co. 2000).
4. "You've Got Trouble (Right Here in River City)," lyrics by Marion Hargrove music by Meredith Wilson & Franklin Lacey (1957).
5. 18 U.S.C. § 1461.
6. 354 U.S. 476. The court actually combined two obscenity case that it decided together, *Roth*, a federal one and *Alberts v. California*, the state obscenity case that Fleishman argued.
7. "The regulation of obscenity, often separated from protected expression only by a 'dim and uncertain line,' must be accomplished through 'procedures that will ensure against the curtailment of constitutionally protected expression.'" *Alexander v. United States*, 509 U.S. 544, 573 (1993)(Kennedy, J., dissenting), quoting the majority in *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).
8. *Kaplan v. California*, 413 U.S. 115, 116 (1973).
9. For those of you who cannot imagine why shoeshine parlors caused blight, you should know that in Northeastern cities, such places were magnets for "numbers" runners involved in the "policy rackets." Largely popular in African-American communities, these storefront-gambling empires still exist.
10. *Young v. American Mini Theatres*, 427 U.S. 50 (1976).
11. 42 U.S.C. § 1988.
12. *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984).
13. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 578 (2002) and, at 600 (Kennedy, J., concurring).
14. AMNE is the Adult Novelties Manufacturers Expo, held every summer in Los Angeles.
15. "Brother, Can You Spare a Dime," lyrics by Yip Harburg, music by Gorney Harburg (1931).