

**LAW & ECONOMICS OF THE ADULT ENTERTAINMENT INDUSTRY TODAY:
AN INSIDE VIEW FROM THE INDUSTRY’S LEADING TRADE PUBLISHER**

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INTRODUCTION

2007 was not, to say the least, a very good year for the American adult entertainment industry, headquartered in southern California’s San Fernando Valley.¹ In brief, a combustible combination of legal fights,² economic downturns³ and content

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¹ See generally Joshua Chaffin, *Porn Industry Points the Way for Struggling Hollywood*, FINANCIAL TIMES (London), Mar. 9, 2007, at World News 6 (describing the San Fernando Valley as “home to the ‘other Hollywood’” where “the pornographic film industry is already suffering through a home entertainment meltdown”); Sharon Mitchell, *How to Put Condoms in the Picture*, N.Y. TIMES, May 2, 2004, at Sect. 4, 11 (describing “the San Fernando Valley – or ‘Porn Valley’ – where much of the sex-film industry is based”).

² See *infra* notes 7-10 (identifying four different federal obscenity prosecutions that were pending or took place in 2007); See also, David Sullivan, *John Stagliano Arraigned on Obscenity Charges*, AVN Website,

piracy⁴ dealt the industry a severe one-two-three punch. The legal battles, in the name of defending the First Amendment⁵ right of free expression, included federal obscenity⁶

available at <http://www.avn.com/video/articles/29739.html> (last visited Apr. 27, 2008) (reporting a 2008 obscenity indictment by the Justice Department against longtime adult producer John Stagliano).

³ See generally Matt Richtel, *For Producers of Pornography, Internet's Virtues Turn to Vices*, N.Y. TIMES, June 2, 2007, at A1 (asserting that “the established pornography business is in decline” and contending that “online availability of free or low-cost photos and videos has begun to take a fierce toll on sales of X-rated DVDs”).

⁴ See generally Mark R. Madler, *Adult Entertainment Industry Leaders Move to Combat Piracy*, SAN FERNANDO VALLEY BUS. J., Sept. 17, 2007, at 1 (describing how piracy of content is a growing problem for the adult entertainment industry, and reporting that the industry’s “loss in 2007 is estimated at \$2 billion, according to the Global Anti-Piracy Agency, a not-for-profit formed in June to tackle porn piracy and based in North Hollywood. The loss is figured at about 25 percent of the industry’s overall revenues of \$8.5 million.”).

⁵ The First Amendment to the United States Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁶ Obscene speech falls outside the ambit of First Amendment protection and thus may be regulated without raising the same constitutional concerns and questions. As the United States Supreme Court put it a half-century ago, obscene expression is “not within the area of constitutionally protected speech or press.” *Roth v. United States*, 354 U.S. 476, 485 (1957).

The current test for obscenity, which was established by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), focuses on whether the material at issue: 1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the

cases in Arizona,⁷ Florida,⁸ Pennsylvania⁹ and Utah.¹⁰ The economic woes and misery, caused by an assortment of factors ranging from the proliferation of free amateur sites like YouPorn.com¹¹ – the so-called “YouTube of Porn”¹² – to a glut of professional adult

perspective of the average person; 2) is patently offensive, as defined by state law; and 3) lacks serious literary, artistic, political or scientific value. *Miller* at 24.

⁷ *Federal Grand Jury Charges Arizona and California Companies and Their Owners with Obscenity Violations*, PR NEWSWIRE, June 1, 2006 (reporting that “[a] Chatsworth, California film production company and a Tempe, Arizona video distributor and retailer, along with three owners of the businesses, have been charged by a federal grand jury in Phoenix, Arizona with operating an obscenity distribution business and related offenses”).

⁸ *See Billy House, Adult Filmmaker Charged with Obscenity*, TAMPA TRIB., June 1, 2007, at 5 (describing the indictment of Paul Little, owner of Maxworld Entertainment, of Altadena, Calif., on ten counts of obscenity – “five counts of transmitting obscene matter by Internet and five counts of sending obscene matter through the U.S. mail to Florida addresses”).

⁹ *See Neil A. Lewis, A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27 (discussing the federal government’s obscenity prosecution of Karen Fletcher, “a 56-year-old recluse living on disability payments,” who faces trial “for writings distributed on the Internet to about two dozen subscribers”); *see also*, Paula Reed Ward, *Appeals Court Reinstates Porn Case*, PITT. POST-GAZETTE, Dec. 9, 2005, at A-1 (discussing the Third Circuit U.S. Court of Appeals decision that the trial judge “erred in dismissing the indictment against Extreme Associates, Inc., and its owners, Robert Zicari, and his wife, Janet Romano”).

¹⁰ *See Pamela Manson, Pair Charged with Porno Sales*, SALT LAKE TRIB., June 15, 2007 (noting “the U.S. Attorney’s Office in Salt Lake City has accused two brothers of selling obscene materials through their Internet business, claiming the Ohio enterprise shipped hard-core pornographic movies to Utah”).

¹¹ A *USA Today* article summed up the situation regarding the economic woes for the adult industry caused by such amateur sites:

content, were captured well by a June 2007 *Los Angeles Daily News* article that observed that “the Internet that built the industry into the multibillion-dollar economic engine it is today threatens to drive it off course. The gate has been cast wide open – and that’s letting too many people in the door.”¹³

Perhaps the most knowledgeable person about both the legal and economic issues facing the adult business today is Paul Fishbein, president of Adult Video News.¹⁴ A frequent commentator in the mainstream news media about issues confronting the adult industry,¹⁵ Fishbein has chronicled this business from his prime perch at AVN headquarters in Chatsworth, California¹⁶ for more than a quarter century.

Overall sales and rentals of X-rated DVDs have plunged 15% in the last year and up to 30% over the past two years because video and photos on the Internet – much of it created by amateurs – are available at a fraction of the cost or for free. PornoTube.com and YouPorn.com are piping user-generated naughty content straight to the PCs, cellphones and Internet-connected TVs of consumers.

Jon Swartz, *Purveyors of Porn Scramble to Keep Up with Internet*, USA TODAY, June 6, 2007, at 4B.

¹² *Predictions 2008*, NAT’L REV., Dec. 27, 2007, available at

<http://article.nationalreview.com/?q=ZTdkMDA5YTdiZTBhYzUwNjI0NjM4OTg1NWU3MmFmMTc=> (last visited Apr. 27, 2008).

¹³ Brent Hopkins, *The Adult-Movie Business Has Come a Long Way from Stag Films and ‘Deep Throat,’* L.A. DAILY NEWS, June 3, 2007, at N1.

¹⁴ See generally *Faces of AVN Media Network: Paul Fishbein*, available at

http://www.avnmedianetwork.com/index.php?content=faces_paul (last visited Jan. 10, 2008) (providing brief biographical information about Fishbein).

¹⁵ See, e.g., Matt Richtel, *A Thaw in Investment Prospects for Sex-Related Businesses? Maybe*, N.Y. TIMES, July 27, 2007, at C7 (suggesting that “[i]nvestor reticence about the sex industry is changing notably”); Scott Hettrick & Dana Harris, *Vid Revs Generate Stream for Porn Biz*, DAILY VARIETY, Dec. 13, 2005

During his tenure at AVN, Fishbein has watched the adult business collide with the government in numerous protracted legal battles – including ones that tested the outer boundaries of First Amendment protection.¹⁷ For a time, Fishbein even published a magazine – *Free Speech* – devoted exclusively to the legal issues adult content producers face daily.¹⁸ Though short lived, the publication nonetheless was evidence of how critical First Amendment law is for an industry that never strays far from the scornful sight of law enforcement authorities.

Today, the government is squeezing the adult entertainment business from multiple directions. The prosecutions referenced above are only part of recent efforts to regulate the operations of an industry struggling to redefine itself in light of technological advancements and amateur entrants into the marketplace. In summer 2006, the FBI began conducting unannounced inspections to confirm that adult content producers keep

(noting that “adult content dominates the sales of in-hotel movie purchases”); Bill Keveney, *Hollywood Gets in Bed with Porn*, USA TODAY, Oct. 17, 2003, at 1E (suggesting that mainstream entertainment producers are creating shows that highlight the adult industry and enable viewers “to peep into the neon glow of a culture that has long operated on the edges of entertainment”); Bill Marvel, *As Profits Explode, Stigma Persists*, DALLAS MORNING NEWS, Apr. 24, 2002 (noting that the number of daily visits to Internet porn sites “is easily in the tens of millions”); and Erik Baard, *You’ve Got Porn*, VILLAGE VOICE (New York, NY), Oct. 24, 2000, at 40 (describing the proliferation of online pornography).

¹⁶ See AVN Media Network Website, available at <http://www.avnmedianetwork.com/index.php?content=contact> (last visited Jan. 31, 2008) (providing the address as 9414 Eton Avenue, Chatsworth, Cal.).

¹⁷ *Supra* notes 7-10.

¹⁸ *Infra* Part II, Section C.

the age-verification records for performers as required under federal law – 18 U.S.C. §2257¹⁹ – and causing further woes for the already beleaguered industry.²⁰

Although ostensibly designed to keep underage performers out of adult materials, the stringent record-keeping requirements arguably go well beyond what is necessary to ensure that no minors find their way on to an adult set.²¹

¹⁹ 18 U.S.C. § 2257 Record keeping requirements, which provides in relevant part:

(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter which--

(1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce; shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

²⁰ Beth Barrett, *Crackdown by FBI Tests Adult Limits*, L.A. DAILY NEWS, June 7, 2007, at N10 (noting that “the FBI has stepped up its inspection of production company documents verifying that all performers are 18 or over”); *See also*, Robert D. Richards & Clay Calvert, *The Legacy of Lords: The New Federal Crackdown On the Adult Entertainment Industry's Age-Verification and Record-Keeping Requirements*, 14 UCLA ENT. L. REV. 155 (2007) (interviewing eight individuals, including a top adult industry attorney, about the current spate of regulatory inspections).

²¹ 18 U.S.C. §2257 (b) (2008), which provides, in relevant part:

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct--

(1) ascertain, by examination of an identification document containing such information, the performer’s name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

Fishbein has witnessed other broad-based law enforcement sweeps of the adult industry in the past – a prosecutorial wave took place in the late 1980s²² and the early

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d) (1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

²² See Caryle Murphy, *FBI Seizes Allegedly Obscene Tapes From 8 Shops; Raids Called Second Phase in Probe of Interstate Transportation of Pornographic Materials*, WASH. POST, Mar. 12, 1987, at C4 (describing the seizure of business records and videotapes at eight video rental stores in three different counties near Washington, D.C., “in what the FBI called the second phase of a continuing investigation into interstate transportation of allegedly obscene materials,” and adding that “[t]he probe is buoyed by a national effort that was begun by Attorney General Edwin Meese III to combat what he called ‘an explosion of obscenity’”); Caryle Murphy, *Federal Pornography Probe Launched; U.S. Grand Jury in Alexandria Subpoenas Records of 11 Firms*, WASH. POST, Nov. 29, 1986, at B1 (writing that “[a] federal grand jury in Alexandria has launched an extensive probe into interstate transportation of allegedly obscene materials, buoyed by Attorney General Edwin Meese III’s promise to combat ‘an explosion of obscenity’”).

1990s²³ – but somehow, for the veteran publisher, this time it is different. As he noted during the interview that is the centerpiece of this article, newcomers to the business have more of a “scorched-earth policy.”²⁴ That translates into retreating and disassociation when the government descends upon a fellow adult producer – a marked change from the past. He explained:

The people I came into the business with, as well as the people who were already established in the business, were much more of a community because they were under fire. They were the outcasts of society. They were pooh-poohed because they were pornographers, so they had this us-against-the-world mentality and they stuck together. Of course, they

²³ See Karen Cusolito, *Federal Porn Sweep Suffers Setback in Oklahoma Mistrial*, HOLLYWOOD REP., Aug. 5, 1991 (describing a mistrial in an obscenity prosecution in Oklahoma against two executives of a Los Angeles adult video production company called Cal-Vista as “the latest development in a U.S. Justice Department crackdown on adult entertainment stemming from raids last year on 30 Los Angeles businesses”); Earl Paige, *Mixed Outcome In Two X-Rated Vid Trials; Anti-Censors: Cal Vista ‘Victory,’ Dallas Defeat*, BILLBOARD, Aug. 17, 1991, at 4 (describing the outcome in two cases that stemmed “from widespread Justice Department actions against adult video suppliers” and that began when “the FBI conducted its sting operation” in 1990 at the Video Software Dealer’s Association [VSDA] convention and that “grew out of an investigation by the Child Exploitation and Obscenity Section of the U.S. Justice Department that has resulted in 30 raids on producers and distributors in the Los Angeles area over the past year and a half”); *Video Pauses on Censorship Issues*, HOLLYWOOD REP., July 19, 1991 (describing the 1990 sting operation that began at the VSDA convention when “agents undertook a sting operation under which they set up phony businesses or took post office boxes in the nation’s more conservative jurisdictions. When product ordered at the VSDA was delivered by mail, the agents initiated federal action against the manufacturers for delivering pornographic goods across state lines”).

²⁴ *Infra* Part II, Section D.

would fight with each other, but the worst enemies would give each other money if they were busted. It meant something.²⁵

Ironically, this may be the most important time in the history of the adult industry when the players should stay aligned, given the government's multi-dimensional attack. At the same time, however, the fractured nature of a business that has embraced technology and grown so rapidly that it lacks gatekeepers makes it all but impossible to recognize a cohesive group that now can be defined as the core of the business.²⁶ Opponents of the adult industry now can lump amateur and professional content providers together under one tent, much in the same way they have long associated child pornographers with legitimate adult producers.²⁷

Fishbein knows well that the government often uses the adult industry as a scapegoat when the real culprits – child predators and child pornographers – elude capture. He explained,

²⁵ *Id.*

²⁶ See generally, Rachel Davis & Konrad Marshall, *WARNING; Sexually Explicit Material is More Accessible, Made Next Door and Can Destroy Lives*, FLA. TIMES-UNION (Jacksonville), Dec. 2, 2007, at E-1 (noting that “with technological advances in online networking and file-sharing, porn has reached a point where the production is all around us, too, from professional production companies to amateur dabblers”).

²⁷ See, e.g., Peter Melchione, *No Exit; We Can't Bar Porno Outlets, But We Can Contain Them*, RECORD (Bergen County, N.J.), July 11, 2007, at L11 (arguing that “[w]ith the explosion of vile pornography on the Internet, and with the ever increasing exploitation of children and women, I find it mind-boggling that governments are being handcuffed in their efforts to limit either pornographic distribution points or access to pornography in the name of the First Amendment” – thus linking together adult materials and child pornography).

it's hard to get a hold of them, while it's easy to get a hold of commercial pornographers. So they do and then say, 'We're protecting our children.' That's the politics. The average person is going to say, 'They went after the pornographer to protect the children.' It doesn't register as a speech issue, and the news media aren't going to come out against it.²⁸

Indeed, painting the mainstream adult entertainment business with the broad brush of child pornography only further adds credence to government efforts to rein in this unseemly mob.

This article focuses on an exclusive interview with Paul Fishbein, president of Adult Video News, a trade publication that has charted and chronicled the evolution and growth of adult entertainment in the United States. Part I of the article briefly describes the methodology used for conducting the interview. Part II then turns to the interview with Fishbein that is the centerpiece of this article, initially providing in Section A, in question-and-answer format, his comments about the government's legal attacks on the adult entertainment industry, specifically the current FBI age-verification inspections.²⁹ Section B turns to Fishbein's observations about the federal government's ongoing obscenity prosecutions.³⁰ Section C examines the rationale for protecting adult expression under the First Amendment.³¹ In Section D, Fishbein discusses the current

²⁸ *Infra* Part II, Section B.

²⁹ *Infra* notes 33-38 and accompanying text.

³⁰ *Infra* notes 40-89 and accompanying text.

³¹ *Infra* notes 90-95 and accompanying text.

economic state of the adult entertainment business.³² Finally, the article analyzes and synthesizes the interview in Part III.³³

I.

METHODOLOGY AND PROCEDURES

The interview with Paul Fishbein was conducted in person on October 5, 2007, at AVN offices, located at 9414 Eton Avenue, Chatsworth, California by the authors of this article. Fishbein's comments were recorded with Marantz, broadcast-quality recording equipment on audiotape using a tabletop microphone. The tape was then transcribed by the authors and reviewed for accuracy.

The authors made a few very minor changes for syntax in some places but did not alter the substantive content or material meaning of any of Fishbein's responses. Some responses were reordered and reorganized to reflect the various themes of this article set forth below in Part II, and other portions of the interview were omitted as extraneous, redundant or simply beyond the scope or the purpose of this article. The authors retain possession of the original audio recording of the interview, as well as the printed transcript of the interview.

Mr. Fishbein had no advance opportunity to review or preview any of the questions he was asked, thus allowing for greater spontaneity and immediacy of responses. In addition, Mr. Fishbein reviewed neither the raw transcripts of the interviews nor any of the drafts of this article before it was submitted for publication.

³² *Infra* notes 96-114 and accompanying text.

³³ *Infra* notes 115-130 and accompanying text.

Furthermore, he was neither paid nor otherwise compensated by the authors for his time and comments.

II.

THE INTERVIEW

A. *Current Legal Issues Facing the Adult Entertainment Industry: Age-Verification and the Current Crackdown*

In this section, Paul Fishbein discusses the current government attacks on the adult entertainment industry. He differentiates between the record-keeping inspections conducted by the FBI and the obscenity prosecutions undertaken by the Justice Department and speculates on the potential impact for the industry.

QUESTION: What are some of the legal issues that *AVN* faces? Are you subject to the same 2257 requirements³⁴ as other publications?

³⁴ *Supra* notes 19-20.

FISHBEIN: We're a secondary producer.³⁵ We don't produce any explicit content, so we feel like we're not a target. Most of our ads are soft. We don't have any hardcore ads in the magazines. We have no nudity on the website.³⁶ I'm sure if you dig deep enough, you'll find something – a nipple or whatever. I just think that we are fairly clean. We do the best job we can to make sure that we don't accept anything that will get us into trouble. Some of the ads have sex that's sort of blurred or whatever so, as a secondary producer, we have to be careful. We're not in the same boat as the people who are putting out the movies or any hardcore content.

QUESTION: Can it be said that the current crackdown³⁷ to enforce the Section 2257 requirements is public relations packaging, on the part of the Bush Administration? If the records designed to keep underage performers out of the industry are not in order, then can't the government claim they're trying to protect children from these pornographers?

³⁵ See Free Speech Coalition website, *available at*

<http://www.freespeechcoalition.com/FSCView.asp?coid=655#two> (last visited Dec. 13, 2007) (defining secondary producer as one who republishes an "image of actual sexually explicit conduct" and noting that "[t]ypical secondary producers include companies that manufacture compilation movies from other companies' catalogs, magazines publishing photos from movies, or companies that purchase content recorded by someone else and publish it for the first time, whether in magazines, DVDs or product covers. Most websites are secondary producers").

³⁶ See AVN Website, *available at* <http://www.avn.com> (last visited Jan. 24, 2008).

³⁷ See Barrett, *supra* note 20, at N10.

FISHBEIN: And they're not going to find underage performers. On the one hand, from a strictly intellectual point of view, you say, "OK, we'll accept this."

On the other hand, I think the rules are onerous. They're ridiculous and the record-keeping requirements are insane.

Listen, you should have on file proper identification – real identification – and a model release for every person who performed in every scene. In one sense, I'm OK with it because, at least, it's an area where people know in advance what the rules are. Whether you like them or not, you can make a choice if you want to follow the rules to be in this business.

Although being horrendously onerous, difficult, stupid and illogical, at least the 2257 rules are there. With obscenity law, nobody knows the rules.³⁸

They're not going to find underage girls. The amount of money they're spending to carry out this process seems ridiculous – the time, the man-hours, the FBI hours and Special Agent Joyner's³⁹ time – all to find people who might be in violation of the record-keeping requirements but who are not using underage girls.

³⁸ For a discussion of how the Miller test for obscenity is outdated and difficult to apply to modern technology, see Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L. J. 507 (2001); See also, Carole Tanzer Miller, *Legal Action Hinges on Defining Obscenity*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 28, 2007, at A25 (interviewing Duke University Law Professor Erwin Chemerinsky who said "[i]t seems too impossible to try to define what the contemporary community standard is").

³⁹ See Robert D. Richards & Clay Calvert, *FBI Agent Joyner: 2257 Record-Keeping 'Very Poor' But Improving*, AVN.COM, available at <http://www.avn.com/index.cfm?objectID=6DE5C9C6-188B-39E4-BC6E8B69D386357E&slid=364550> (last visited Jan. 24, 2008) (noting that Charles Joyner is "the FBI supervisory special agent in charge of the ongoing Section 2257 inspections in southern California").

It's a level playing field, at least. If I want to open up a company today that produces explicit material, then I know going in what I have to do on that particular area. I don't know, however, what obscenity is.

While the record-keeping is ridiculous, the concept is fine. I'm all about consenting adults. I'm not about underage and not about anybody not consenting.

B. *Obscenity Prosecutions and the Bush Administration*

In this section, Fishbein discusses how the Bush Administration has handled its relationship with the adult entertainment industry. He notes that it is far easier for the government to target commercial adult producers than underground child pornographers, which, in his estimation, should be the focus of the government's efforts. Finally, he talks about the mainstreaming of the adult business and the intersection of morality and the law.

QUESTION: Let's talk about some of the obscenity prosecutions going on right now.⁴⁰ Obviously, the Bush Administration in the last year or so has really pushed ahead on obscenity prosecutions, as promised to the constituency.⁴¹ Is this just politics as usual for the Bush Administration? Is this a big push now, but then it will die off?

⁴⁰ *Supra* notes 7-10.

⁴¹ See Mark Sherman, *Bush Administration Stepping Up Obscenity Prosecutions*, ASSOC. PRESS, May 4, 2005, at BC Cycle (noting that then-"Attorney General Alberto Gonzales, like his immediate predecessor, John Ashcroft, has pledged to make obscenity prosecutions a priority").

FISHBEIN: Who knows who is going to be elected President? It always seems to be part of the agenda of the right. There's a big push against LodgeNet⁴² right now. They're under a lot of pressure.

It's that vocal minority – the right wing always seems to push this.⁴³ I think the Bush Administration was slow getting to it, but I guess we had a few other issues going on in this country.⁴⁴ They're going to plow forward with these few. The prosecutions are more targeted to the extreme material⁴⁵ rather than trying to put specific people out of business like Larry Flynt⁴⁶ or taking a shot at a high-profile pornographer. They are looking more to get wins.

⁴² See LodgeNet website, available at <http://www.lodgenet.com/whoweare/corpprofile.php> (last visited Dec. 13, 2007) (describing the company as “the leading provider of media and connectivity services designed to meet the unique needs of hospitality, healthcare and other visitor and guest-based businesses”).

⁴³ See Joe Mozingo, *Obscenity Task Force's Aim Disputed; Anti-Porn Groups Say Targeting Only Extreme Content is Not Enough, and Many Prosecutors Say It's a Waste of Time*, L.A. TIMES, Oct. 9, 2007, at B1 (observing that “[a]nti-porn groups had been lobbying the Bush administration from its early days to go after the adult entertainment business as Ronald Reagan did. The groups view almost any explicit depiction of sex as obscene, including pay-per-view movies in top hotel chains and the type of video clips that have flooded the Internet”) (emphasis added).

⁴⁴ *Id.* (noting that anti-porn groups “thought they would find a sympathetic in Atty. General John Ashcroft, a social conservative, but 9/11 derailed any progress”).

⁴⁵ See, e.g., Robert Gehrke, *Nation's Porn Prosecutor Fronts War Against Obscenity*, SALT LAKE TRIB., Feb. 26, 2007 (quoting Brent Ward, head of the Justice Department's obscenity prosecution task force, as saying “most obscenity cases today are Internet-related, and the content is more extreme” than in the past).

⁴⁶ See generally, Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159 (2001) (exploring Flynt's many battles with law enforcement and his deep commitment to First Amendment principles).

Maybe they didn't expect that these guys would be feisty and fight back. Extreme Associates,⁴⁷ JM⁴⁸ and Max Hardcore⁴⁹ are fighting back. They're not going to go down lightly. In the case of Extreme Associates and Max Hardcore, it's pretty aberrant material. I don't want to see obscenity convictions, by any stretch of the imagination. It's bad shit, but the remedy shouldn't be censorship. The remedy should be, "Hey, this stuff sucks." The marketplace and bad reviews should decide.

I think it's politics as usual. I remember the transition from Bush I to Clinton. At that time, they disbanded the obscenity unit in the Justice Department,⁵⁰ and Janet Reno was much more interested in serious issues.⁵¹ I may just have liked Clinton and that administration because it was better for my business, so I'm speaking from a completely prejudiced point of view. But it seems to me that they concentrated on real crime. If Mitt

⁴⁷ See Reed, *supra* note 9, at A-1.

⁴⁸ See *Federal Grand Jury Charges Arizona and California Companies and Their Owners with Obscenity Violations*, *supra* note 7.

⁴⁹ See House, *supra* note 8, at 5.

⁵⁰ Cf. *Despite U.S. Campaign, a Boom in Pornography*, N.Y. TIMES, July 4, 1993, at Sec. 1, 20 (noting that, in the early days of the Clinton Administration, "[m]any lawyers say there is little political support for the obscenity unit these days" and quoting law professor G. Robert Blakey as saying, "I believe that the obscenity unit will slowly slip away....They won't announce its disbanding, but natural attrition will eliminate it.").

⁵¹ *Id.* (quoting Miami defense attorney Jeffrey S. Weiner who described Reno's non-prioritization of adult obscenity prosecutions this way: "When it involves the exploitation of children, these types of prosecutions are high on her list. There are other issues, like drug offenders, which are more pressing.").

Romney⁵² or Rudy Giuliani⁵³ is elected President, then I think it could be insane. But then again, if we get hit with another terrorist attack, who knows? It's all politics – every little bit of it – like Bush vetoing a completely logical bill that would have provided more money for underprivileged children for healthcare⁵⁴ simply because the tobacco lobby is so large. The tobacco lobby put a lot of money in Bush's pocket. He's now going to stand up for the tobacco lobby to the detriment of children who don't have healthcare.

There's no logic to any of it. So who knows what Romney or Giuliani or anybody will do. I can't tell you that I know what Hillary Clinton⁵⁵ is going to do, although I have an idea. Or Barack Obama,⁵⁶ who I would love to see win. Actually, I would love to see Ron Paul⁵⁷ win, but there's no chance in hell.

⁵² See Mitt Romney for President 2008 Website, *available at* <http://www.mittromney.com> (last visited Jan. 23, 2008).

⁵³ See Rudy Giuliani for President Website, *available at* <http://www.joinrudy2008.com> (last visited Jan. 23, 2008).

⁵⁴ Sasha Issenberg and Susan Milligan, *Bush Vetoes Children's Health Insurance Bill; Democrats Push for Override to Expand Coverage*, BOSTON GLOBE, Oct. 4, 2007 (saying Bush portrayed “the State Children's Health Insurance Program as a costly entitlement program that has increasingly come to benefit middle-class families”).

⁵⁵ Hillary Clinton for President Website, *available at* <http://www.hillaryclinton.com> (last visited Jan. 23, 2008).

⁵⁶ Barack Obama for President Website, *available at* <http://www.barackobama.com> (last visited Jan. 23, 2008).

⁵⁷ Ron Paul for President Website, *available at* <http://www.ronpaul2008.com> (last visited Jan. 23, 2008).

I'm a libertarian, for the most part. I'm passionate about the bill that would have given the kids healthcare, and yet I'm a libertarian, so I'm sort of a half-ass libertarian – I'm an animal-rights activist who eats meat!

QUESTION: You mentioned LodgeNet, what is going on there?

FISHBEIN: They're under immense pressure from right-wing groups to drop pornography.⁵⁸ Again, if I go into a hotel room, and I'm an adult over the age of eighteen – if kids are in the room, you can lock it – you have to turn on the TV, go to the menu, find the movies, find the adult segment, look at the descriptions and then push a button. There are twenty-two steps you have to go through! If you're an adult and you don't want kids to see, just lock it. If you're an adult and you can't control your children, you shouldn't have children.

I don't think there should be hardcore Internet sites without a barrier of entry for kids. Unfortunately, there are many, and I think it's wrong. In a hotel, however, there are so many clicks before you get to the movie. Kids aren't checking into hotels by themselves. But it's a bunch of vocal minorities – religious-right fanatics – wanting to tell everybody else what they can and can't enjoy in the privacy of their own home or hotel room.

QUESTION: All of these prosecutions are not going to be wrapped up by the time the administrations change. Even if Hillary Clinton or another Democrat were elected President, don't you think there still would be pressure to go after the industry?

⁵⁸ See Mozingo, *supra* note 43 at B1.

FISHBEIN: I don't know. It's hard for any politician to get up there and say, "Yeah, pornography is OK." Instead, they don't come out and say anything or they'll say, "It's bad and we want to protect our children." How many of these bills get passed under the guise of protecting children? What they were really going after, however, was presumably protected material. Nobody is going to get up there and say, "No. We shouldn't protect our children."

I don't see certain candidates going after the industry. They know it's an accepted part of American subculture. It's part of entertainment, and it's a big business.⁵⁹ They get that. They also know how silly it is to prosecute speech, but they are not going to come out and say that. Bill Clinton just didn't have an agenda to do it,⁶⁰ and nothing happened, by the way – we didn't have an increase in rapes and people didn't kill children. Nothing changed.

They are scared of the Internet. There are sexual predators on the Internet going after children. I have a sixteen-month-old daughter, so whatever you can do to go after

⁵⁹ See Swartz, *supra* note 11, at 4B (noting that adult entertainment is "a \$13 billion industry"); see also, Mariel Garza, *Porn Panelists Dish Dirt, Raise Temperatures*, L.A. DAILY NEWS, Dec. 2, 2007, at V1 (observing that "[d]epending on whom you talk to, adult entertainment business – porn – is anywhere from a \$1 billion to \$50 billion-a-year industry").

⁶⁰ See Clay Calvert & Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 *Cardozo Arts & Ent. L.J.* 247, 284 (2004) (quoting adult industry attorney Jeffrey Douglas on the lack of obscenity prosecutions during the Clinton Administration: "The last federal prosecution began in 1990 and it ended in 1992 or 1993. It was pre-Clinton really, so we were seeing it grind to a halt.").

these underground people who participate in child pornography, sell child pornography and trade child pornography – these pedophiles and sexual predators – do it. That’s the issue. The Internet has made it impossible for law enforcement to go after them.

But don’t mix that up with adult speech that is protected. Just separate it and say, “You know what? We don’t have time for this because the real issues here are protecting children and going after real criminals.”

But it’s hard to get a hold of them, while it’s easy to get a hold of commercial pornographers. So they do and then say, “We’re protecting our children.” That’s the politics. The average person is going to say, “They went after the pornographer to protect the children.” It doesn’t register as a speech issue, and the news media aren’t going to come out against it.

It’s the typical PR of the Bush Administration, the way they sell things and the way they bullshit the entire country. And the country buys, eats and swallows it, instead of looking at it and saying, “This is fucked up.” They package and PR this shit. So we get this indictment on JM Productions, and it’s like, “Oh, my God, this is just the worst kind of horrible pornography. Thankfully, we are going to keep it out of children’s hands. This horrible pornographer is going to go to jail.”

Dude, that’s not the criminal. The criminal is the pedophile out there hurting children, but the government can’t get to that guy. He doesn’t have an office in Chatsworth. If they really want to go after the criminals and if they have an agenda to do the right thing, then that’s where the work is.

QUESTION: In terms of obscenity, is it possible to create a coherent, clear definition that can be applied?

FISHBEIN: Well, yes. I've got it. Ready? Do you want to save the world a lot of money and time?

Here it is: If the material is performed by consenting adults over the age of eighteen – if you want to change that age, go ahead – but over the age of eighteen, and they are people – not animals – who are able to consent, have consented and no crime was committed, then it's protected speech.

Anything involving underage kids – child pornography – go after it. Anything involving coercion, go after the crime.

It's as simple as that. If you want to outlaw the conduct of the crime for commercial use – this girl was raped against her will and you cannot sell it – fine. I'm OK with that. You cannot commercially sell material that did not involve consenting people. That's the way you do it. There's no gray area.

QUESTION: How do you respond to the feminist argument about the exploitation of women,⁶¹ when they suggest that these girls really aren't consenting because they have come from such abused backgrounds?

⁶¹ See, e.g., Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U.L. REV. 793, 796-97 (1991) (observing that pornography "is done because someone who has more power than they do, someone who matters, someone with rights, a full human being and a full citizen, gets pleasure from seeing it, or doing it, or seeing it as a form of doing it"); See also, CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 300 (2005) Cambridge, MA. The Belknap Press of Harv. Univ. Press.

FISHBEIN: There are issues there. I get it. I know there are girls in this business that should not be in the business. I can tell you for an absolute fact of girls who have come into this office through connections – people I know – who want to get into the business, and I have tried to talk them out of it. A couple of times I did, but a couple of times I couldn't talk them out of it. A couple of girls found out the hard way, and a couple of girls got into it and were just fine. Unfortunately, a lot of abused, parentless, fucked-up kids get into the business, and the agents don't care.

But that's not a speech issue and it's not a call for censorship. It's an issue with the agents and with the girls. It's an issue about having proper counseling for abused kids.

I know that it's a career choice right now for girls turning eighteen,⁶² and I think it's a bad career choice for a lot of girls because I don't know if they're emotionally ready for what they are getting themselves into. There are producers who take advantage and they bait and switch. For instance, a girl gets to the set, and they say, "You get \$800 if you do this, but you've got to do anal." She says, "I didn't agree to do anal." And the producer says, "We'll give you a thousand dollars." She does anal and gets ripped up.

(suggesting that women who perform in adult entertainment media "are also made to look as if they are enjoying themselves").

⁶² See generally, Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. 255, 277 (2006) (quoting former porn star Sharon Mitchell, who now holds a Ph.D. in human sexuality and runs the Adult Industry Medical Healthcare Foundation, as saying, "your son or daughter may grow up to be a porn star because it is a legitimate job...").

She doesn't know what she's getting into, signs away all of her rights and is in pain.

Those are issues that have to be dealt with. In some ways, I think those things are crimes.

The government ought to spend time going after the conduct, not the speech.
Separate the conduct from the speech.

The other part of it is, and I've had arguments with feminists about it, and I agree that there should be help for girls who are of that age and don't have anywhere else to turn. They're uneducated and don't want to work in a grocery store because the money is no good. Then, they get on drugs. Those are societal issues that need to be dealt with everyday. They may be moral issues, but they're not speech issues.

I would love to see counseling. AIM⁶³ does a good job and, if girls get into AIM first before they get into the business, then they get a lot of good information really quickly so that they can make a better decision. Unfortunately, for a number of girls, that's not their first stop.

QUESTION: Where is their first stop typically?

⁶³ Adult Industry Medical Healthcare Foundation, About AIM, *available* at <http://www.aim-med.org/about> (last visited Dec. 14, 2007) (noting that “[t]he Adult Industry Medical (AIM) Health Care Foundation is a non-profit corporation formed to care for the physical and emotional needs of sex workers and people who work in the adult entertainment industry through our HIV and STD testing and treatment, our counseling services and our support group programs”).

FISHBEIN: An agent is their first stop. They don't have to go to AIM to get their HIV test. They can go to a doctor or a clinic to get the HIV test. Some of the agents are great, and some are unscrupulous in some ways.⁶⁴

The biggest thing in the market is new girls, new girls, new girls. Get them as quickly as you can. They might go to the wrong producers. You try to tell a girl, "Don't go to Max Hardcore⁶⁵ first. You shouldn't go to Max Hardcore because he's not a good guy. Go to Vivid,⁶⁶ Wicked,⁶⁷ Evil Angel,⁶⁸ Digital Playground⁶⁹ or one of the more reputable companies." Now, I'll give Max this: I don't like his material, but he does tell the girl what she is getting into beforehand. As sickening as his material can be, the girls

⁶⁴ See Calvert & Richards, *supra* note 62, at 287 (quoting Sharon Mitchell discussing the role of agents: "Agents now kind of rule the industry. Agents are now recruiting people from, literally, the middle of the country that are eighteen years old who haven't remotely had any type of sex, let alone the type of sex they're probably going to have tomorrow.").

⁶⁵ See Max Hardcore Website, *available at* http://cowboybucks.com/hosted_tours/max_tours/Max_tour1_nopops.html?s=1&p=&w=100038&t=1&c=3&cs=0 (last visited Jan. 24, 2008).

⁶⁶ See Vivid Video Website, Welcome to Vivid.com, *available at* <http://vc4.vivid.com/indexmain.php?x=d61c0acd7a487eda6adf3f1f3872c86f> (last visited Jan. 24, 2008).

⁶⁷ See Wicked Pictures Website, Wicked Pictures.com, *available at* <http://www.wickedpictures.com/?nats=ODI1NToxMDox,0,0,0,0> (last visited Jan. 24, 2008).

⁶⁸ See Evil Angel Website, The Evil Empire, *available at* <http://www.evilangel.com> (last visited Jan. 24, 2008).

⁶⁹ See Digital Playground Website, *available at* <http://www.digitalplayground.com> (last visited Jan. 24, 2008).

do consent. I don't believe there's any non-consensual stuff there. It's unwatchable, but that's a taste matter.

Some girls want to do this stuff. There are fetishes and there are people who really do like to get beaten up, tied up or really like hard sex. There are girls who really want that. It's not me or my life – I don't want to be slapped or punched.

QUESTION: Earlier you mentioned that adult entertainment was an accepted part of American subculture. Why do you think it is acceptable? Also, what do you mean by subculture?

FISHBEIN: It's sort of like a double-edged sword. On the one hand, all of the mainstreaming that we talked about over the past ten years and how it sifted into the culture, through television, other media, newspapers, magazines, the Internet and girls like Jenna Jameson⁷⁰ and Tera Patrick⁷¹ becoming stars, makes sense. You read articles about the mainstreaming of porn⁷² and you get it.

⁷⁰ See Jenna Jameson Website, available at

http://www.jennajameson.com/index_warning.php?site=tour.jennajameson.com/track/MTk2MTI6MjM6N Tg (last visited Dec. 17, 2007).

⁷¹ See Tera Patrick Website, available at <http://clubtera.com> (last visited Dec. 17, 2007).

⁷² See, e.g., Brent Hopkins, *The Adult-Movie Business Has Come a Long Way From Stag Films and 'Deep Throat,'* DAILY NEWS (L.A.), June 3, 2007, at N1 (noting the adult entertainment business “has evolved from its adult-theater roots to a commodity available online in homes worldwide”).

When pornography came into the home through the VCR,⁷³ it changed it by making it acceptable there. As it became more accessible, it became a generational thing. It was completely natural for an entire generation of kids who grew up with a VCR to watch porn when they turned eighteen, if not sooner.

I grew up with television, but kids today grow up with computers and the Internet. It's accessible and acceptable. It's all the same. For girls who turn eighteen, it's now a career choice to act in porn movies. It's mainstream and an acceptable part of the subculture.

But when you boil it down, there's still something naughty about it, something sleazy about it. We're still this puritanical, Judeo-Christian society that still thinks something is wrong with sex – something dirty. We have not evolved in this country enough that it's part of the culture.

So when I say subculture, yes it's mainstream, accepted, and you can see it on the E! Channel and HBO. Even on those channels, though, it's kind of wink-wink, dump it in late at night. They don't really market it or promote it. "Don't ask us about it, but we make money on it." The hotels make a fortune – Marriott and Hilton – but they would say they're not in the pornography business. Time Warner makes all of this money on Pay-Per-View and DirecTV. It makes all of this money on hardcore Pay-Per-View, but it's not even in their business plan. You can't find it on their website.

⁷³ *Id.* (calling the VCR "the simultaneous salvation and bane of the industry" because video made adult materials more accessible, but also "lowered the bar to get into the business").

The money is good, it's cool to know who Jenna Jameson is and it's interesting to see Stormy Daniels⁷⁴ on Entourage but, "No, it's not part of my everyday life." That's why I say subculture. Now, kids today don't have the hang-ups because it's a natural extension of growing up. For the performers, it's gone from "I want to be a model, but I can't make it in modeling, so I'll do some scenes" to "I want to be a porn star. As soon as I turn eighteen, I'm going to L.A. to be a porn star." It's real, it's out there and the role model is Jenna Jameson.

QUESTION: If adult entertainment has mainstreamed to the extent you suggest, then do you think there will be a point down the line – perhaps in ten years or twenty years – when the model for the law will move away from the current form of trying to define what's obscene to more of a privacy model?

FISHBEIN: That is the main defense in the Extreme Associates case⁷⁵ and the main reason those charges were thrown out by the district court judge in Pittsburgh.⁷⁶ The government managed to get them reinstated.⁷⁷

⁷⁴ For an interview with Stormy Daniels that includes her views of the mainstreaming of adult entertainment, see Clay Calvert & Robert D. Richards, *Porn in their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture, and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 272 (2006).

⁷⁵ United States v. Extreme Associates, 352 F. Supp. 2d 578, 587 (W.D. Pa. 2005) (granting defendants' motion to dismiss on the grounds that "the government can no longer rely on the advancement of a moral code i.e., preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest").

Again, it's logical and makes sense. If you look at the three-prong *Miller* definition of obscenity,⁷⁸ what is one of the prongs? Community standards. Let me ask a question: If you're sitting in your home in Centre County, Pennsylvania, which I presume is somewhat conservative, and there is nothing publicly exhibited – no porn theaters or anything like that – and you buy a DVD from Adam & Eve,⁷⁹ it's mailed to your house, and you sit in your home and you watch it with your wife or whatever you do with it, then what business is that of the community?

⁷⁶ For a discussion of the U.S. District Court's decision abandoning the federal obscenity statutes in favor of a privacy analysis, see Clay Calvert & Robert D. Richards, *Vulgarians at the Gate: Privacy, Pornography & the End of Obscenity Law As We Know It*, 34 Sw. U.L. REV. 427, 428 (2005) (noting that the case was “[q]uickly lambasted as the height of judicial activism run amok” by lawmakers pushing the agenda of obscenity prosecutions).

⁷⁷ *United States v. Extreme Associates*, 431 F.3d 150, 162 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006) (concluding “that directly applicable Supreme Court precedent, upholding the constitutionality of the federal statutes regulating the distribution of obscenity under First Amendment and substantive due process privacy rights, governs this case”).

⁷⁸ The current test for obscenity, which was established by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), focuses on whether the material at issue: 1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; 2) is patently offensive, as defined by state law; and 3) lacks serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24.

⁷⁹ Adam & Eve Website, available at http://www.adameve.com/t-company_info.aspx (last visited Dec. 18, 2007) (describing the company as “the nation's largest marketer of adult products with millions of satisfied customers in the United States and all over the world”).

QUESTION: The Supreme Court just declined to hear the Alabama sex-toy case.⁸⁰ What are your thoughts on that decision?

FISHBEIN: See what I mean about logic? In the state of Alabama, I cannot buy a masturbation toy – a dildo, a fake penis – because I’m a woman or a gay man and I want to masturbate myself. How can that possibly be legal in 2007 in the United States? Tell me what logic there is. It’s fucking frightening, and it’s the most ridiculous, stupid thing I have ever heard in my life. How can that be? How can that possibly be constitutional? Yet, I told you what I believe about this Supreme Court. It’s a scary court because Samuel Alito⁸¹ says it’s disgusting.

QUESTION: Can we separate out morals from the law in this country?

FISHBEIN: You can legalize morality only to the point where, if I murder someone, that’s immoral and should be illegal. You can separate legality and morality. Obviously, shooting you and killing you is illegal, and I should go to jail for that. Of course, it’s also morally wrong. But you can’t legislate morality, and that’s what they try to do. Somebody is upset that somebody else is having a good time. Everything is stemmed in the rooted belief that there is something dirty about sex. That’s how we’ve been brought up in this country. Even I, in this business, am so conservative and believe in

⁸⁰ Williams v. Morgan, 478 F. 3d 1316 (11th Cir. 2007), *cert. denied*, Williams v. King 128 S. Ct. 77 (2007).

⁸¹ See generally, Supreme Court of the United States Website, Biographies of Current Justices, *available at* <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Jan. 24, 2008).

conservative values when I think about bringing up my own daughter. I'm part of that problem because, somehow, I am going to have to train my daughter that sex is wrong before a certain age. The evolution has to evolve generationally and over time. I won't be around to see that evolution.

In 1973 when *Miller* was adopted, there were porn theaters and publicly exhibited materials, so you can sort of understand the community-standard issue. I don't like it or agree with it, but at least there was a little bit of logic to it. Now, thirty-four years later, you get this stuff over the Internet or through the mail. You can't see it without electronically doing something. Are you going to get twelve jurors in Centre County, Pennsylvania to rule on whether you can watch that in the privacy of your own home? It's completely logical that privacy is the overriding issue here. The obscenity definition from *Miller* is completely antiquated. Maybe it made a modicum of sense in 1973, which it didn't, but how can you make the argument today when nobody is watching this stuff in the public world?

QUESTION: Do you think the law will change, then, so that Judge Lancaster's opinion in *Extreme Associates* will prevail?

FISHBEIN: I hope so. Again, you are asking a country whose entire political system, government and laws are not based on logic to be logical. Why not place a sixty-cent tax on tobacco, which causes cancer anyway, that would provide billions of dollars for underprivileged children to have healthcare? Because the tobacco lobby is so strong, Bush vetoes it.

You're asking for logic. You're asking why a President who faked the information for a fake war⁸² is sitting in office running this country and making decisions that affect our lives everyday and setting this country back fifty years or more in the international world. There's no logic. How can he be in office?

If you and I sat down and looked at a thousand laws, we could probably boil them down and get them logical. But we would put all these politicians out of business!

I'm never going to predict that this country will be logical. Plus, with the way this Supreme Court is constituted, I think we are stuck with a bad ratio for the rest of my life. I think it's a shame. In spite of the fact that a lot of current justices prior to Bush II were appointed by Republican presidents,⁸³ they have turned out to be fair jurists, with the exception of Clarence Thomas.⁸⁴ Anthony Kennedy⁸⁵ and David Souter⁸⁶ are very fair and objective. Prior to Bush II, Antonin Scalia⁸⁷ and Thomas were the bad guys

⁸² See, e.g., *WAR UPDATE: A compilation of 'false pretenses'; White House issued hundreds of statements to justify Iraq war, according to groups' database*, *NEWSDAY* (N.Y.), Jan. 24, 2008, at A26 (discussing a study by two independent research groups that examined remarks made by President George W. Bush and his administration and concluded "the statements 'were part of an orchestrated campaign that effectively galvanized public opinion and, in the process, led the nation to war under decidedly false pretenses'").

⁸³ The following current Supreme Court justices were appointed by Republican presidents, prior to the administration of President George W. Bush: John Paul Stevens (Gerald Ford, 1975); Antonin Scalia (Ronald Reagan, 1986); Anthony M. Kennedy (Ronald Reagan, 1988); David H. Souter (George H.W. Bush, 1990); and Clarence Thomas (George H.W. Bush, 1991).

⁸⁴ See *supra* note 81.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

because they're not logical, they're zealots. But at least it was balanced. Now, John Roberts⁸⁸ and Samuel Alito⁸⁹ are really so far to the right that I don't think we are going to find a decision where we can say, "OK, they're being objective." The makeup of the Court is not going to allow laws to change in what an objective, libertarian, smart citizen will think is logical. We're not living in a logical country in any way, shape or form – legal, political or moral.

It's based in Christian values that have to do with Jesus Christ and believing in a fake deity. If people who were religious kept it to themselves and didn't try to force it on society, and it wasn't part of all these politicians out there talking about Christian society, then I'd be cool with it. But if you're making decisions that affect 300-million people and that are based on believing in Jesus Christ, then that's a problem. To me, that's a personal thing that you can live your own life by, but it shouldn't be what dictates the rest of the country. It isn't going to change in my lifetime.

All of the wars in the history of the world and all of the strife that the world is now facing are mostly because of organized religion and because of different beliefs. We are as guilty of it here as anywhere else in the world.

C. *First Amendment and the Value of Protecting Adult Materials*

In this section, Fishbein gives his views on the reasons why we have and need a First Amendment in this country. He also discusses why the First Amendment should protect adult entertainment.

⁸⁸ *Id.*

⁸⁹ *Id.*

QUESTION: What do you think the primary purpose of free speech is, as protected by the First Amendment?⁹⁰ Why do we need it?

FISHBEIN: I think it's one of the building blocks of our country. It's what separated us from – when the country was formed – the oppressive environment that settlers came over from. It also separates us from horrendous, autocratic societies in the world today. In Iran, if you're caught with pornography, you get the death penalty.

It's a free society, and a free society means free. We know it's not truly a free society, but the idea that free-thinking adults could not have the voice to oppose, endorse, argue and to otherwise put out speech that may not be accepted – the thought that that wouldn't exist in my world – is an aberrant thought. I can't imagine living in a society where a newspaper can't give an opinion. It's the very basis of why we live in the United States.

Even with all of the problems we're having, based upon this [Bush] administration, and with all of the issues with our image overseas, it's still the best country in the world to live in. The reasons are capitalism, free speech and all of the principles that make us different. Freedom of speech is the very basis of America.

⁹⁰ The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law...abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

QUESTION: But there are some people out there that would say the First Amendment is not designed to protect adult content – the framers of the Constitution didn't have that in mind. How do you respond to that argument?

FISHBEIN: I don't think the framers of the Constitution had a lot of things in mind that they could have imagined would happen as life progresses. It doesn't matter. The reality of it is that the principle of free speech and the First Amendment makes sense.

Unfortunately – and this is just me – this is a country, from the top office down to most of the citizens, that bases everything on religion, God and Christianity. They're not rooted in any sort of reality, in my opinion. My life is rooted in reality. I believe in science and what I can see, feel and touch. That's what I'm comfortable with.

Unfortunately, people are not comfortable with that. If you look at it, the reality is that speech has never hurt anybody. There's nothing hurtful about it. It's not like a gun you can shoot or a drug you can inject. It's just speech – it's just pictures and film. It's very simple: If all of that is protected by the First Amendment – it's for adults and consumed by adults, consenting adults, mind you – then there is nothing, no matter how disgusting, that is not protected because it's just a film.

If a crime was committed during the making of the film – if someone was raped or any disgusting behavior took place in which a crime was committed – then prosecute to the full extent of the law. But the speech is the speech.

You can watch the news at night and see someone shot in the head, and that's considered news. Or you can go to a horror movie and see a girl's breast chopped off, and it's a film. You see a rape in a Jodie Foster movie, "The Accused," and she wins an

Academy Award.⁹¹ I don't get the concept of why adult entertainment is different. It's just sex. Some of it is pretty bad pornography, or it's brutal or violent, but if the actors consented, it doesn't matter how disgusting it is. The remedy for bad speech is good speech, not censorship.⁹²

QUESTION: You certainly have thought a great deal about these issues. When you started this business some twenty-five years ago, did you know a lot about the First Amendment?

FISHBEIN: No. Interestingly enough, I went to school for journalism. I was not a great student. I was at Temple University and it took me five years to finish four years of school to get a journalism degree. I was done with math and history and all that stuff. I didn't do well. I dropped a bunch of courses that had too much work. I took film, and I did great. I only got "A"s in my writing courses and film courses. I published magazines. I accidentally knew what I wanted to do.

⁹¹ See *And the Winners Are...*, WASH. POST, Mar. 30, 1989, at B2 (noting that Jodie Foster won the Oscar for Best Actress for her performance in "The Accused").

⁹² Fishbein is paraphrasing a popular legal aphorism that describes the doctrine of counterspeech, brought to light by Justice Louis Brandeis in *Whitney v. California*, 274 U.S. 357, 377 (1927) (suggesting "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). For a discussion of the modern application of the counterspeech doctrine, see Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. REV. 553 (2000).

I didn't really understand about the First Amendment. I took a law and ethics of mass communications course, and I slept through it. I didn't really care. I didn't know I was going to be in this business. It was an accident.

When I got into the business, got to know the people and then we started to write about legal matters, I kind of learned on the job. It was those busts of 1989. I shouldn't say that because I did the Larry King Show in 1988 and I was pretty well versed already on First Amendment issues. But it was those busts of 1989 and 1990⁹³ that really got me to the forefront of knowing, understanding, thinking and talking about censorship and obscenity. All of my friends and customers were being visited by the FBI in these massive busts,⁹⁴ all to be hung out to dry in conservative communities in Mississippi, Oklahoma and Alabama. Some of them went to jail. You learn on the job. Then, you get friendly with all the First Amendment attorneys. We have Mark Kernes writing about all of this stuff, along with columns from attorneys. You just learn.

Plus, in the eighties and into the nineties, we published something called *Free Speech*, which was a paid newsletter with no advertising, before the Free Speech

⁹³ *Supra* notes 23-24 and accompanying text.

⁹⁴ *See also*, ERIC SCHLOSSER, REEFER MADNESS 189 (2003) (referring to this crackdown as "Project Postporn" and noting that it "was aimed at mail-order companies that sold sexually explicit material"); Robert F. Howe, U.S. Accused of 'Censorship by Intimidation' in Pornography Cases, WASH. POST, Mar. 26, 1990, A4 (describing "Project PostPorn" as "a nationwide investigation geared specifically toward mail-order distributors of sexually oriented films and publications" that "was launched by the Justice Department's National Obscenity Enforcement Unit, formed in 1986 by then-U.S. Attorney General Edwin Meese III shortly after the Attorney General's Commission on Pornography delivered its final report").

Coalition⁹⁵ was formed. It was a subscription newsletter available to all the people in the business. It was very gray and before the Internet. I did it as long as I could – losing money. People didn't want to pay for it. We asked for \$150 – half an hour of their attorney's time – for a one-year subscription. That was our campaign: For less than one hour of an attorney's time, here are twenty-six issues a year of solid information that will keep you out of jail. It was nothing but information every two weeks. I did it for a little more than a year, and then I was like, "What the fuck am I doing?" People wouldn't pay for it.

D. *The Business of Adult Entertainment*

In this section, Fishbein talks about the future of the adult entertainment industry and the economic forces that will likely control the direction it takes. He discusses the possible compression of companies and the role new technology plays in the changes that lie ahead.

QUESTION: You're doing some planning, at this point, for the future of the magazine. How does that process work in the adult entertainment world?

⁹⁵ Free Speech Coalition Website, *available at* <http://www.freespeechcoalition.com/> (last visited Dec. 18, 2007) (describing its mission "to: [l]ead, protect and support the growth and wellbeing of the adult entertainment community. As the trade association for the adult entertainment we do this by: Being the legislative watchdog for the industry; Lobbying; Public education and communication; Member education and communication; As a last resort, litigation").

FISHBEIN: We are getting ready for our strategy meetings, and you need to look at the market and what's happening. We notice that DVD sales are probably down for everybody thirty to forty percent. I think our ad pages are down thirty percent. I think that the business has flattened out. It's a combination of people going digital and online. A lot of revenue is not being replaced online.

There's also a glut of product and a glut of companies. There are the laws of economics. As robust and as big of a business as it is, there's just so much product. The laws of supply and demand apply, and when the supply has outlasted the demand, something's got to give. We've seen a few companies no longer producing DVDs. Instead, they're going online and trying to go video on demand only. Whether or not they'll be successful, the jury is out. A lot of the old-time producers who haven't moved online successfully are finding themselves with nowhere to go. They're changing their business model.

At AVN, we have to look at where it's going. Is the DVD market going to continue to dive? Obviously, people will want hard goods. Will things go more online? How are the delivery systems of pornography changing? What are our customers going to do? Are they still going to want us? What is it that we can provide our customers that will keep them engaged? Who are our readers going to be five years down the road? If retailers continue to dwindle, are we going consumer oriented? How much do we put into print and how much online? All of those big issues get discussed everyday, but once a year we try to plan and project.

QUESTION: In terms of the readership of *AVN*, do you view it as a trade publication? Does it attract people who are not in the industry?

FISHBEIN: With *AVN*, the magazine, we have very limited circulation outside the industry. We used to sell a lot more to newsstands, but it was kind of a loss leader. We didn't see any residual effect on the ad side. So, now we only sell it COD to people with no returns. That brought the number way back down. We cut out a lot of that distribution. Now, ninety-nine percent of our readership is the industry. There are those people who are fanatics and want to read the magazine, but most of those fanatics would then go to *AVN.com*. There would be no reason for them to read the magazine because they will get everything they need from the site. So, in terms of the print book, it's only the industry; in terms of the website, obviously, the traffic is much more than just the industry.

QUESTION: You were discussing the loss of print revenue and not yet being able to translate it into gained revenue through advertising online. The newspaper industry is experiencing a similar problem.⁹⁶ Are there any solutions?

FISHBEIN: And it applies for the traditional movie producers whose DVD sales have dipped, but who have not been able to translate to an online presence. They're selling

⁹⁶ Cf. Simon Montlake, *Newspapers Thriving? Yes, in Asia*, CHRISTIAN SCI. MONITOR, Jan. 24, 2008, at 6 (noting that while "the ailing US newspaper industry gasps for air, its counterparts in Asia are breathing in the exhilarating oxygen of success").

their movies for VOD, but getting a very small percentage. There are some who don't have a membership site or haven't figured out a way to monetize their content correctly. They're feeling it, too.

The more successful group is comprised of the guys who were doing Internet content and who had all their money in the web. Now, they've started DVD lines based upon content that already had made them profit. Now, it's pure profit. That's the reverse side and it seems to be working.

QUESTION: Can you please talk a little about the job itself? What's been the best part of the job for you these past twenty-five years?

FISHBEIN: We generally piss off a lot of people and we lose some advertisers, but the AVN Awards⁹⁷ have always been the one area where it feels like we've really done something here. It's fun because it has mainstream acceptance and we get mainstream press⁹⁸ – it's sort of what we are known for outside of the industry. It's the most satisfaction I get.

Because it's such a high-maintenance industry, and I take on a lot of the customer-service bashing, nothing else is as much fun. It used to be fun to come to work everyday and to revel in what we were doing.

⁹⁷ See generally, 2008 AVN Adult Movie Awards, available at <http://www.avnawards.com> (last visited Jan. 24, 2008).

⁹⁸ See, e.g., *Jenna Leg-Lock*, N.Y. POST, Jan. 15, 2008, at 10 (noting that famed porn star Jenna Jameson announced at the AVN Awards that she will no longer perform in front of the camera in adult entertainment).

Today, then, I would have to say the awards. It's the one night a year when I feel like we've really achieved something. Otherwise, it just seems like work.

QUESTION: You do get that mainstream news coverage every year. Does that help?

FISHBEIN: Yeah, we still get a kick out of that. I just think that the industry has changed. It no longer feels like a community but more like a vast, disjointed business.

QUESTION: To what do you attribute that change?

FISHBEIN: It's just technology and new people coming into the business. The new people have a certain attitude and mentality – the younger mentality is much more of a scorched-earth policy. The people I came into the business with, as well as the people who were already established in the business, were much more of a community because they were under fire. They were the outcasts of society. They were pooh-poohed because they were pornographers, so they had this us-against-the-world mentality and they stuck together. Of course, they would fight with each other, but the worst enemies would give each other money if they were busted. It meant something.

As a new generation – my generation – came in, we sort of adapted that community feeling and merged with the original guys and continued that dysfunctional adult family.

As the industry became more mainstream and accepted, and as the Internet and other technology took over, a whole new slew of people jumped into the business from

that side. It spread it out and thinned it out. It created new markets and new ways that people could do business. The two sides really didn't know each other. They're now just starting to really merge.

The new people are younger and don't have a history of even understanding what the First Amendment is. They don't understand what people had to go through and how many times people like Al Goldstein⁹⁹ or Larry Flynt¹⁰⁰ went to jail. Larry got shot. They don't know what it meant to really fight for the First Amendment and to be arrested and sent to jail. I haven't been to jail, but I was friends with all those people who did go to jail. I felt it and I visited them in jail.

The new generation has no history attached to it. Some of the guys from the Internet business who are really successful or those who are new in the video business and are successful are nice people, but when you start to mention Reuben Sturman,¹⁰¹

⁹⁹ See generally, *Al Goldstein Announces Candidacy for 2008 Presidential Election*, PR NEWSWIRE, Apr. 2, 2007 (reporting that "Goldstein received his degree in English from PACE University, and bounced around as photographer and tabloid journalist until he founded *Screw Magazine* in the summer of 1968. Within two years, Goldstein had accumulated seventeen arrests for obscenity, establishing his reputation as a champion of the first amendment.").

¹⁰⁰ See generally, LARRY FLYNT, AN UNSEEMLY MAN; MY LIFE AS PORNOGRAPHER, PUNDIT, AND SOCIAL OUTCAST (1996) (chronicling Flynt's life from his childhood in Magoffin County, Kentucky through his rise to the top of the adult entertainment publishing business).

¹⁰¹ See LEGS MCNEIL & JENNIFER OSBORNE, THE OTHER HOLLYWOOD: THE UNCENSORED ORAL HISTORY OF THE PORN FILM INDUSTRY 104 (2005) (calling Sturman "by far the most important pornographer in the history of the world").

Sidney Niekerk,¹⁰² Norman Arno¹⁰³ of VCX – the founders of the business – they have no idea who these people were. There’s no sense of history and no sense of what it is like to be busted. The material today is so hard, edgy and over the top – there’s no self-restraint. It flattened the industry out. The playing field got leveled. There was no barrier of entry.

There’s no sense of community anymore. For instance, a girl died last week. I saw it on my website. She did like 300 movies, but there was no feeling in the community that something had happened. We did one article. I don’t even think we followed up on it. It’s like, “Oh, it’s just another girl.”

The girls come in and the agents send them out. Everybody is trying to shoot the new girls. There is no marketing and no establishing them. The girls are just out for the money. There are no personalities, it’s generic and it just feels different.

QUESTION: Do you ever sense how that could change? Do you feel it will ever change?

FISHBEIN: Yes. As soon as they start busting everybody, it will change, and I don’t want that to happen.

¹⁰² See *Major L.A. Producer Indicted for Distributing Obscene Material*, BUS. WIRE, Oct. 4, 1990 (describing the U.S. Justice Department’s indictment of Niekerk, et al. on charges of “interstate transportation of obscene material and conspiracy”).

¹⁰³ See Dennis Anderson, *AP News Features*, ASSOCIATED PRESS, June 1, 1986 (discussing the prosecution in Miami of 29 Californians, including Arno, on charges of conspiracy and transportation of obscene films across state lines).

We always hoped and felt that the AVN Awards were a unifying force. It's the one night a year that everyone is in the same room. But so many people are bitter and think, "We're never going to ever win, we're never going to get nominated." There still is all of that bitterness out there, so you don't get everybody coming together. When we started the awards show, I think we got everybody or mostly everybody. I kind of hoped that would happen with the Adult Entertainment Expo in January. At least it's an area where everybody can see each other, but it's competitive and prices are cheap. People are trying to survive. Unless some catastrophic thing happens that brings people together, I don't know how it will change. It's just another business that evolved.

I'll bet you that if you talked to someone in the music business or somebody in the movie business who's been around twenty-five years, you would hear the same thing. It may just be me and my feelings – maybe it's just burnout or age – but I think you get that in these industries.

I've always had a good business. It's been good for a long time and, no matter what happens from this point forward, we're a success. I long for fewer crappy companies, people who are more engaged in the business, people who understand the legal stuff and people who pay their bills. I also long for some of the more principled people that I used to know – who have either died, retired or went off into the sunset.

QUESTION: Your business has responded really well to technology. Your web site looks great.¹⁰⁴ You now have a podcast on it.¹⁰⁵ Newspapers haven't been able to make that

¹⁰⁴ See AVN Home Page, <http://www.avn.com> (last visited Jan. 24, 2008).

¹⁰⁵ *Id.*

transition and draw an audience. Your audience, it would seem, would be more likely to go online because they are more technologically savvy. Is that the case?

FISHBEIN: A newspaper audience is a newspaper audience. I am a newspaper reader. I read the *L.A. Times*. I get the *Wall Street Journal* and never have time to read it. I read *The New York Times* on Sunday. I have a baby, so I can't get the time to read things anymore, but I love newspapers.

I don't get my news from the web. I'll get it from radio, particularly NPR. I'll get it from CNN. And I get it from the newspaper. I don't go online to get news. The CNN breaking news report online is that Britney Spears has to go back to court, and that's a CNN breaking news report! Another 200 people die in Iraq, but I get a report that Britney Spears is headed back to court. That's my CNN alert. If they do send me an alert that I'm interested in, I may click and read it.

The mainstream newspaper audience is a different world than a specialty product. Our world is made up of people – the consumers, the online people, the webmasters and the people who have retail sites – that live in an online world. We have to have a website. It took us a year to get this new site up and the bells and whistles have been removed. Over the next six months, I think it will become the site it was intended to be. You have to do that in our business. A big chunk of my future is online. As the video companies who put out DVDs see their sales slump and want to reach consumers through VOD or pay sites – whatever it is – we are going to transition them from print to a combination of print and online and then, eventually, to online.

I hope that *AVN* exists as a print magazine for a long time to come, but we have to prepare for the possibility that print won't be worth doing anymore. We have no choice, if we want to exist, but to live in the online world and to have a great site or multiple sites. I think we're doing that. Nobody touches what we do. *XBiz*¹⁰⁶ does a good job, but I don't think they do nearly as well as we do. I could be wrong, but I think I'm right. I think there's a strong number one and a strong number two, then there's everybody else – that's my opinion. From the news point of view, we're already there. In terms of providing the information that people will need for pornography – assuming they need information or marketing – we'll be there. If not, I'll do something else.

QUESTION: Was it difficult to get your advertisers – your clients – to buy into advertising on your website?

FISHBEIN: No. We don't have a lot of trouble selling banners. One of the problems we have is that we cannot sell too many because we don't want to dilute the traffic to the site. We don't have enough space for everything we would like to sell. We have to start to create other opportunities and other things, which we're doing. It's part of what we're working on company-wide next week: What are phases two, three and four, and what are we going to be doing in January and March of next year? We're going to need spaces to put people if, in fact, their DVD sales flatten out and they want to start reaching

¹⁰⁶ See generally *XBiz.com*, <http://www.xbiz.com> (last visited Jan. 24, 2008) (describing itself as “The Industry Source”).

consumers or have another model. We need to be able to provide them marketing opportunities.

QUESTION: How far can you really speculate, given the technology shifts down the line?

FISHBEIN: You just guess. It's a guess, and I would never have guessed that we would see that people's business would be off thirty to forty percent this year. We thought ten percent, maybe. It was huge. Our page number was down that much and we thought we could be profitable by putting out twenty-eight pages, but it was a bit of a shock and kick to the stomach. We had to start coming up with some new, creative ways to get the revenue up – just like the video companies do.

QUESTION: Are companies falling by the wayside or are they consolidating and merging?

FISHBEIN: I think we're seeing consolidation. I think we see people buying other people. A couple of companies seemed to have folded, but they've really not. They're just selling their catalog. They're going online and producing content for the Internet. They're doing websites. Everything is going on.

I think you're going to see some mergers, acquisitions and bankruptcies. Not to get too crazy, but I've been talking about a glut of product for fifteen years. Every time I say "glut of product," the true capitalists say, "No, no, no. There's no such thing. Consumers just have more choices."

I don't know how these companies survive. How do they put out a thousand movies and survive? You realize they sold cable or sold foreign. I never understood it. I think we're finally seeing the end of that, and the people are hitting the wall. They can no longer live off the cash flow. That's just economics. It's catastrophic within the business, but if you look at it objectively from the outside, you would say: "It's a \$12 billion-a-year business and the video segment is \$3 billion and that's a big business." There are, however, too many players and the pie is split up in to too many little, small slices.

It's still a big business, so quality, marketing, deep pockets and good ideas will win out. Maybe the day when a guy could simply open his doors, have a video camera, shoot a movie, sell it and be successful is over. As all these little guys go away – some of them are my customers, it's bad and I may get beat for some money – from a business point of view, it's probably a good consolidation. It's ultimately a good thing.

There are too many companies, too many movies and too many titles.

QUESTION: If the AVN Awards are the best part of the job, what's the worst part of the job today?

FISHBEIN: Customers – the companies advertising with us – banging on me and complaining. They say things like, "How come I'm not higher on the charts? I know I sell more than this guy and I'm tired of you guys giving us bad reviews. I sent in a press release and it didn't get up on your site. You guys suck. I never win any awards, so I'm not advertising anymore – it's too expensive and I can't afford to advertise."

I'd love to get a phone call that says "what a great article you guys did" or "boy, that issue was really cool." If they like it, I don't hear from them, but if their ad prints a little bit badly, then I hear from them. It just sort of sucks because my friends in the business don't even say, "Hey, good issue," because they've read 320 AVNs in their life and they view it as just another AVN – nothing special. Our twenty-fifth anniversary is coming up and we're getting excited to do something really spectacular. But I don't know – I'm just sort of exhausted from it. It's an exhausting business.

QUESTION: You mentioned the fact that adult entertainment is an almost \$13 billion business, and that means there are an awful lot of consumers buying this material. Have you ever put out a consumer product or would consider doing so?

FISHBEIN: We've put out consumer versions of AVN, which failed at the newsstand miserably. I put out something called *Fetish* and something called *Sexposé*. I've taken my shot. I was underfinanced. The magazine distribution business has always been corrupt at the core, even when it was good. Now, the magazine business generally – not just adult, but all magazines – is way down. It's very difficult to get shelf space. The retailers of magazines pay their bills with magazines they haven't even had out for a week. It's not worth launching a newsstand issue now. AVN had its opportunity and probably should have done it in a more serious way, but we didn't. Remember, we weren't providing spreads and we weren't providing sex. We were providing information. I think that our way to get the consumer is via the web. I think that will be our place. The newsstand business is corrupt.

Condé Nast, when it launched *Portfolio* recently, said this is its last big newsstand launch. That's Condé Nast, and it's a beautiful magazine. They spend millions to launch a magazine.

QUESTION: How about magazines like *GayVN*?¹⁰⁷ How is that segment doing in the market?

FISHBEIN: We've always covered gay. We felt that by breaking gay into its own division – its own magazine, with cheaper ad rates because there's less circulation and fewer stores carry gay product – that it would be good. It's kind of a break-even business for us right now. We're trying to expand, servicing all of the retailers who carry gay. Now, we're servicing the webmasters and giving a gay webmaster show. I think the potential to pick up is there. It's slightly profitable, maybe slightly above break-even, but we have to do it.

QUESTION: Didn't you have a *GayVN Awards* show in San Francisco?¹⁰⁸

FISHBEIN: That was a big hit. We had Kathy Griffin host it, and it was great.

QUESTION: Are there other segments that work well?

¹⁰⁷ See GAYVN Home Page, <http://www.avn.com/gay/> (last visited Dec. 19, 2007).

¹⁰⁸ Wyatt Buchanan, *Plenty of Love to Spare at S.F.'s Gay Porn Awards Industry Pioneers Honored at Porn Awards*, S.F. CHRON., Feb. 26, 2007, at D1 (noting that host Kathy Griffin “earned her fee for the night by moving the often-repetitive ceremony along with her take-no-prisoners humor”).

FISHBEIN: Our novelties magazine is doing great, and that's definitely a growth business. It doesn't get affected by people going on line digitally. If you want to buy a novelty, you have to buy the novelty. That business is real good. Our *AVN Online* magazine is doing fine. We're doing well in that world. We've refocused that magazine quite a few times to change with the marketplace, and it's doing well. *AVN* is doing OK. We're not doing badly. It is our flagship book, and it was the big cash cow at one time. Now, it's just a regular business and it has to be run like a regular business. Dan [Miller] will do his budgets for 2008, and if he has to let one or two people go, he will. If they come up with some new revenue ideas, so that they don't have to let those people go, that's great. That's part of what he's learning to do.

QUESTION: In many ways, you're like any other publishing business, is that right?

FISHBEIN: Yeah, but we didn't run it like a real publishing business for the first twenty years. We ran it like a porn business. You can make up for a lot of business errors by having a product that is different and outside the norm. Living by different rules, you can get away with stuff. Today, however, you can't. You have to run it like a business.

QUESTION: You mentioned *XBiz* and the competition between the two companies. Is the adult business big enough to support two trade publications?

FISHBEIN: I think so. There are more, too. In the online world, there's another magazine called *Clicks*. In the video world, there's one called *Adult Store Buyer*.¹⁰⁹ Neither of those compare to either of the other products that either we or *XBiz* puts out. I still put us as one and two, and then there's everybody else.

Then, there's the competition for the ad dollars everywhere – online, consumer magazines, everywhere.

XBiz doesn't have real circulation. In other words, if *AVN* hits 20,000, they maybe hit 5000. They don't have qualified circulation – they don't go out and qualify to find out who their readers are. They'll dump a lot of copies in video companies' lobbies and call that circulation. It's a lot of flash and a lot of marketing, but there's not a lot of context or content that's unique. I don't see it. But I think they do a good job of marketing so that people think it's new, fresh and exciting. Their online magazine is much more competitive with what we do online. I still think we're better. I think our writing is better, our features are better and our depth is better.

Again, theirs looks good. It's a tabloid and it's easy to read, so people like that. They like the short, little bites of regurgitated press releases. We both run a lot of pictures of personalities and schmooze and kiss our customers' asses because you have to do it.

Listen, there's competition for the ad dollar, and they come in with these really cheap prices. People want us to match them, and we say, "We can't. We can't give it to

¹⁰⁹ See *Adult Store Buyer Magazine, About Us*, available at <http://www.asbmagazine.com/content/view/15/26> (last visited Dec. 19, 2007) (describing the publication "as a niche publication geared toward 'the buyers' at adult retail stores. ASB is more about what happens within the four walls of an adult retail store than what happens within the entire adult entertainment industry.").

you at a loss. We'll work with you, but they're not giving you the circulation." Some people have left to advertise with *XBiz*, but then they come back and say, "I don't want to do that anymore." Some people advertise with both. Very few do them and not us; a couple do, but I'm not going to match the price. I can't do thousand-dollar pages. They want to get everyone in there cheap, cheap, cheap, so that people will think they have to be in there. They're counting on that. They're banking on that.

QUESTION: Did you say that *AVN's* circulation is about 20,000?

FISHBEIN: Yes. Maybe it's 18,700, but it's qualified. Qualified circulation means something, but people in this business don't get that.

QUESTION: What do you mean by qualified circulation?

FISHBEIN: It means that we know who are readers are. We're sending them to real buyers: They fill out a form and we know they exist. We're not just sending them out blindly. We used to send some that way. We used to have 30,000 – a lot of them blind.

QUESTION: Can you please talk about the difficulty in estimating the amount of revenue the adult industry generates?

FISHBEIN: It's really difficult. You have Playboy,¹¹⁰ Private Media Group¹¹¹ and New Frontier Media¹¹² – that's it for public companies. Nobody else is putting their numbers out, so you're guessing. You're trying to cobble your information from research firms and people who have done research, like *The New York Times* came up with some numbers. You throw all their research together and you have to just guess – logical guesses. That's why we say it's an estimate. Every interview I do where they ask me about the numbers, I say, "I just want to qualify this by telling you that this is a guess, and I am not going to say that it's absolute fact. If you want to say it's absolute fact, don't attribute it to me." *The New York Times* did its own figure. Hotels don't tell you and novelty companies don't want their competitors to know. With magazines and newsstands, you can do a logical guess. The video companies aren't public, so how are you going to figure that out? They'll all inflate their numbers. You can go to retailers, get some idea and multiply it out by the number of retailers. But there are so many online retailers and direct-to-consumer sales in which no one even knows the transaction is even taking place. You've got strip clubs, video on demand, cable television, satellite television, pay-adult segments and on and on. So we're guessing, but we think we're close.

QUESTION: We understand that October is one of the busiest times of the year for you. Why is that?

¹¹⁰ See generally Playboy Enterprises, Inc., <http://www.playboyenterprises.com> (last visited Apr. 20, 2008).

¹¹¹ See generally Private Media Group, Inc., <http://www.prvt.com/company.php> (last visited Apr. 20, 2008).

¹¹² See generally Hoover's Profile: New Frontier Media, Inc., <http://premium.hoovers.com/subscribe/co/factsheet.xhtml?ID=55983> (last visited Apr. 20, 2008).

FISHBEIN: Last Friday was the last release date for a movie to be eligible for the AVN Awards. Over the next couple of weeks, people are finishing up making their submissions for the nominations. Then, we're going to spend the better part of six weeks – a group of eight editors and myself – plowing through thousands and thousands of videos in order to come up with the nominations, which should be announced just before Thanksgiving. Once the nominations are out, then everybody votes through the end of the year – it's a larger voting body, including all of the freelancers. The eight of us in the office do the actual nominating, along with the outside opinions of these other people. Then, there's about a six-week voting period where the whole voting body at large gets to vote. Between now and the next three months, it's voting for the awards, and it's a monster job.

QUESTION: How much time do you spend watching all the videos?

FISHBEIN: I would guess that, just in this upcoming six-week period, the average person in this office will watch 200 hours of video. They'll just be fast-forwarding through so many. A lot of times they'll be watching one particular sex scene or they'll be listening to music for the music nominations. We'll put in thousands of DVDs.

QUESTION: How many categories of awards are there?

FISHBEIN: There are as many categories as the Grammy Awards – something like 100. When you look at the volume of product – 12,000 new releases in a year – and the many genres, sub-genres and specialties, you’re trying to make sure you don’t just concentrate on the big movies. You want to let the people who do foot fetish have their category. You want people who do spanking or squirting to have their categories. You want to give opportunities to all of the little genres that people have created because they’re not going to compete with the big Vivid and Evil Angel movies. Regardless of whether they’re putting out amateur video, gonzo, anal specialty or ethnic specialty, you have to give them their categories because that makes everybody feel part of it.

QUESTION: Other than the fact that it is nice to win an award, what advantage is there for a film producer to win an AVN Award?

FISHBEIN: It varies. If Vivid wins for best film, not much. If Wicked wins, same thing. I mean, it’s great for their marketing and it’s good for their ancillary sales – their business at large – because the publicity is really good.

For a company like, for example, Sex Z Pictures, which was the big winner for best video feature last year for “Corruption,” it’s big. They were just a nothing company. A guy who owns retail stores decided to get into the business and he sort of floundered for a few years. Then he decided to dump a quarter of a million dollars into a movie – I don’t know if he ever made his money back, but people stood up and took notice. All of a sudden, people from overseas and cable operators were calling him. For a guy who hadn’t won before, he went, “Oh my God.”

It's an ego thing – they can put the awards up on their mantles. It's also a marketing tool; if the company understands marketing, it can use it and it will help the company image.

If Rocco Siffredi¹¹³ wins another award or if Lexington Steele¹¹⁴ wins his fourth Male Performer of the Year, well, he's already the best male performer. If he didn't win last year, so what? He's already won three. It's like winning three batting titles. OK, this year, you hit .322 and you were fourth in the league in hitting. It doesn't matter because you're consistent.

It really depends on the people. Any time somebody new wins, you kind of notice. Any time someone who doesn't advertise with us wins, they notice. They say, "We thought you actually had to advertise to win." No, they just had to have the best movie in that category. It really depends on the category and the company.

QUESTION: Some people might think that this is the best job in the world – to sit here and watch all of these adult movies all the time. Is that the case?

FISHBEIN: If this were 1984 and we had 200 movies eligible, it would be great and a blast. But when you have 12,000 movies eligible, and everybody thinks every movie deserves a nomination, it's beyond work – it's drudgery.

That's only because, to feel like you've done the best job possible, if there are 300 pre-noms in the anal sex scene category, your tendency is to go with the big names and

¹¹³ See Rocco Siffredi Official Website, <http://www.roccosiffredi.com>(last visited Apr. 20, 2008).

¹¹⁴ See Lexington Steele Official Website, <http://www.lexsteele.com>(last visited Apr. 20, 2008).

big companies, so I force everybody to watch all 300 scenes. We'll send a committee off to narrow it down to thirty. So it's like, "You two guys take these 100 or 200 movies home tonight and narrow it down to thirty. Then, we'll watch the thirty and vote." It's brutal.

The other part of it is that people in this office are passionate about the things they like. Whether they think it's really good, like a certain girl or think that somebody really deserves something, that all comes into play. I think it's no different from any other awards show. You don't know what's in the mind of some of these Academy Awards voters.

When you get into some of the arguments here, it's funny if you can step back and look at what we're arguing about. On the other hand, I love the passion of the people who work here. They take it seriously and it's drudgery. At the start of the first day, you're all raring to go, but by the end of the first day, you're just beaten down. We look at this list, and we've done five sheets out of 500. We say, "How are we going to ever get this done?" We have forty-five days to do it.

At one point, it's an exhilarating time of the year. At another point, it's just brutal.

QUESTION: Does it ever come to blows at any of these meetings?

FISHBEIN: Nah. Well, it's come to serious arguments, with people holding their ground. If we're down to sixteen nominees and we can't have more than fifteen in a category, then it's brutal. They're making deals, saying "if we do this, then I want this. If I let go

of this scene, then I want this scene in this category. This company never gets anything, so can we at least nominate them here.” Deals like that? Constantly. No one’s gotten into a fistfight, but there are people who are passionate.

QUESTION: This is the Oscars of the adult entertainment industry, is that right?

FISHBEIN: Well, you can say it. I can’t. Oscar has technical service mark.

QUESTION: People from the outside might think that the AVN Awards is like in the movie “Boogie Nights,” when they have the awards show and the character Dirk Diggler, in getting his award, says something like, “I’m going to keep on rockin’ in this industry.” Is that what it’s like?

FISHBEIN: Yeah. Girls will get up there, cry and thank their moms. Sometimes guys will go, “Hey, I was just trying to get laid.” That’s his acceptance speech! But when a girl says, “I can’t believe I worked so hard. I want to thank my agent and all the companies I’ve worked for, and I want to thank AVN” – and then they cry – that’s great. Tears are great. When they say, “I want to thank my mom for standing by me” – all good. It’s weird. It’s like bizarro world.

QUESTION: Tell us a bit about the trade show that leads up to it.

FISHBEIN: Well, the Adult Entertainment Expo is the largest in the world. It's a combination trade show and consumer show. We'll have 350 exhibitors and 20,000 people come through. It's a pretty big trade show.

It's starting to morph or change because a lot of people can't afford the big booths anymore. You have a combination of booths and business suites now. There's a lot to see from the trade point of view. It's a big trade show.

QUESTION: If you could wish one thing for the adult entertainment industry, what would it be?

FISHBEIN: That people would act morally in business and do the right things: Treat and pay the talent correctly, not scam other people, protect the First Amendment, support people who are under indictment, act morally and be good citizens rather than like fuckers trying for the quick buck.

III.

ANALYSIS & CONCLUSION

In many respects, the adult entertainment business is no different from any other industry. It employs thousands of workers,¹¹⁵ caters to its marketplace, generates tax

¹¹⁵ See Garza, *supra* note 59, at V1 (describing how the adult entertainment industry "employs about 6,000 people directly, such as actors and production workers, and countless others indirectly, such as vendors

revenue and responds to changes in the economy. It also embraces – albeit sometimes reluctantly – rapidly changing technology. It experiences periods of tremendous growth, but sometimes suffers setbacks and losses. Yet, the adult entertainment industry differs from other American enterprises in one stark respect: It is an enterprise that the federal government would like to put out of business.

One of the weapons in the government’s arsenal against the adult entertainment industry is federal obscenity law.¹¹⁶ Of late, those provisions have gotten some use,

who sell items for use in production to those employed in plastic surgery and other body-part enhancement”).

¹¹⁶ See 18 U.S.C. § 1465 (2007). Production and transportation of obscene matters for sale or distribution, which provides, in pertinent part:

Whoever knowingly produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934 [47 USCS § 230(e)(2)] in or affecting such commerce, for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both;

and 18 U.S.C. § 1466. Engaging in the business of selling or transferring obscene matter, which provides, in pertinent part:

(a) Whoever is engaged in the business of producing with intent to distribute or sell, or selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign

particularly during the second term of President George W. Bush.¹¹⁷ The Bush Administration had been promising to go after the adult industry since taking office, but as Paul Fishbein, president of Adult Video News, wryly noted during the interview, “I think the Bush Administration was slow getting to it, but I guess we had a few other issues going on in this country.”¹¹⁸

The healthy dose of sarcasm that seeps through his comments has been well honed – understandably – during his quarter of a century as a witness and scribe to the evolution of pornography in America. His magazine calls itself the “Industry Standard,” but it is much more. *AVN*, in essence, is the publication of record for an industry that continues to experience growing pains, as well as dogged pursuit by law enforcement. Fishbein has seen both – many times, it turns out – during his long kinship with the business that began shortly after he graduated from Temple University and headed west to California’s San Fernando Valley.

While his confident posture is that of a seasoned veteran who has seen it all, the latest wave of federal prosecutions presents somewhat of a different feel for him than in the past. This is due, in part, to the fractured adult industry that Fishbein and his staff now chronicle. The doors to the adult entertainment have been thrown wide open, thanks, in large part, to inexpensive and accessible technology. Entrepreneurs, amateurs and opportunists of all stripes, in turn, are pouring in, and the camaraderie of the once maverick-grounded enterprise has dissipated. The resulting detachment of the players

commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.

¹¹⁷ See *supra* notes 7-10 and accompanying text.

¹¹⁸ See *supra* note 44 and accompanying text.

makes it particularly difficult when federal law enforcement turns up the heat hoping, if not to eradicate porn in this country, at least to cripple some of its long-time producers.

Fishbein recognizes that serious times lie ahead for the industry. The government appears to be targeting for prosecution material that gives them the very best chance of securing convictions, although as he observed during the interview:

Maybe they didn't expect that these guys would be feisty and fight back.

Extreme Associates, JM and Max Hardcore are fighting back. They're not going to go down lightly. In the case of Extreme Associates and Max Hardcore, it's pretty aberrant material. I don't want to see obscenity convictions, by any stretch of the imagination. It's bad shit, but the remedy shouldn't be censorship.¹¹⁹

While he makes clear that he does not want to see convictions of adult producers – he abhors the idea of prosecuting individuals for creating speech products – he thinks the newer generation of content producers might take notice and recognize the need to coalesce as an industry when they witness colleagues going to jail. Fishbein gives the impression that he has grown weary of people who enter the adult business solely to squeeze as much profit as possible out of it without paying any attention to the constitutional battles hard fought by the pioneers in the industry. As he observed,

The new people are younger and don't have a history of even understanding what the First Amendment is. They don't understand what people had to go through and how many times people like Al Goldstein or Larry Flynt went to jail. Larry got shot. They don't know what it meant

¹¹⁹ See *supra* notes 47-49 and accompanying text (internal footnotes omitted).

to really fight for the First Amendment and to be arrested and sent to jail.

I haven't been to jail, but I was friends with all those people who did go to jail. I felt it and I visited them in jail.¹²⁰

Asked whether he ever thought that situation would change, his answer was characteristically to the point: "Yes. As soon as they start busting everybody, it will change, and I don't want that to happen."¹²¹

Fishbein clearly is troubled by the government's continued insistence upon finding ways to hinder the adult enterprise. In his view, the *Miller* test¹²² is unworkable; he would craft a better law to save time, money and effort. It would read as follows:

If the material is performed by consenting adults over the age of eighteen – if you want to change that age, go ahead – but over the age of eighteen, and they are people – not animals – who are able to consent, have consented and no crime was committed, then it's protected speech. Anything involving underage kids – child pornography – go after it. Anything involving coercion, go after the crime. It's as simple as that. If you want to outlaw the conduct of the crime for commercial use – this girl was raped against her will and you cannot sell it – fine. I'm OK with that. You cannot commercially sell material that did not involve consenting people. That's the way you do it. There's no gray area.¹²³

¹²⁰ See *supra* notes 99-100 and accompanying text (internal footnotes omitted).

¹²¹ See *supra* Part II, Section D.

¹²² *Supra* note 6.

¹²³ *Supra* Part II, Section B.

Fishbein has a refined knack for making thoughtful and common-sense distillations of law and procedure. A common theme of his remarks throughout the interview was that government and its application of the law in this area is completely illogical. The current age-verification inspections being carried out by the FBI provided another example for Fishbein of the government's squandering taxpayer dollars when the results will not unveil any minors performing in adult materials – the purported rationale for the Bureau's efforts. As for the 2257 regulations that underlie the inspections, he added, "I think the rules are onerous. They're ridiculous and the record-keeping requirements are insane."¹²⁴

For Fishbein, logic can be found in the recognition and protection of Americans' privacy interests. He thought Judge Gary Lancaster's opinion in the *Extreme Associate's* case¹²⁵ made sense because it was premised on privacy. To illustrate the point, Fishbein asked the authors of this article:

If you're sitting in your home in Centre County, Pennsylvania, which I presume is somewhat conservative, and there is nothing publicly exhibited – no porn theaters or anything like that – and you buy a DVD from Adam & Eve, it's mailed to your house, and you sit in your home and you watch it with your wife or whatever you do with it, then what business is that of the community?¹²⁶

¹²⁴ *Supra* note 37 and accompanying text.

¹²⁵ *Supra* note 75 and accompanying text.

¹²⁶ *Supra* note 79 and accompanying text (internal citation omitted).

Fishbein's subscribes to a libertarian philosophy – he labels himself a “half-ass libertarian,”¹²⁷ given his belief that the government should provide children healthcare protection – and urges the courts to keep the government out of people's bedrooms.

While the law continues to cause headaches for adult producers, the industry is struggling to reposition itself to remain competitive in the marketplace. The proliferation of entrepreneurial entrants into the adult industry – particularly Web-based businesses – coupled with a glut of product that retains a long shelf life threaten to render some mainstream adult producers obsolete. He cannot see the business operating at its current pace, noting during the interview, “There are, however, too many players and the pie is split up in to too many little, small slices.”¹²⁸ He foresees some mergers, acquisitions and even bankruptcies as the market sorts this out.

While the industry experiences an economic downturn, so too do Fishbein's trade publications that cover it. At the time of the interview, the AVN staff was putting together its future business plan. As Fishbein described the process:

We are getting ready for our strategy meetings, and you need to look at the market and what's happening. We notice that DVD sales are probably down for everybody thirty to forty percent. I think our ad pages are down thirty percent. I think that the business has flattened out. It's a combination of people going digital and online. A lot of revenue is not being replaced online.¹²⁹

¹²⁷ See *supra* Part II, Section B.

¹²⁸ See *supra* Part II, Section D.

¹²⁹ *Id.*

The uncertainty of the direction of the adult business, the outcome of the current spate of prosecutions, as well as any future indictments, and the potential introduction of new technology provides more questions than answers. For Fishbein, those questions are on his mind every day, as he asked: “Is the DVD market going to continue to dive? Obviously, people will want hard goods. Will things go more online? How are the delivery systems of pornography changing? What are our customers going to do? Are they still going to want us?”¹³⁰

Although the answers to those questions are now unknown, what is clear today is that the public’s appetite for adult content has not waned. Despite the best efforts of the federal government, adult entertainment continues to mainstream into society. While the stigma associated with pornography has not been erased completely – Fishbein suggested “there’s still something naughty about it, something sleazy about it” – Americans unquestionably are more comfortable with it, albeit silently so. The vocal minority still grabs the headlines and controls an agenda that relishes pouring taxpayer dollars into insidious inspections and pointless prosecutions.

¹³⁰ *Id.*