THE LEGAL XXX MAKING FILMS IN

BY MARC JOHN RANDAZZA, ESQ.

Spurred by recent California legislation, the adult film industry has started to migrate from its ancestral home in California to Nevada. While Nevada has largely welcomed the industry, the shift raises the question: "Is it legal here?" There is a misperception that the only places porn production is legal are California and New Hampshire. Some ask the question, "why isn't pornography considered a form of prostitution?" We can clarify both with one analysis; pornography does not fit the definition of prostitution, and even if it did, it could not be constitutionally prohibited as such.

The Story Starts in California

The reason California is the home of the adult film industry is largely the *People vs. Freeman* case. In that case, the California Supreme Court ruled that when an adult film company pays actors to appear in a film, it isn't prostitution.[1]

Harold Freeman hired and paid actors to perform in a non-obscene erotic film, called "Caught from Behind, Part II." A prosecutor tried to put an end to "that kind of thing" by charging Freeman with pandering — defined as "procurement of persons for the purpose of prostitution." The California Supreme Court overturned the conviction, holding that, "in order to constitute prostitution, the money or other consideration must be paid for the purpose of sexual arousal or gratification."

Prostitution requires payment and a sexual act, which would seem to encompass a porn shoot. However, the payment must be "…for the purpose of sexual arousal or gratification." Since the payment was for acting fees, and not gratification, it wasn't prostitution.

The *Freeman* court dealt with the alternate rationale as well — that the First Amendment bars any prostitution charge in this setting. Otherwise an entire genre of expression would be de facto illegal. Therefore, even amending the statute to remove the gratification requirement would not bless mass prosecution of adult film producers.

New Hampshire Continues the Trend

In 2008, in *New Hampshire v. Theriault,* the New Hampshire Supreme Court held, like its California counterpart, that paying someone to be in an adult film was not the same as paying a prostitute for sex.[2] Going a little further, the *Theriault* court engaged in the same constitutional analysis as the *Freeman* court, but relied on the New Hampshire Constitution.

The *Theriault* court ran over well-traveled ground. The court noted that *Miller v. California* and *Ashcroft v. Free Speech Coalition* establish that pornography can only be banned if it is deemed to be legally obscene. However, prosecuting adult film producers as panderers would lead to a de facto ban on non-obscene erotica. The court recognized that filming a crime does not automatically transform it into protected activity, but that expressive materials are a different story. The state could not use the prostitution statute as a back door prohibition on adult film production, thus New Hampshire followed California.

Nevada

Nevada allows prostitution. Therefore, the whole *Freeman/Theriault* analysis might seem unnecessary. However, Nevada bans prostitution in counties with more than 700,000 residents, allows it only in licensed brothels and has strict operation requirements.[3] Therefore, while adult film companies could set up in Pahrump, after opening their own brothels, this would be impractical. Further, under *Freeman/Theriault* analysis, the state could not require adult film production to take place only in brothels.[4]

The Nevada prostitution statute historically contained the same gratification requirement as California's and New Hampshire's.[5] Anti-porn forces sought to change that but, in doing so, only succeeded in protecting it further.

In 2013, the Nevada assembly proposed a human-trafficking bill: AB 67. In the lengthy bill, there was a clever attempt to remove the gratification requirement from the prostitution statute.[6] The prior statute defined a prostitute as a person who engages in sex with another person, for a fee, for the purpose of arousing or gratifying the sexual desire of either person, making it a *Freeman/Theriault*-style statute. Under the bill, the definition changed to a person who "for a fee**,** monetary consideration or other thing of value, engages in sexual conduct."

This subtle change would have tilted the statutory construction playing field in Nevada, leaving only the First Amendment argument to protect adult film producers. But, after protest by

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First Amendment advocates,[7] the bill was quickly amended to return it to its former state. In fact, the very issue of pornography producers was part of the debate during the next committee meeting, where it was made clear that, "nothing in the bill was intended to criminalize First Amendment-protected activity such as films, speech, or consenting adult actors engaging in sexual conduct."[8] Immediately thereafter, Assembly Amendment 793 returned the prostitution language to its original form.

Accordingly, the legislative history surrounding AB 67 makes it clear that not only does the Nevada prostitution statute not encompass adult film production, but AA 793 makes it clear that the actual legislative intent was to protect this kind of expressive activity.

The First Amendment

Had the initial version of AB 67 passed, a Nevada prosecutor could have sought to take a porn producer to task. Then, we might have had a First Amendment showdown, which we have so far avoided. However, if there had been one, it seems most likely that it would have been resolved in favor of the adult entertainment producers. The *Theriault* court relied on New Hampshire's free speech clause, thus ensuring that the case was not open to review by the U.S. Supreme Court. However, we are not without any higher court guidance on the First Amendment issue; our guidance is just not binding authority. California sought a stay of the *Freeman* decision from Justice O'Connor as Circuit Justice.[9] O'Connor denied the stay, noting that even if the Supreme Court reversed the decision, upon remand the California Supreme Court's statutory construction position would still control the outcome. Nevertheless, in denying the stay, O'Connor gave a bit of insight into the free speech issue. Without so holding, she seemed to approve of the California Supreme Court's view on end-runs around the First Amendment.

There is language early in the California Supreme Court's discussion section observing that "the prosecution of [Freeman] under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort."" 46 Cal. 3d, at 423, 758 P. 2d, at 1130.

This certainly lacks the authority of a decision on the merits, and O'Connor did not add any editorial content. However, a positive reading seems consistent with existing decisions, and she was clearly within her rights to criticize this view.

Conclusion

The legal status of adult film production in Nevada is clear; under Nevada law, porn is not prostitution. Thus, it cannot be prosecuted as such, nor must adult film companies be forced to open their own brothels in order to make their movies in Nevada. Further, the Nevada legislature made it clear that it respects adult film producers' First Amendment rights. While the judiciary has not yet resolved the ultimate First Amendment issue in a binding opinion, it would seem that if this issue came before the Nevada Supreme Court, it would have to do some logical contortions in order to disagree with the *Freeman* analysis. **NL**

1. *People v. Freeman*, 46 Cal. 3d 419 (1988).
2. *New Hampshire v. Theriault*,158 N.H. 123 (2008).
3. *See*, e.g., NRS 244.345; NRS 201.380; NRS 201.390.
4. While there is little First Amendment jurisprudence in Nevada Supreme Court decisions, a recent case gives us insight into whether burdening porn producers with the requirement of only shooting in brothels instead of IN studios would meet with approval. *See Busefink v. State*, 286 P.3d 599, 601 (Nev. 2012) ("The Free Speech Clause prohibits the state from significantly burdening potential speakers with financial disincentives to speak.") A brothel studio requirement would certainly run afoul of this logic.
5. As an example, Oregon has a gratification requirement as well. (O.R.S. § 167.002), but others do not. (*See* Fla. Stat. § 796.07; Ariz. Stat. § 13-3209); Tex. Pen. Code § 43.03.
6. Nevada Assembly Bill No. 67, first reprint, - Committee on Judiciary, § 40-41, p. 20, lines 28-32.
7. Hearing on AB 67 before the Assembly Ways and Means Committee, 77th Leg. (Nev., May 13, 2013), at 37, ¶ 2-6.
8. Hearing on AB 67 before the Assembly Ways and Means Committee, 77th Leg. (Nev., May 16, 2013), at 7, ¶ 2-3. *See also* Hearing on AB 67 before the Senate Committee on Judiciary, 77th Leg. (Nev., May 22, 2013) at 8.
9. *California v. Freeman*, 488 U.S. 1311 (1989).

MARC J. RANDAZZA is a Las Vegas-based First Amendment lawyer licensed in Nevada, California, Arizona, Florida and Massachusetts.