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The cat-and-mouse game of fighting adult entertainment laws.

Â Bill of Rights.Â (From the public domain.)Â Nearly a decade ago, I added adult entertainment to my law practice. Such representation is a great way to defend the First Amendment, and can include criminal defense, as well.
Â Litigating against adult entertainment zoning and licensing laws can be like a cat-and-mouse game, pitting businesses against censorious municipalities, seeingÂ which businesses will cave rather than financing expensive litigation and, sometimes, expert witness fees, getting significantly different outcomes depending on the prevailing appellate circuit, and witnessing often sharply-divided Supreme Court opinions. Â As with criminal defense, even after a battle defeat against adult entertainment laws, I keep persevering, knowing that critical victories are on the horizon. In that regard, congratulations to the legal team thatÂ obtained good First Amendment headway in the Seventh Circuit last month in Annex Books v. City of Indianapolis, __ F.3d _ (7th Cir., Sept. 3, 2009). Â Annex Books rejects the tired efforts of so many municipalities to rely on old, junk science "studies" connecting adult entertainment with everything from reduced property values to crime to the bubonic plague. Interpreting Los Angeles v. Alameda Books, 535 U.S. 425 (2002), Annex BooksÂ says in relevant part: Â Because the other Justices divided 4 to 4 [in Alameda books], and Justice Kennedy was in the middle, his views establish the holding. See Marks v. United States, 430 U.S. 188 (1977). He concluded that a regulation of adult bookstores â€œcan be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech.â€• 535 U.S. at 445 (concurring opinion). â€œ[A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. â€¦ A city may not assert that it will reduce secondary effects by reducing speech in the same proportion.â€• Id. at 449.Â Annex BooksÂ speaks of the importance of specifics to justify adult entertainment laws rather than the mere inclusion of tired negative secondary effects studies in legislative histories, where one wonders how many legislators even look at any of the studies:
Â Counsel for Indianapolis conceded at oral argument that none of the studies that the City has offered in defense of its ordinance deals with the secondary effects of stores that lack private booths. Nor do the studies assess the effects of stores that sell as little as 25 % adult products. These shortcomings, plus [U.C. Santa Barbara professor Daniel] Linzâ€™s work, call the Cityâ€™s justifications into question and require an evidentiary hearing at which the City must support its ordinance under the intermediate standard of Alameda Books. See also Abilene Retail #30, Inc. v. Dickinson County, 492 F.3d 1164 (10th Cir. 2007) (reaching the same conclusion on a similar record). The Supreme Court decided Playtime Theatres more than 30 years ago, and since then adult-entertainment ordinances have become common. There must be some pertinent data to be gathered, if not in Indianapolis then elsewhere. (Some can be found in a bibliography at http://www.secondaryeffectsresearch.com.) But if, as is possible, there is simply no sound basis for a conclusion that book or video stores (without live entertainment or private booths) open after midnight, or on Sunday, cause adverse secondary effects, then Indianapolis must revert to its pre-2003 system of regulation.Marks v. United States, 430 U.S. 188 (1977). He concluded that a regulation of adult bookstores â€œcan be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech.â€• 535 U.S. at 445 (concurring opinion). â€œ[A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. â€¦ A city may not assert that it will reduce secondary effects by reducing speech in the same proportion.â€• Id. at 449. Justice Kennedy insisted that the benefits (less crime) be compared with the detriments (less speech) and added that a given regulatory system is easier to justify if it works in the same way as the regulation of other, similar, businesses, for then it is harder to conclude that the government has set out to curtail speech because of its subject matter. Id. at 447â€“49. Â Annex BooksÂ My cat and mouse description of battling adult entertainment laws became all the more relevant when IÂ readÂ T.T. Liang's T'ai Chi Ch'uan for Health andÂ Self Defense, where heÂ talks of the difference of the patient cat waiting for the mouse to move, and then arriving before the mouse does, as opposed to the dog that barks its head off when it sees a squirrel, thus alerting the squirrel to get toÂ safety and then to thumb its nose at theÂ dog. Without the harmony, balance and strength of t'ai chi, those fighting adult entertainment laws risk getting weakened through being frustrated by the many boobytraps of such challenges. Jon Katz

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