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CLARENCE MADDOX
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. **07-21767**

ADVANCED CONSULTING AND
MARKETING, INC.,

CIV-COOKE

MAGISTRATE JUDGE
BROWN

Plaintiff,

vs.

ALBERTO GONZALES as ATTORNEY
GENERAL OF THE UNITED STATES,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. Plaintiff Advanced Consulting and Marketing, Inc., challenges the constitutionality of 18 U.S.C. § 48, a federal statute purporting to criminalize the sale of depictions of animal cruelty, on the ground that the statute abridges speech protected by the First Amendment to the United States Constitution. Plaintiff is in the business of broadcasting over the Internet cockfighting contests conducted legally in the Commonwealth of Puerto Rico. The broadcasting of these popular and traditional contests for profit is a constitutionally protected activity, which the language of 18 U.S.C. § 48 purports to criminalize. Although Plaintiff firmly believes that it is acting legally, it has good reason to doubt whether the government would construe 18 U.S.C. § 48 as criminalizing the broadcasting of legally staged cockfights over the Internet. Plaintiff's free exercise of First Amendment rights is therefore being chilled unconstitutionally by the government.

JURISDICTION AND VENUE

2. This Court has jurisdiction of these claims pursuant to 28 U.S.C. § 1331, as they arise under the First Amendment to the Constitution of the United States of America and 18 U.S.C. § 48.

3. This Court has authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rules of Civil Procedure 57 and 65.

4. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391(e) as Plaintiff is based in this District and as Plaintiff's broadcasts extend nationally, including into this District.

PARTIES

5. Plaintiff Advanced Consulting and Marketing, Inc., is a corporation organized under the laws of Florida having its principal place of business in Hollywood, Florida, a place within the Southern District of Florida. Advanced Consulting and Marketing operates and maintains Internet web sites (most notably <http://www.toughsportslive.com>) that broadcast throughout the United States cockfights staged legally in the Commonwealth of Puerto Rico.

6. Defendant Alberto Gonzales is the Attorney General of the United States and head of the Department of Justice, the Executive Branch cabinet department responsible for enforcing the criminal laws of the United States.

STATEMENT OF FACTS

7. Cockfighting has been practiced as a sport for thousands of years throughout the world, including in Ancient Rome, Ancient Greece, China, Europe, Latin America, and the United States by persons of all socioeconomic backgrounds.

8. Cockfights are contests between a pair of trained roosters held in a ring called a

cockpit.

9. Roosters have a natural, congenital aggression toward each other which is amplified through conditioning.

10. Roosters in a cockfight wear metal or bone spurs fitted over their natural spurs and engage in exciting displays that may or may not entail the death of one or both of the roosters.

11. Cockfighting has been an object of serious anthropological and philosophical study for centuries, and its importance in many cultures stretching from the ancient world to the present day is well-documented and well-established.

12. In the fourth century, St. Augustine of Hippo pondered a cockfight with this reflection in *De Ordine*: “Why do all cocks behave this way? Why do they fight for the sake of supremacy of the hens subject to them? Why did the very beauty of the fight draw us aside from this higher study for a while, and onto the pleasure of the spectacle?”

13. Cockfights were held in the theatres of Elizabethan England. Hence, the chorus in the prologue to William Shakespeare’s *Henry V*, refers to the theatre itself as a “cockpit” and asks:

Can this cockpit hold
The vasty fields of France? or may we cram
Within this wooden O the very casques
That did affright the air at Agincourt?

Henry V, Act 1, Scene i.

14. George Washington, Benjamin Franklin, Andrew Jackson, and Henry Clay all purportedly enjoyed cockfighting. Evidently referring to the tragic deaths of soldiers during his own time, Abraham Lincoln is reported to have told a group seeking to outlaw cockfighting, “As long as the Almighty permitted intelligent men, created in his image and likeness, to fight in public and kill

each other while the world looks on approvingly, it's not for me to deprive the chickens of the same privilege.”

15. While cockfighting remains an important and popular sport in many parts of the world, animal rights groups in the United States have mounted a sustained effort to outlaw the sport. These efforts have recently been the subject of newsworthy and contentious public concern and debate in several states.

16. Cockfighting was legal in Oklahoma until 2002 when its citizens voted to ban it. New Mexico's ban on cockfighting went into effect on June 15, 2007. Louisiana, the last state in the Union where cockfighting is not a crime, is currently considering legislation that would criminalize it.

17. Despite the animal rights groups' success in lobbying for legislation, it is unclear whether their efforts have in fact decreased the popularity of cockfighting, as some reports suggest the sport remains vital and popular throughout the United States.

18. Like bullfighting in Spain and boxing in the United States, cockfighting remains both legal and popular in the Commonwealth of Puerto Rico. In fact, cockfighting contests are a traditional part of Puerto Rican culture, as the Supreme Court has recognized. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986) (quoting Puerto Rican court statement that “horse racing, cockfighting, ‘picas,’ or small games of chance at fiestas, and the lottery ‘have been traditionally part of the Puerto Rican’s roots,’ ...”).

19. Cockfighting is also an important cultural institution in the Philippines, where it has thrived for centuries, and is also both legal and popular in other places around the world, including Thailand and the Dominican Republic.

20. Plaintiff is in the business of broadcasting over the Internet cockfights staged legally in the Commonwealth of Puerto Rico. These cockfights can be viewed throughout the United States on the Internet.

21. Plaintiff charges a subscription fee to customers who wish to view these cockfights.

22. On December 9, 1999, President Clinton signed into law a bill criminalizing the creation, sale, or possession of any depictions of animal cruelty. The law's full text is:

(a) Creation, sale, or possession.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Exception.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) Definitions.—In this section—

(1) the term “depiction of animal cruelty” means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

18 U.S.C. § 48 (2007).

23. The law made it a felony to create, sell, or possess in a United States territory for commercial gain any photograph, video, computer image, movie, or audio recording depicting the intentional maiming, torturing, wounding, or killing of any animal.

24. The maximum possible prison sentence for a violation of 18 U.S.C. § 48 is five years. The maximum possible fine is \$250,000 for an individual and \$500,000 for an organization.

25. There are two exceptions to the statute's broad prohibition. First, it is legal to create, sell, or possess depictions of harming animals in ways that are legal in the place where the creating, selling, or possessing takes place. Thus, one could broadcast a video of a cockfight within Puerto Rico because cockfights are legal there.

26. According to the statute's legislative history,

The Government is not required to prove that the animal cruelty depicted violated the law of the place where the cruelty actually took place. The activity prohibited by this bill is not the animal cruelty itself. Rather, the illegal activity is the creation, sale, or possession of a depiction of such cruelty with the intent to use interstate or foreign commerce to distribute it for commercial gain.

H.R. Rep. 106-397, 1999 WL 959194 at *8.

27. For the same reason, the statute's legislative history posits that depictions of legal hunting and fishing would not be illegal.

28. Second, there is also a broad exception from the scope of 18 U.S.C. § 48 for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." None of these terms (including "serious") is defined by the statute, leaving its scope unclear.

29. Although Plaintiff believes his activity falls within the statutory exception, it is unclear whether the Government believes that broadcasting of legal cockfights would be deemed to have "value" sufficient to bring it within the statutory exception.

30. Title 18 U.S.C. § 48 was enacted for the specific purpose of suppressing a growing market in "crush videos," videos showing women torturing or killing animals to appeal to sexual fetishists. According to the statute's legislative history:

Much of the material featured women inflicting the torture with their bare feet or while wearing high heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos. The witnesses explained that, through their investigation into the sale of these materials, they learned that these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting. ... Many Internet sites were blatant in offering to sell these depictions, and some even advertised to make such depictions to order, in whatever manner the customer wished to see the animal tortured and killed.

H.R. Rep. 106-397, 1999 WL 959194 at *2--*3.

31. Recognizing that the language of § 48 was much broader than necessary to criminalize the proliferation of videos meant to gratify this sexual fetish, President Clinton gave the statute a narrow construction in his signing statement. He wrote:

It is important to avoid constitutional challenge to this legislation and to ensure that the Act does not chill protected speech. Accordingly, I will broadly construe the Act's exception and will interpret it to require a determination of the value of the depiction as part of a work or communication, taken as a whole. So construed, the Act would prohibit the types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex. I will direct the Department of Justice to enforce the Act accordingly.

Statement by President William J. Clinton Upon Signing H.R. 1887, 1999 U.S.C.C.A.N. 324.

32. In 2004, the federal government indicted one Robert Stevens in Pennsylvania, charging him with three counts of violating 18 U.S.C. § 48 for selling videotapes of dog fights.

33. Following a trial, Mr. Stevens was convicted in 2005 and sentenced to 37 months imprisonment on each count, with the sentences to run concurrently.

34. The government did not contend or prove that the dog fights depicted in the videos Mr. Stevens sold were illegally staged.

35. Mr. Stevens has appealed his conviction to the Third Circuit which *sua sponte* opted

to consider the case *en banc* before a panel opinion issued. No opinion has issued as of the time this Complaint was filed.

36. Media reports suggest that the federal government is also considering bringing charges against NFL quarterback Michael Vick over recent highly-publicized allegations that Mr. Vick is involved in dogfighting.

37. Cable-television sports channel ESPN and other media broadcast footage of dogfighting during their coverage of the Michael Vick investigation.

38. ESPN's website has a video depicting dogfighting as part of its Michael Vick coverage. *See* <http://sports.espn.go.com/nfl/news/story?id=2884063>.

39. Numerous videos of bullfighting as well as cockfighting are available on the Internet video-hosting sites YouTube.com and at Video.Google.com. Similarly, depictions of humans engaged in extremely violent and macabre "ultimate fighting" contests are freely available on the Internet and on cable television.

40. It is unclear whether and why ESPN's depiction of dogfighting is, in the Justice Department's view, legally different from Mr. Stevens'. It is also unclear whether depictions of bullfighting (which are ubiquitous) and other violent sports would come within the scope of 18 U.S.C. § 48.

41. In other words, there is no obvious way to know with reasonable certainty what sort of depictions would come within the broad statutory exemption for depictions having "serious" value and what sort would not.

42. Because the Department of Justice has evidently departed from President Clinton's

directive that only depictions of animal cruelty designed to appeal to a prurient sexual interest be prosecuted as crimes under 18 U.S.C. § 48, Plaintiff has a real and concrete doubt as to whether broadcasting legal cockfights over the Internet subjects Plaintiff, its employees, its officers, or its agents to criminal prosecution under 18 U.S.C. § 48.

43. This threat of prosecution unconstitutionally chills the free exercise of Plaintiff's First Amendment rights to freedom of speech and freedom of the press.

44. Plaintiff has retained counsel to bring and prosecute this action, incurring expenses for attorney's fees and litigation costs.

45. Plaintiff has no adequate remedy at law. The maintenance of this action for declaratory and injunctive relief is necessary to remedy the chilling effect that 18 U.S.C. § 48 has on the exercise of Plaintiff's constitutional rights.

CLAIMS FOR RELIEF

COUNT ONE: VIOLATION OF FIRST AMENDMENT FREEDOM OF SPEECH (Content-based speech restriction)

46. The paragraphs set forth in the foregoing statement of facts are incorporated into this Count as though fully set forth herein.

47. Title 18 U.S.C. § 48 violates Plaintiff's First Amendment right to freedom of speech because it is a content-based restriction on speech.

48. The statute and its enforcement substantially chill Plaintiff's freedom of speech with regard to the broadcasting of legally staged cockfights over the Internet, a constitutionally protected activity given the worldwide popularity and cultural significance of cockfighting over the course of millennia.

WHEREFORE Plaintiff respectfully requests that this Court

49. a. Declare that the broadcasting of cockfights staged legally under the laws of the place where they are held is necessarily outside the scope of 18 U.S.C. § 48 because such cockfights and their broadcasts have “serious . . . educational, journalistic, historical, or artistic value” within the meaning of that statute, OR

b. Declare that 18 U.S.C. § 48 is unconstitutional on its face because it abridges the free exercise of the right to freedom of speech, contrary to the First Amendment to the United States Constitution;

50. Enjoin Defendant Attorney General from arresting or prosecuting Plaintiff, Plaintiff’s officers, Plaintiff’s employees, or Plaintiff’s agents pursuant to 18 U.S.C. § 48 in relation to the broadcasting of legally conducted cockfights; and

51. Grant Plaintiff reasonable attorney’s fees, costs of suit, and such other and further relief as may be equitable and just.

**COUNT TWO: VIOLATION OF FIRST AMENDMENT FREEDOM OF SPEECH
(Overbreadth)**

52. The paragraphs set forth in the foregoing statement of facts are incorporated into this Count as though fully set forth herein.

53. Title 18 U.S.C. § 48 violates Plaintiff’s First Amendment right to freedom of speech because it is overbroad.

54. The statute and its enforcement substantially chill Plaintiff’s freedom of speech with regard to the broadcasting of legally staged cockfights over the Internet, a constitutionally protected activity.

WHEREFORE Plaintiff respectfully requests that this Court

55. a. Declare that the broadcasting of cockfights staged legally under the laws of the place where they are held is necessarily outside the scope of 18 U.S.C. § 48 because such cockfights and their broadcasts have “serious . . . educational, journalistic, historical, or artistic value” within the meaning of that statute, OR

b. Declare that 18 U.S.C. § 48 is unconstitutional on its face because it abridges the free exercise of the right to freedom of speech, contrary to the First Amendment to the United States Constitution;

56. Enjoin Defendant Attorney General from arresting or prosecuting Plaintiff, Plaintiff’s officers, Plaintiff’s employees, or Plaintiff’s agents pursuant to 18 U.S.C. § 48 in relation to the broadcasting of legally conducted cockfights; and

57. Grant Plaintiff reasonable attorney’s fees, costs of suit, and such other and further relief as may be equitable and just.

**COUNT THREE: VIOLATION OF FIRST AMENDMENT FREEDOM OF SPEECH
(Vagueness)**

58. The paragraphs set forth in the foregoing statement of facts are incorporated into this Count as though fully set forth herein.

59. Title 18 U.S.C. § 48 violates Plaintiff’s First Amendment right to freedom of speech because it is vague as to the conduct that is prohibited.

WHEREFORE Plaintiff respectfully requests that this Court

60. a. Declare that the broadcasting of cockfights staged legally under the laws of the place where they are held is necessarily outside the scope of 18 U.S.C. § 48 because such

cockfights and their broadcasts have “serious . . . educational, journalistic, historical, or artistic value” within the meaning of that statute, OR

b. Declare that 18 U.S.C. § 48 is unconstitutional on its face because it abridges the free exercise of the right to freedom of speech, contrary to the First Amendment to the United States Constitution;

61. Enjoin Defendant Attorney General from arresting or prosecuting Plaintiff, Plaintiff’s officers, Plaintiff’s employees, or Plaintiff’s agents pursuant to 18 U.S.C. § 48 in relation to the broadcasting of legally conducted cockfights; and

62. Grant Plaintiff reasonable attorney’s fees, costs of suit, and such other and further relief as may be equitable and just.

COUNT FOUR: VIOLATION OF FIRST AMENDMENT FREEDOM OF THE PRESS

63. The paragraphs set forth in the foregoing statement of facts are incorporated into this Count as though fully set forth herein.

64. Title 18 U.S.C. § 48 violates Plaintiff’s First Amendment right to freedom of the press. The statute unconstitutionally contracts the spectrum of available knowledge regarding a matter of significance in many cultures.

65. This substantially chills and inhibits Plaintiff’s exercise of freedom of the press with regard to the broadcasting of legally staged cockfights over the Internet.

WHEREFORE Plaintiff respectfully requests that this Court

66. a. Declare that the broadcasting of cockfights staged legally under the laws of the place where they are held is necessarily outside the scope of 18 U.S.C. § 48 because such

cockfights and their broadcasts have “serious . . . educational, journalistic, historical, or artistic value” within the meaning of that statute, OR

b. Declare that 18 U.S.C. § 48 is unconstitutional on its face because it abridges the free exercise of the right to freedom of the press, contrary to the First Amendment to the United States Constitution;

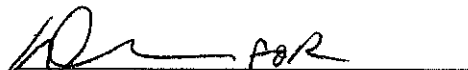
67. Enjoin Defendant Attorney General from arresting or prosecuting Plaintiff, Plaintiff’s officers, Plaintiff’s employees, or Plaintiff’s agents pursuant to 18 U.S.C. § 48 in relation to the broadcasting of legally conducted cockfights; and

68. Grant Plaintiff reasonable attorney’s fees, costs of suit, and such other and further relief as may be equitable and just.



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