

CAHILL GORDON & REINDEL LLP
EIGHTY PINE STREET
NEW YORK, NY 10005-1702

FLOYD ABRAMS
L. HOWARD ADAMS
ROBERT A. ALESSI
HELENE R. BANKS
LANDIS C. BEST
SUSAN BUCKLEY
KEVIN J. BURKE
JAMES J. CLARK
BENJAMIN J. COHEN
CHRISTOPHER T. COX
STUART G. DOWNING
ADAM M. DWORKIN
RICHARD E. FARLEY
PATRICIA FARREN
JOAN MURTAGH FRANKEL
JONATHAN J. FRANKEL
BART FRIEDMAN
CIRO A. GAMBONI

WILLIAM B. GANNETT
CHARLES A. GILMAN
STEPHEN A. GREENE
ROBERT M. HALLMAN
WILLIAM M. HARTNETT
CRAIG M. HOROWITZ
DOUGLAS S. HOROWITZ
DAVID G. JANUSZEWSKI
ELAI KATZ
THOMAS J. KAVALER
DAVID N. KELLEY
CHÉRIE R. KISER*
EDWARD P. KRUGMAN
JOEL KURTZBERG
ALIZA R. LEVINE
JOEL H. LEVITIN
GEOFFREY E. LIEBMANN
MICHAEL MACRIS

TELEPHONE: (212) 701-3000
FACSIMILE: (212) 269-5420

1990 K STREET, N.W.
WASHINGTON, DC 20006-1181
(202) 862-8900
FAX: (202) 862-8958

AUGUSTINE HOUSE
6A AUSTIN FRIARS
LONDON, ENGLAND EC2N 2HA
(011) 44.20.7920.9800
FAX: (011) 44.20.7920.9825

WRITER'S DIRECT NUMBER

ANN S. MAKICH
JONATHAN I. MARK
BRIAN T. MARKLEY
GERARD M. MEISTRELL
MICHAEL E. MICHETTI
WILLIAM J. MILLER
ATHY A. MOBILIA
NOAH B. NEWITZ
MICHAEL J. OHLER
KENNETH W. ORCE
DAVID R. OWEN
JOHN PAPACHRISTOS
LUIS R. PENALVER
DEAN RINGEL
JAMES ROBINSON
THORN ROSENTHAL
TAMMY L. ROY
JONATHAN A. SCHAFFZIN

JOHN SCHUSTER
MICHAEL A. SHERMAN
DARREN SILVER
HOWARD G. SLOANE
SUSANNA M. SUH
JONATHAN D. THIER
JOHN A. TRIPODORO
GLENN J. WALDRIP, JR.
MICHAEL B. WEISS
S. PENNY WINDLE
COREY WRIGHT
DANIEL J. ZUBKOFF
ADAM ZUROFSKY

*ADMITTED IN DC ONLY

February 11, 2011

Chairman Patrick Leahy
Ranking Member Chuck Grassley
Senator Orrin Hatch
Senate Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: COICA

Dear Chairman Leahy, Ranking Member Grassley and Senator Hatch,

I write with regard to the Combating Online Infringement and Counterfeits Act (“COICA”), which this Committee unanimously approved on November 18, 2010.¹ I represent the Directors Guild of America, the American Federation of Television and Radio Artists, the Screen Actors Guild, the International Alliance of Theatrical and Stage Employees, and the Motion Picture Association. I write to you at their request to offer my view that COICA is consistent with the First Amendment and to set forth the basis for that conclusion.

¹ Throughout this letter, I refer to the final version of the bill passed by the Judiciary Committee in the 111th Congress, S. 3804 (Reported in Senate), in anticipation of the Senate considering the bill during the 112th Congress.

In this letter, I will summarize the provisions of the statute briefly and then turn to its constitutionality under the First Amendment. I think it useful, however, to begin with some observations about copyright law and the First Amendment in the age of the Internet.

I start with what should not be controversial. The Internet is one of the greatest tools of freedom in the history of the world. That is why, as Secretary of State Clinton observed last month, there is an “urgent need” to protect freedom of expression on the Internet throughout the world. At the same time, however, she pointed out that “all societies recognize that freedom of expression has its limits,” observing specifically that those who use the Internet to “distribute stolen intellectual property cannot divorce their online actions from their real world identities” and that our ability to “safeguard billions of dollars in intellectual property [is] at stake if we cannot rely on the security of our information networks.”

It is no answer to this challenge to treat loose metaphors—the Internet as “the Wild West,” for example—as substitutes for serious legal analysis. It is one thing to say that the Internet must be free; it is something else to say that it must be lawless. Even the Wild West had sheriffs, and even those who use the Internet must obey duly adopted laws.

It is thus no surprise that libel law applies to material that appears on the Internet. *Milum v. Banks*, 642 S.E.2d 892 (Ga. Ct. App. 2007) (holding that defendant published libelous statements by posting them on his website) *cert. denied* (June 4, 2007). Or that libel precedents regarding printing information on paper are given comparable meaning as to information posted online. *Nationwide Bi-Weekly Administration, Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. 2007) (holding that the “single publication rule” for the statute of limitations in libel suits applies to Internet publication). Or that principles of privacy law are applied to personal information posted online with the same animating principles that apply in more traditional media. *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34 (Minn. Ct. Ap. 2009) (holding that posting information from a patient’s medical file on a social networking website constitutes the “publicity” element of invasion of privacy); *Benz v. Washington Newspaper Publishing Co.*, 2006 WL 2844896 (D.D.C. Sept. 29, 2006) (holding that false information posted on independent websites provided reasonable claim for defamation, invasion of privacy and false light against private party defendant, in addition to claims regarding publication of related information by a newspaper).

Copyright law is no different. It is not disputable that “[a]ll existing copyright protections are applicable to the Internet.” Edward H. Rosenthal, *J.D. Salinger and Other Reflections on Fair Use*, 1003 PLI/Pat 35, 42 (2010). See *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191 (3d Cir. 2003) (upholding preliminary injunction against website compiling video clips of copyrighted movies for commercial use); *UMG Recordings, Inc. v. Stewart*, 461 F. Supp. 2d 837 (S.D. Ill. 2006) (finding *prima facie* case of liability in support of default judgment against Internet user who downloaded, reproduced and distributed copyrighted audio recordings online). The seizure provisions of copyright laws are applied to seize and stop the use of online property to facilitate infringement, such as domain names, just as offline property can be seized to stop its use to facilitate infringement. *United States v. The Following Domain Names: TVShack.net et al.*, 2010 WL

2666284 (S.D.N.Y. June 29, 2010) (treating domain names hosting infringing videos as forfeitable property under 18 U.S.C. §§ 2323(a) and ordering their seizure, locking domain names at registry level, replacing registrar information to identify the government as the domain names' owner, and compelling the registry to route traffic to the domain names to a government IP address notifying the public that the domain name was seized).

Copyright law has existed throughout our Nation's history. The Constitution itself authorizes Congress to adopt copyright legislation (Art. I, Sec. 8, Clause 8) and the first such legislation was enacted in 1790, a year before the First Amendment was approved by Congress. Ch. 15, 1 Stat. 124 (1790) (repealed). From the start, injunctions were one form of relief accorded to victims of copyright infringement. (Courts applied the 1790 Act, and its later amendments, to grant injunctions "according to principles of equity." Act of Feb. 3, 1831, ch. 16, 4 Stat. at 438 (1831) (repealed 1870) (cited in Kristina Rosette, "*Back to the Future: How Federal Courts Create a Federal Common Law Copyright Through Permanent Injunctions Protecting Future Works*," 2 J. Intell. Prop. L. 325, 340 (1994)). However, since injunctions in non-copyright cases have frequently been held to be unconstitutional prior restraints on speech, *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971), and for other reasons, the subject has arisen as to the application, if any, of the First Amendment to copyright principles. See generally, Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 19E (2010).

The issue of whether and, if so, how certain elements of the Copyright Act should be read to accommodate various First Amendment interests remains open. The law could hardly be clearer, however, that injunctions are a longstanding, constitutionally sanctioned way to remedy and prevent copyright violations. Indeed, that premise was explicit in the critical concurring opinion in the Supreme Court's most famous prior restraint case, assessing publication of the Pentagon Papers, which noted that "no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another." *New York Times Co.*, 403 U.S. at 731 n.1 (White, J. and Stewart, J., concurring). Current treatises reflect this judicial consensus. "[C]ourts have found no constitutional obstacle to enjoining, pursuant to federal legislative mandate, the unlawful use of a registered trademark or copyright." Floyd Abrams & Gail Johnston, *Communications Law in the Digital Age 2010: Prior Restraints*, 1026 PLI/Pat 247, 261 (2010); James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 38 J. Copyright Soc'y 63, 71 (1990) ("A pirated or copied edition, record, movie, song or other work . . . cries out for an injunction").

The Supreme Court's most detailed treatment of the interrelationship between the First Amendment and copyright, the seminal case of *Harper & Row Publishers, Inc. v. Nation Entpr.*, 471 U.S. 539, 560 (1985), stressed that far from conflicting with the First Amendment, the Copyright Act actually furthers the very interests which the First Amendment protects. "First Amendment protections," the Court noted, are "already embodied in the Copyright Act's distinctions between copyrightable expression and uncopyrightable facts and ideas." The Constitution supports the explicit protection of such expression and creativity, the Court stated, within a framework that defends *both* the right to speak *and* the ability to profit from speech. "[T]he Framers intended copyright itself to be the engine of free expression," explained the Court, and "[b]y establishing a market-

able right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* at 558. Copyright law thus fortifies protections for speakers and creators, in a First Amendment context, while stimulating future creativity.

The evident constitutionality of injunctive relief for copyright violations does not mean, to be sure, that injunctions must automatically or always be issued in response to a copyright violation. The Supreme Court has recently held to the contrary, warning against the error of a "categorical grant" of injunctive relief for patent infringement in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006), and the Second Circuit has applied that conclusion in a recent, celebrated copyright case, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010). What *no* court has ever denied is that injunctions are a valuable and constitutional response to copyright violations.

Legislative Summary

I turn to a discussion of the bill itself. COICA is designed to enforce federal copyright and trademark law in the age of the Internet. It aims to combat the "theft of American intellectual property" on a scale that costs "American creators and producers billions of dollars per year," as this Committee's Legislative Report documented, and which results in "hundreds of thousands of lost jobs annually." S. Rep. No. 111-373, at 2 (2010).

COICA does so by strengthening the measures that the Attorney General may pursue, with court approval, to address infringing content. The bill buttresses injunctive relief to not only order offending websites to cease breaking the law, but also to compel domain names, advertising companies, financial transaction providers and Internet service providers to cease cooperating with websites that are breaking the law.

The bill does not address all types of infringement online. It focuses only on websites that are *dedicated* to profiting from infringing content or activities. COICA would establish a statutory category of websites that are "dedicated to infringing activities." This term is defined as a website that is "marketed" or "primarily designed" for infringement, or has no other "commercially significant purpose or use" besides infringement, as defined under current copyright and trademark law, and which would otherwise be "subject to civil forfeiture." Thus for copyright violations under COICA, a website must be "dedicated to infringing activities" and offering goods or services in violation of title 17 U.S.C., or facilitating such violations by means such as downloading, streaming, transmitting or linking. For trademark violations under COICA, a website must be "dedicated to infringing activities" and offering, selling or distributing goods, services or counterfeit materials in violation of section 34(d) of the Lanham Act (15 U.S.C. 1116(d)).

COICA does not alter the available remedies for private parties seeking to redress infringement. Nor does it limit the defenses that may be offered, including but not limited to that of fair use. What the bill does, beyond the current copyright framework, is add to the remedies available to the Attorney General, who would be authorized to commence actions against websites "dedicated to infringing activities." Under COICA, a federal district court "may" issue a temporary re-

straining order, a preliminary injunction or an injunction “in accordance with rule 65 of the Federal Rules of Civil Procedure.” By incorporating Rule 65, COICA applies the procedural protections that federal law currently affords all litigants in civil actions in the United States.

Under Rule 65, courts “may issue a preliminary injunction only on notice to the adverse party.” For temporary restraining orders to be issued without notice, Rule 65 requires that two conditions must be met. “[S]pecific facts in an affidavit or verified complaint [must] clearly show that immediate and irreparable injury, loss, or damage will result . . . before the adverse party can be heard in opposition.” And “the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.” Hearings for orders without notice are to be held “at the earliest possible time, taking precedence over all other matters,” under Rule 65, and the adverse party may move to dissolve or modify an order on two days’ notice to the moving party. All these protections are incorporated into COICA.

For websites registered in the United States, COICA provides for *in rem* actions to be commenced located in the judicial district where a domestic website’s domain name registrar is doing business. Once court orders are issued against domestic domains, a federal law enforcement officer shall serve the registrar, or if the registrar is abroad, then the registry. A registrar or registry receiving such an order is required to suspend or lock the domain name.

For foreign websites, COICA provides for *in rem* actions in the District of Columbia against the domain names of such websites, provided that the Attorney General simultaneously sends notice to the registrant of the domain name by postal mail and email, (using the addresses that the registrant provided to the domain name registrar), and provided that the Attorney General publishes notice of the action, as a court may direct, after its filing. Once court orders are issued against foreign domains, a federal law enforcement officer may serve such orders on three entities that work with the website in question. First, the order may be served on advertising services companies, which shall take “reasonable measures” to prevent their networks from providing advertisements to the website named in the order. Second, the order may be served on financial transaction providers, which shall stop payment transactions between U.S. customers and the website named in the order, and which shall inform the website that it is not authorized to use the transaction provider’s trademark. Third and finally, the order may be served on Internet service providers (“ISPs”), which shall take “technically feasible and reasonable steps” to block the domain name in the United States. COICA enumerates several protections for ISPs in this process, stipulating that they “shall not be required” to modify their network or facilities to comply with such orders; nor to take steps involving “domain name lookups” that are performed by entities other than their “own domain name system server”; nor to continue taking preventive actions under the order once access to the domain name has been “disabled by other means.” Under COICA, all three such entities may decide, at their discretion, how to communicate their actions to users or customers. In the event of a willful and knowing failure to comply with such orders, the Attorney General may seek injunctive relief directly against the entity in question. In such actions, COICA provides that the technological inability to comply with the underlying orders shall serve as a defense.

Entities taking actions reasonably designed to comply with court orders issued under COICA are granted immunity from causes of action based on such compliance. They are also exempted from liability for voluntarily taking the actions stipulated against websites dedicated to infringing activity in COICA, provided that such actions are taken based on the reasonable belief that the websites are dedicated to infringing activity.

First Amendment Considerations

Having discussed the broad constitutional and copyright framework for COICA, and described what the bill does in basic terms, I now turn to two potential First Amendment issues in analyzing COICA: the breadth of the regulatory framework's impact on speech, and its procedural protections in a First Amendment context.

Potential Overbreadth

It is a fundamental principle of First Amendment jurisprudence that government restrictions on speech should be narrowly tailored to avoid unnecessarily burdening protected speech. Courts apply strict scrutiny to statutes that potentially interfere with protected speech, with special attention for rules that may sweep too broadly. Like any statute impacting speech, Congress must consider the potential overbreadth of COICA's statutory structure and remedies in light of these First Amendment considerations.

COICA is not constitutionally overbroad. First, it sets a rather high bar in defining when a website or domain is eligible for potential actions by the Attorney General. Second, its remedies are focused on preventing infringing content at the distribution point where website operators choose to infringe. Finally, the application of Federal Rule 65 serves as a check on overbreadth.

COICA is not designed to regulate the entire Internet. Nor is it designed to counter the vast array and forms of online infringement, which are subject to various laws already on the books. COICA focuses, instead, on a narrow category of entities which are not simply trafficking in some infringing content, or occasionally breaking federal laws, but which are primarily and continuously devoted to providing and selling infringing content in the United States. Since COICA specifically defines a rigorous standard of websites that are "dedicated to infringing activities," actions under COICA require a showing that a target website is both violating federal law and operating with the main function of continuous infringement. Therefore, any website devoted to legal activities, such as commentary, socializing or commerce, cannot be pursued under COICA if it occasionally or even repeatedly practices infringement.

For websites and domains that meet COICA's definition, injunctive relief would be issued to address infringement at its distribution point. Thus an individual choosing to use a website or domain to practice infringement faces relief at the point of infringement, be that a particular website address or a domain name devoted to infringement. This approach constitutes a narrowly tai-

lored means to prevent future infringement, with a court making the final determination as to whether and how to craft injunctive relief “against the domain name used by an Internet site . . . to cease and desist from undertaking any further activity in violation” of COICA, S. 3804 (Reported in Senate) at 17. Such relief tracks equitable remedies in traditional copyright law, such as forfeiture or impoundment. 17 U.S.C. § 506(b) (forfeiture); 17 U.S.C. § 503 (impoundment). In the online context, distribution may occur only at a single website address, in which case injunctive relief may block that address via orders served on the domain name registrar, registry or ISP. Or distribution may occur across a domain, in which case injunctive relief may block the domain via orders served on the domain name registrar, registry or ISP. Some protected and non-infringing content may be implicated in this process, but such content would have to be hosted in conjunction with an entity that is dedicated to infringement. Even without such a high bar, of course, the presence of non-infringing speech generally does not provide a copyright violator with immunity from enforcement actions. The First Amendment allows government regulations to prevent piracy that clearly have an incidental impact on non-infringing speech. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1129 (N.D. Cal. 2002) (noting that the First Amendment allows the government to pursue online infringement with an “incidental restriction” on First Amendment freedoms, so long as the traditional test is met that the “means chosen do not burden substantially more speech than is necessary to further the government’s legitimate interests.”) (internal citations omitted). Furthermore, and independent of a potential statutory framework such as that set forth in COICA, courts already approve, on a case-by-case basis, copyright seizures of domain names that can result in the blockage of some non-infringing content. Indeed, some such seizures apply current forfeiture laws to permanently seize a domain name as property. *United States v. TVShack.net et al.*, 2010 WL 2666284 (S.D.N.Y. June 29, 2010) (treating domain names hosting infringing videos as forfeitable property under 18 U.S.C. §§ 2323(a) and ordering their seizure).

If an order under COICA does result in blocking some non-infringing content, COICA is sufficiently narrow to accommodate the immediate publication of that content elsewhere and the future publication of the content on the same domain. First, by definition, any non-infringing content is not specifically enjoined by the order, so it may still be legally posted anywhere else online. Second, such content can be unblocked or reposted *on the same* website or domain name in the future, once the infringing content at issue is removed. Indeed, the content can be unblocked or reposted precisely because the domain name itself, as property, is not forfeited by an order pursuant to COICA. Thus after the infringement issue is resolved and the site operator is in compliance with federal law, the domain name can post its archived non-infringing content.

In addition, it is worth noting that a website may meet COICA’s “dedicated to infringement” standard based on its links to other websites providing infringing content, apart from whether or not the linking website technically hosts infringing content on its own site or servers. COICA provides that such websites may be dedicated to infringement by providing “aggregated links to other sides or Internet resources for obtaining” infringing content. Just as with posting infringing content, however, such a site must meet the high bar of being “marketed” or “primarily designed” for infringement, or having no other “commercially significant purpose or use” besides infringement. This is consistent with caselaw regarding online copyright infringement, since

“[l]inking to infringing material” can create liability, 1003 PLI/Pat 35 at 43. When a website links to infringing content, or links to technology to facilitate infringement, courts look to whether the website operator knowingly linked to facilitate violations of the law. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (holding defendant violated Digital Millennium Copyright Act by linking to program to unlock DVDs for unauthorized copying, and requiring knowing linking for the purpose of disseminating the program); *Bernstein v. JC Penney, Inc.*, 50 U.S.P.Q.2d 1063 (C.D. Cal. 1998) (plaintiff did not have a claim for mere linking to website without knowledge of infringing material on the site). Injunctions issued specifically against linking, in order to thwart copyright infringement, have also been held to be consistent with the First Amendment. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). Furthermore, in recent enforcement actions against domain names, the U.S. Department of Homeland Security specifically seized “‘linking’ websites” that provide “links to files on third party websites that contain illegal copies of copyrighted content.” (Aff. ¶ 13) *United States v. The Following Domain Names: HQ-Streams.com et al.*, 2011 WL 320195 (S.D.N.Y. Jan 31, 2011). Given these precedents, potential actions pursuant to COICA against websites dedicated to infringing content based on extensive and continuous linking to facilitate infringement appear to rest on a solidly constitutional foundation. As for overbreadth in the linking context, it appears clear that neither a few inadvertent links to infringing material on an otherwise lawful website, nor some links to infringing websites for the purposes of public information or education, could be held to meet COICA’s threshold.

Procedural Protections

The procedural protections under COICA are so strong, uniform and constitutionally rooted that it is no exaggeration to observe that any complaints in this area are not really with the bill, but with the Federal Rules of Civil Procedure itself, which governs all litigants in U.S. federal courts.

COICA incorporates Rule 65 to provide the process governing how a judge “may” issue a temporary restraining order, preliminary injunction, or permanent injunction. Thus website operators subject to COICA would benefit from the same procedural safeguards afforded litigants in all other U.S. civil actions. For preliminary injunctions, those safeguards require notice in advance. For temporary restraining orders, the safeguards include first, the requirement that temporary restraining orders issued without notice must be based on specific facts showing the prospect of immediate and irreparable damage “before the adverse party can be heard in opposition” (emphasis added); and second, a written certification by, in this case, the U.S. government’s attorney, explaining efforts made to give notice and the reasons it should not be required in this instance. Subsequent hearings for orders without notice are a first priority under Rule 65, which also grants the adverse party the option of moving to dissolve an order with two days’ notice.

In addition to those well-established procedures, COICA also explicitly requires the Attorney General to conduct service of process by sending notice of an intent to proceed under COICA to the domain name registrant. Consistent with the objectives of Rule 65, this requirement

provides an opportunity to operators of allegedly infringing websites to defend themselves before an order is issued. In the event that operators prefer to respond later, or only learned of injunctive action later because they did not provide accurate contact information to their registry, they also retain their rights to seek later relief from the order by disputing the allegations or appealing to the interests of justice. It is worth noting that federal copyright law disfavors the submission of false contact information to a domain name registrar, treating the knowing provision of “materially false contact information to a domain name registrar” as a rebuttable presumption of willful infringement. 17 U.S.C.A § 504(c); *Chanel, Inc. v. Cui*, 2010 WL 2835749 (S.D.N.Y. July 7, 2010) (entering default judgment for permanent injunction against product trademark infringement and finding willful conduct based, in part, on defendant’s repeated submissions of “false information in registering domain names” used for infringement). Indeed, the rules for registration of domain names require the provision of accurate contact information. Registrar Accreditation Agreement, section 3.7.7.1 (May 21, 2009), available at <http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm#3> (registrants required to provide registrar accurate and reliable contact details). Finally, since COICA states that courts “may” issue preliminary injunctions or injunctions, the range of available remedies includes the prospect of a final—not preliminary—resolution of the dispute.

Once COICA’s required procedural protections are satisfied, it is still possible that some operators of allegedly infringing websites will knowingly decline to participate in U.S. court proceedings. Such a choice, after legitimate notice and procedural safeguards are provided, can lead to *ex parte* proceedings and default judgments. Courts routinely enter default judgments in civil lawsuits, including comparable online copyright cases. After initial notice has been served, courts grant permanent injunctive relief for copyright violations in default judgments without additional attempts at notice. *Disney Enterprises, Inc. v. Farmer*, 427 F.Supp. 2d 807 (E.D. Tenn. 2006) (issuing permanent injunction barring infringement of copyright by website distributing copyrighted movies over peer-to-peer network, with default judgment entitled without additional service of notice on defendant); *Priority Records, LLC v. Bradley*, 2007 WL 465754 (E.D. Mich. Feb. 8, 2007) (issuing permanent injunction in default judgment against defendant using online distribution system to download and distribute copyrighted recordings).

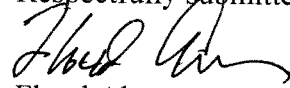
Conclusion

I am aware that COICA has been criticized on First Amendment-related grounds by organizations such as the American Civil Liberties Union and certain human rights groups, organizations for which I have the highest regard. The core of their concern about the bill seems anchored in the view that the United States would be less credible in its criticism of nations that egregiously violate the civil liberties of their citizens if Congress adopts COICA.

I disagree. Copyright violations are not protected by the First Amendment. Entities “dedicated to infringing activities” are not engaging in speech that any civilized, let alone freedom-oriented, nation protects. That these infringing activities occur on the Internet makes them not less, but more harmful. The notion that by combating such acts through legislation, the United States

would compromise its role as the world leader in advancing a free and universal Internet seems to me insupportable. As a matter of both constitutional law and public policy, the United States must remain committed to defending both the right to speak and the ability to protect one's intellectual creations. This legislation does not impair or overcome the constitutional right to engage in speech; it protects creators of speech, as Congress has since this Nation was founded, by combating its theft.

Respectfully submitted,



Floyd Abrams*

cc: Directors Guild of America
American Federation of Television and Radio Artists
Screen Actors Guild
International Alliance of Theatrical and Stage Employees
Motion Picture Association

* I thank my associate and colleague, Ari Melber, for his assistance in all aspects of the preparation of this submission.