



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

January 25, 2012

VIA E-MAIL AND FIRST-CLASS MAIL

The Honorable Charles K. Edwards
Acting Inspector General
DHS Office of Inspector General
245 Murray Drive, SW, Building 410
Washington, DC 20528
charles.edwards@dhs.gov

Re: **Request for Investigation**

Dear Inspector General Edwards:

We write on behalf of Cause of Action, an independent 501(c)(3) public interest group that uses public advocacy and legal reform strategies to ensure greater transparency in government and protect taxpayer interests and economic freedom.

We are concerned that the Department of Homeland Security (“DHS”), U.S. Immigration and Customs Enforcement Agency (“ICE”), coordinating with the National Intellectual Property Rights Coordination Center (“IPR Center”), has violated applicable federal laws by obtaining and subsequently disseminating a video that can be traced to Creative America Campaign, Inc. Of concern, Creative America has demonstrable ties to special-interest groups that regularly use registered lobbyists to advocate for passage of legislation that, directly or indirectly, is in ICE’s pecuniary interest. Further, ICE has violated applicable federal law by using money appropriated by an act of Congress to produce sophisticated, self-aggrandizing videos that amount to nothing more than propaganda. We respectfully request that you immediately investigate these matters.

I. Background

Since June 2010, in an effort to address trademark and copyright infringement and other perceived threats to intellectual property, ICE, coordinating with the IPR Center, has conducted a multi-phased, high-profile operation in which civil forfeiture statutes have been aggressively used to seize a relatively new type of property: domain names.¹ ICE has touted these domain-name seizures as major successes in its effort to ameliorate the problem of Internet-related

¹ ICE’s “crackdown” on Internet-related intellectual property crime is referred to as “Operation In Our Sites,” which is apparently in its eighth phase. See U.S. Immigration and Customs Enforcement, News Releases, “Operation In Our Sites protects American online shoppers, cracks down on counterfeiters: ICE-led IPR Center seizes 150 website domains selling counterfeit and pirated merchandise,” November 28, 2011, <http://www.ice.gov/news/releases/1111/111128washingtondc.htm> (hereinafter “Operation In Our Sights”).

intellectual-property theft.² However, academics,³ commentators,⁴ government officials,⁵ public interest groups,⁶ and private attorneys⁷ have expressed well-founded concerns that Operation In Our Sites and similar practices constitute prior restraints on speech that violate the First Amendment.

In addition to aggressively seizing domain names pursuant to seizure warrants issued by U.S. magistrate judges,⁸ ICE has posted notices on the seized websites informing visitors that the domain name has been seized. A visitor to one of the seized websites is automatically directed to a YouTube video that advances an agency-approved point of view concerning intellectual property.⁹ On its website, ICE indicates that the so-called “banner” and video have been viewed by a wide segment of the general public:

Since the operation’s June 2010 launch, the IPR Center has seized a total of 350 domain names, and the seizure banner has received more than 77 million individual views. . . . Additionally, a public service announcement (PSA), launched in April 2011, appears on each of the 114 forfeited domain names. This video educates the public about the economic impact of trademark counterfeiting and copyright infringement.¹⁰

² See *id.*; see also U.S. Immigrations and Customs Enforcement, “Fact Sheet: websites seized during the eighth phase of Operation in Our Sites,” November 28, 2011, *available at* <http://www.ice.gov/doclib/news/releases/2011/111128washingtondc.pdf> (listing recent website seizures).

³ See, e.g., Letter from Law Professors in Opposition to S. 3804 to the Senate Judiciary Comm. (Nov. 16, 2010), *available at* <http://www.publicknowledge.org/files/docs/LawProfCOICA.pdf>.

⁴ See, e.g., Jack Mellyn, Note, “Reach Out and Touch Someone”: The Growing Use of Domain Name Seizure as a Vehicle for the Extraterritorial Enforcement of U.S. Law, 42 GEO. J. INT’L L. 1241 (2011).

⁵ See Letter from Senator Ron Wyden to Attorney General Eric Holder and Director John Morton (Feb. 2, 2011), *available at* <http://www.scribd.com/doc/75338866/Letter-to-Attorney-General-Holder-from-U-S-Senator-Ron-Wyden-D-Oregon-Regarding-Domain-Seizures>.

⁶ Brief of Amici Curiae Electronic Frontier Foundation, Center for Democracy and Technology, and Public Knowledge in Support of Puerto 80’s Petition for Release of Seized Property, *Puerto 80 Projects, S.L.U., v. United States of America and Department of Homeland Security, Immigration and Customs Enforcement*, Civil Action No. 1:11-cv-03983-PAC (S.D.N.Y. Aug. 24, 2011), *appeal filed* No. 11-3390-CV (2d Cir. 2011).

⁷ Opening Brief and Special Appendix for Petitioner-Appellant *Puerto 80 Projects, S.L.U., supra*.

⁸ Attorney General Eric Holder described Operation in Our Sites II this way:

During the course of . . . [Operation in Our Sites II], federal law enforcement agents made undercover purchases from a variety of online retailers suspected of selling counterfeit goods. For items confirmed as counterfeit or infringing, seizure orders for the domain names of the websites that sold these goods were obtained from U.S. Magistrate Judges.

Attorney General Eric Holder, “Attorney General Eric Holder Speaks at the Operation in Our Sites II Press Conference, Washington, D.C.—Monday, November 29, 2010,”

<http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101129.html>. Conspicuously absent from the 754 pages of documents ICE provided in response to Cause of Action’s Freedom of Information Act request are any copies of the seizure orders issued by U.S. magistrate judges or copies of affidavits submitted by ICE agents in support of their applications for those warrants.

⁹ See, e.g., <http://2009jerseys.com/> (last visited January 23, 2012).

¹⁰ See *supra* note 1.

The video fails to disclose, however, who produced the video and whether the video was funded by money from the public fisc.

The so-called PSA, which Cause of Action has learned features a well-known Hollywood actor and comedian, Tom Papa, links to a YouTube page through which at least *fifty-six* other ICE videos are available, including “How to Steal an America Job.” These videos not only self-aggrandize the agency’s importance and mission but also advance positions that are in the agency’s pecuniary interest. As the attached exhibits make abundantly clear, this “PSA” has been not only posted on seized domain names but also on official government websites.¹¹ Consequently, both official government websites and seized domain names are, in essence, being used as vehicles to widely disseminate ICE and Creative America’s message.

The Department of Homeland Security Appropriations Act of 2010 (“DHSAA”) set forth ICE’s budget “[f]or necessary expenses for enforcement of immigration and customs laws, detention and removals, and investigations” and related matters in fiscal year (FY) 2010.¹² The DHSAA was explicitly incorporated by reference into the Department of Defense and Full-Year Continuing Appropriations Act of 2011 (“DDFYCAA”).¹³ The government websites are created and maintained by federal employees, acting within the scope of their employment, whose salaries are paid with money from the DDFYCAA. The funding that is required for operating and maintaining these government websites is obtained via the DDFYCAA. Indeed, Operation In Our Sites, including the seizure of domain names and subsequent posting of the “PSA” on those domain names, was paid for with money from the aforementioned appropriations acts. In short, money appropriated by the DDFYCAA was used to disseminate the “PSA.”

Cause of Action has learned that what ICE refers to as an “Anti-Piracy PSA” is, in fact, a professionally produced, sophisticated advertisement, entitled “The Choice,”¹⁴ designed to garner public and congressional support for antipiracy legislation. Neither ICE nor the IPR Center produced this video; rather, Creative America and NBC Universal are responsible for the

¹¹ See, e.g., Exhibit 1, available at <http://www.iprcenter.gov/news-releases/video/anti-piracy> (last visited January 23, 2012); <http://2009jerseys.com/> (last visited January 23, 2012).

¹² See Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Title 2, 123 Stat. 2142, 2148-50 (2009).

¹³ See Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1101, 125 Stat. 38, 102 (2011). Section 1101(a)(3) of the DDFYCAA provides in relevant part:

Such amounts as may be necessary, at the level specified in subsection (c) and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2010, for projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for, and for which appropriations, funds, or other authority were made available in the following appropriations Acts: . . . (3) The Department of Homeland Security Appropriations Act, 2010 (Public Law 111-83).

Id. at § 1101(a)(3) (emphasis added).

¹⁴ See Creative America, “The Choice,” Be Informed: Explore the Issue, <http://creativeamerica.org/inform/> (last visited January 23, 2012); see also “‘The Choice’ by Creative America,” CULTURAL WEEKLY, <http://www.culturalweekly.com/the-choice.html> (last visited January 23, 2012) (describing “The Choice” as an “engaging new video from Creative America”).

so-called PSA. At a minimum, taxpayer dollars funded the dissemination of government-approved propaganda.

Creative America appears to be a coalition lobbying group that openly advocates for passage of specific legislation and influences Members of Congress to support proposed, contemplated, and pending legislation, i.e., the Stop Online Piracy Act (“SOPA”) and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (“PROTECT IP Act”).¹⁵ NBC Universal has close ties to Creative America.¹⁶ Creative America’s other supporters include groups such as the New York State AFL-CIO and the International Alliance of Theatrical and Stage Employees (“IATSE”);¹⁷ in fact, IATSE operates out of the same building as Creative America.¹⁸ IATSE uses registered lobbyists who, according to Lobbying Reports filed pursuant to the Lobbying Disclosure Act of 1995, lobby on issues such as “Rogue Sites Legislation” and “Streaming Legislation,”¹⁹ i.e., legislation such as SOPA and the PROTECT IP Act.

In an article appropriately entitled “Creative America’ Launches Pro-SOPA Propaganda Campaign,” the *Daily Kos* characterizes “Creative America . . . [as] an astroturf group” that is engaging in “an extensive advertising campaign in support of SOPA.”²⁰ More recently, the *Wall Street Journal* clarified the relationship between Creative America and numerous groups with demonstrable ties to registered lobbyists:

The MPAA [Motion Picture Association of America] is in discussions with studio chiefs and Hollywood unions to launch an advertising campaign in coming days. . . . The campaign launched Wednesday wasn’t created by the Hollywood studios or the MPAA. Instead, the ads were generated by Creative America, an advocacy group that represents unions and other entertainment-industry organizations.²¹

¹⁵ See Exhibit 2. See generally Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011).

¹⁶ See Letter from Creative America, “Stop Foreign Internet Criminals from Stealing American Jobs,” to Members of Congress, available at

http://creativeamerica.org/media/uploaded/resources/19_1323740515_CreativeAmerica_WSJ_K5.pdf (last visited January 23, 2012) (hereinafter “Creative America Letter to Congress”) (hereinafter and attached as “Exhibit 3”).

¹⁷ See Exhibit 3. IATSE is the acronym for the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada.

¹⁸ Compare Exhibit 3 (address for IATSE West Coast Office) and Exhibit 4 (address for questions about Creative America website).

¹⁹ See, e.g., Exhibit 6 at 1-2.

²⁰ “Creative America’ Launches Pro-SOPA Propaganda Campaign,” DAILY KOS, (December 7, 2011), <http://www.dailykos.com/story/2011/12/07/1043074/-Creative-America-Launches-Pro-SOPA-Propaganda-Campaign>.

²¹ Erica Orden & Geoffrey A. Fowler, *Hollywood Loses SOPA Story: In Web Piracy Debate, Even Chief Lobbyist Dodd is Muzzled*, WALL STREET JOURNAL, Jan. 19, 2012, B1-B2. As the *Wall Street Journal* notes, former U.S. Senator Christopher Dodd is currently “the leader of Hollywood’s lobbying group, the Motion Picture Association of America. . . . Mr. Dodd was hired by the studios, in part, because of the long-term benefits of his Washington connections and clout.” *Id.* at B1-B2. On January 19, 2012, *AdWeek* released an article that describes Creative America’s more recent activities as follows:

According to the *Los Angeles Times*, “[t]hrough the Creative America website and online petitions at Change.org, more than 60,000 individuals have sent more than 153,000 emails to their legislators in support of stronger legislation that would make it easier for the Justice Department to crack down on” Internet content theft, as of December 5, 2011.²²

Creative America took credit for and posted “The Choice” on its website and held itself out to the public as the source of this video.²³ “The Choice” appears to be designed to convince the public at large to lobby Members of Congress to pass legislation. This conclusion is reinforced by statements of Creative America and NBC Universal. In an open letter to Congress, entitled “Stop Foreign Internet Criminals From Stealing American Jobs,” signed by NBC Universal, Creative America “strongly urge[ed] . . . [Members of Congress] to protect the jobs and intellectual property of American citizens by supporting the PROTECT IP Act (S. 968) and the Stop Online Piracy Act (H.R. 3261).”²⁴ As of January 23, 2012, the home page of Creative America’s website stated in relevant part: “Tell Congress to Fight Back! Tell Congress to support the Stop Online Piracy Act (H.R. 3261) and the PROTECT IP Act (S. 968). Send a letter now.”²⁵ Indeed, as of January 23, 2012, Creative America had the following statement on its website: “Creative America has rolled out a new ad campaign in support of legislation before Congress.”²⁶

ICE, the IPR Center, Creative America, IATSE, and Creative America’s other supporters all have a direct or indirect pecuniary interest in SOPA and the PROTECT IP Act becoming law. Language of SOPA and the PROTECT IP Act suggests that the budgets for ICE and the IPR Center will significantly increase in the event that SOPA and the PROTECT IP Act are

As tens of thousands of websites protested SOPA (Stop Online Piracy Act) and PIPA (Protect Intellectual Property Act), Creative America, the organization representing major entertainment unions and media companies, launched another round of advertising Wednesday to support the two anti-piracy bills they worked so hard to advance in Congress. TV and radio ads will be running in as many as 25 targeted states, focusing on key districts and key legislators. National print ads are running in papers such as *The New York Times* . . . [and] *The Wall Street Journal* The group also created a new banner ad for Creative America member websites and took out a billboard in Times Square. “We’re trying to mobilize people to contact members of Congress and support the bills,” said Mike Nugent, the executive director of Creative America.

Katy Bachman, *Big Content Fights Back in Anti-Piracy Campaign: Ads stress U.S. job protection*, ADWEEK, (Jan. 19, 2012), available at <http://www.adweek.com/news/technology/big-content-fights-back-anti-piracy-campaign-137595?auto>.

²² Richard Verrier, *Creative America releases new anti-piracy video*, LOS ANGELES TIMES, (December 5, 2011), available at <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/12/creative-america-.html> (last visited January 19, 2012).

²³ See Creative America, “The Choice,” Be Informed: Explore the Issue, <http://creativeamerica.org/inform/> (last visited January 23, 2012).

²⁴ See Exhibit 3.

²⁵ Creative America, Home: Welcome, <http://creativeamerica.org/> (last visited January 23, 2012).

²⁶ See Creative America, Be Informed: News & Resources: Industry News, <http://creativeamerica.org/inform/news/> (last visited January 23, 2012).

enacted.²⁷ Additionally, there may be some other, unknown link between Creative America and ICE, given that Creative America has apparently hired former DHS/ICE spokesperson Chris Ortman and Creative America's website links to ICE's website.²⁸

II. Analysis

A. *Anti-Lobbying Act Violations*

Money appropriated to federal agencies through duly enacted federal laws may not be used, directly or indirectly, to fund activities designed or intended to influence pending federal legislation. Commonly referred to as the Anti-Lobbying Act, 18 U.S.C. § 1913 broadly proscribes "lobbying with appropriated moneys":

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, *be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device*, intended or designed to influence *in any manner* a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation. . . . *Violations of this section shall constitute violations of section 1352(a) of title 31.*²⁹

In sum, "Section 1913 makes illegal the government subsidy of lobbying."³⁰ 18 U.S.C. § 1913 incorporates by reference the civil penalties contained in 31 U.S.C. § 1352(c), which, *inter alia*, subject agencies and agency personnel that violate Section 1913 to fines ranging between \$10,000.00 and \$100,000.00 per expenditure.³¹

²⁷ See, e.g., Stop Online Piracy Act, H.R. 3261, 112th Cong. § 106(a) (2011) ("The Attorney General shall—(1) provide appropriate resources and procedures for case management and development to effect timely disposition of actions brought under this title; (2) develop a deconfliction process in consultation with appropriate law enforcement agencies, including U.S. Immigration and Customs Enforcement, to coordinate enforcement activities under this title...."); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, IS.S. 968, 112th Cong. § 7(a) (2011) ("The Attorney General shall—...(5) provide appropriate resources and procedures for case management and development to affect timely disposition of actions brought under this Act; and (6) develop a deconfliction process in consultation with other law enforcement agencies, including the United States Immigration and Customs Enforcement, to coordinate enforcement activities brought under this Act.").

²⁸ See Mike Masnick, *Creative America Restocks...Hires Former DHS/ICE Spokesperson*, TECHDIRT (Jan. 23, 2012), <http://www.techdirt.com/blog/?tag=creative+america>; Creative America, "News & Resources, Further Resources," <http://creativeamerica.org/inform/news/> (last visited January 23, 2012).

²⁹ 18 U.S.C. § 1913 (emphasis added).

³⁰ *Nat'l Assoc. for Cmty. Dev. v. Hodgson*, 356 F. Supp. 1399, 1403 (D.D.C. 1973), *overruled by Nat'l Treasury Employees' Union v. Campbell*, 482 F. Supp. 1122 (D.D.C. 1980).

³¹ See 31 U.S.C. § 1352(c) (outlining scope civil exposure for persons and agencies liable for making prohibited expenditures).

18 U.S.C. § 1913 was amended in late 2002 to significantly expand the scope of its lobbying restrictions.³² Violations need only be established by a preponderance of the evidence.³³ The essential elements of each discrete violation are as follows: (1) money appropriated by an Act of Congress to a federal department or agency and officers and employees thereof; (2) is used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device; (3) intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government to take a position on pending, proposed, or contemplated legislation. The Anti-Lobbying Act imposes a strict-liability regime and, by its terms, does not excuse liability on the ground that the misuse of appropriated money is *de minimis*.

i. Use of money appropriated by an Act of Congress

With respect to the first element, as the attached exhibits demonstrate, ICE and the IPR Center have, at minimum, used federal money—in the form of salaries to federal employees who, acting within the scope of their employment, are paid to create, update, and monitor websites and post links and videos on those websites and the operating costs of those links and websites—in connection with posting the Creative America video. It is possible that Creative America has received federal money directly from ICE and the IPR Center in connection with the production of the video posted on seized and government-owned websites and other Creative America-related videos. A thorough, impartial investigation would certainly reveal the extent of these agencies' contributions to Creative America.

ii. Direct and indirect use of money appropriated by an Act of Congress to pay for dissemination of Creative America video on the Internet

As for the second element, Creative America appears to have been primarily formed to engage in coalition lobbying while evading the disclosure and registration requirements of the Lobbying and Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.*, by special-interest groups that also use registered lobbyists to lobby on these issues. Creative America, according to its own statements, has created numerous ads and videos for the stated purpose of influencing Members of Congress to pass legislation that Creative America and the special-interest groups that support it believe is in their pecuniary interest. At a minimum, federal money is being used to provide a platform for Creative America's lobbying activities concerning SOPA and the PROTECT IP Act, thereby, albeit indirectly, providing a significant benefit to an organization that makes no

³² See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, div. A, title II, § 205(b), 116 Stat. 1758, 1778 (2002).

³³ Although the precise issue of the appropriate standard of proof for violations of 18 U.S.C. § 1913 has not yet been definitively addressed, because the amended statute exclusively prescribes civil penalties, it is clear that violations need only be established by preponderant evidence. *Cf. Sedima v. Imrex Co.*, 473 U.S. 479, 491 (1985) (“We are not at all convinced that the [RICO] predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. There is no indication that Congress sought to depart from this general principle here.... That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction.” (citations omitted)).

secret of its efforts to influence Members of Congress' views concerning proposed, pending, and contemplated legislation that is in the pecuniary interest of its members and supporters,³⁴ many of whom use registered lobbyists to lobby on the very same issues that gave rise to Operation in Our Sites.³⁵

Notwithstanding that it is unclear whether ICE or the IPA Center have given taxpayers' money to Creative America, the mere fact that government websites—created and monitored by federal employees at taxpayers' expense with money appropriated by congressional enactments—are being used as a vehicle to disseminate advertisements that are intended and designed to influence Members of Congress' views on pending legislation **violates the plain language of 18 U.S.C § 1913**. Moreover, but for Operation In Our Sites, which was conducted at considerable taxpayer expense with appropriated money, a large segment of the general public would not have been exposed to the Creative America video, because it necessarily follows that far fewer domain names would have been used as a platform for Creative America's political message. Further, the amount of federal money expended to provide links to the Creative America video does not alter the analysis; there is no *de minimis* exception to the Anti-Lobbying Act.³⁶

It is reasonable to infer that ICE and the IPA Center knew or, at minimum, should have known about Creative America's lobbying-related activities. Even assuming *arguendo* that the agencies and their employees acted in good faith and without actual or constructive knowledge that the Creative America video was designed and specifically intended to influence Members of Congress' votes on pending or contemplated legislation, ICE and the IPA Center are nonetheless liable for violating 18 U.S.C § 1913 and thereby violating 31 U.S.C. 1352(a).³⁷ The absence of *scienter* is not a defense to liability under 18 U.S.C § 1913, which, with respect to the use-of-appropriated-money element, is strict liability.³⁸

iii. The Creative America video is specifically intended and designed to influence Members of Congress to take a position on pending, proposed, and contemplated legislation

Clearly, Creative America was heavily involved with the production of "The Choice," a video that is conspicuously posted on not only seized domains but also official government websites. Creative America takes credit for the video on its website and indeed in the version of the video that is conspicuously posted on its website.³⁹ "The Choice" subtly but effectively

³⁴ See Exhibits 2-3.

³⁵ Compare Exhibit 3 (Creative America letter that is endorsed by IATSE) and Exhibit 6 (Lobbying Report for registered lobbyist Thorsen French Advocacy, LLC, which lobbies on behalf of IATSE on "Rogue Sites Legislation" and "Streaming Legislation," i.e., SOPA and the PROTECT IP Act).

³⁶ See 18 U.S.C § 1913.

³⁷ See *id.* at § 1352(a) (limiting use of appropriated funds to influence certain federal contracting and financial transactions).

³⁸ See 18 U.S.C § 1913.

³⁹ For example, the following statement appears on Creative America's website when one views and subsequently pauses "The Choice": "'The Choice' by creativeamerica." Creative America, "The Choice," Be Informed: Explore the Issue, <http://creativeamerica.org/inform/> (last visited January 24, 2012).

exaggerates the consequences of content theft in a sophisticated effort to convince both the general public and Members of Congress that stronger so-called anti-piracy legislation is required and thereby, directly or indirectly, induce Members of Congress to pass legislation. For example, according to “The Choice,” “If you take [, i.e., download, two free] . . . movies, this nice woman right here loses her job.”⁴⁰ In other words, “The Choice” makes the claim that for every two movies that are downloaded for free on the Internet, an American job is lost. Further, “The Choice” strongly implies that anyone who has downloaded a free movie from the Internet “ha[s] no soul” and is “what’s wrong with everything.”⁴¹

Influencing Members of Congress to take specific positions on pending, proposed, and contemplated legislation is Creative America’s *raison d’être*. But for its quasi-lobbying activities, Creative America would not exist. According to statements on Creative America’s website, “Creative America has launched a print ad targeted to members of Congress asking them to ‘stop foreign criminals from stealing American jobs.’”⁴² In an undated open letter to Congress, Creative America explicitly urges Members of Congress to pass specific legislation: “That’s why we all strongly urge you to protect the jobs and intellectual property of American Citizens by supporting the PROTECT IP Act (S. 968) and the Stop Online Piracy Act (H.R. 3261).”⁴³

Here, given that the available information provides reasonable cause to suspect that violations of 18 U.S.C. § 1913 have occurred, further investigation is appropriate, and this matter should be referred to both Congress and the DOJ.

B. ICE’s Actions are Statutorily Proscribed

Article I, Section 7, clause 7 of the U.S. Constitution requires that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁴⁴ The DHSAA prescribed ICE’s budget “[f]or necessary expenses for enforcement of immigration and customs laws, detention and removals, and investigations” and related matters in fiscal year (FY) 2010.⁴⁵ The DHSAA was explicitly incorporated by reference into the DDFYCAA.⁴⁶ The plain

⁴⁰ *Id.* at 00:00:16-00:00:21.

⁴¹ *See id.* at 00:00:34-00:00:46.

⁴² Creative America, Be Informed, News & Resources, Industry News, <http://creativeamerica.org/inform/news/> (last visited January 23, 2012).

⁴³ Exhibit 3.

⁴⁴ U.S. CONST. art. I, § 7, cl. 7.

⁴⁵ *See* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, title 2, 123 Stat. 2142, 2148-50 (2009).

⁴⁶ *See* Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1101, 125 Stat. 38, 102 (2011). Section 1101(a)(3) of the DDFYCAA provides in relevant part:

Such amounts as may be necessary, at the level specified in subsection (c) and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2010, for projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for, and for which appropriations, funds, or other authority were made available in the following appropriations Acts: . . . (3) The Department of Homeland Security Appropriations Act, 2010 (Public Law 111–83).

language of the DDFYCAA unequivocally states that “[n]o part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress,”⁴⁷ thereby circumscribing the authority of individual agencies to, without specific congressional authorization, use public funds for publicity, propaganda, or the promotion of public awareness. Further, the DDFYCAA contains a broad proscription against agencies’ use of money from the public fisc in connection with lobbying-related activities: “None of the funds made available by this Act *shall be used in any way, directly or indirectly, to influence* congressional action on any legislation or appropriation matters pending before the Congress.”⁴⁸

i. ICE and IPR Center videos are *ultra vires*

Here, ICE exceeded its statutory authority when it used taxpayer money for the purpose of producing and disseminating what are, in essence, executive-branch propaganda videos, irrespective of whether those videos are referred to by the agency as “public service announcement[s] (PSA[s]).”⁴⁹ The DHSAA neither specifically authorizes the agency to use money from the public treasury to produce or commission the production of the aforementioned video nor specifically authorizes the agency to disseminate this video on YouTube or on seized domain names.⁵⁰ The same holds true with respect to most, if not all, of the other *fifty-six* YouTube videos ICE has posted on the Internet. While the DHSAA does specifically authorize the use of agency funds “for promotion of public awareness of the child pornography tipline and anti-child exploitation activities,”⁵¹ conspicuously absent from the statute is any implicit or explicit authorization for ICE to use taxpayer funds to create and disseminate online videos that are unrelated to its anti-child exploitation activities. As straightforward application of the well-accepted principle of statutory construction *inclusio unius exclusio alterius*⁵²—the inclusion of one thing suggests the exclusion of another—makes abundantly clear, Congress carefully considered the issue of ICE expenditures of public money “for promotion of public awareness.” Congress decided, as was its right, to carefully and intentionally limit ICE’s use of public money “for promotion of public awareness” to promoting “anti-child exploitation activities.”⁵³ This conclusion is reinforced by Congress’s use of the term in another section of the statute that expressly authorized the use of taxpayer funds for “public awareness and enhancement of community support of law enforcement training,” thereby limiting the purposes for which the Federal Law Enforcement Training Center could use public money to promote public awareness.⁵⁴ As discussed *supra*, the DHSAA incorporated the DDFYCAA *in toto*; but

Id. at § 1101(a)(3) (emphasis added).

⁴⁷ *Id.* at § 8001.

⁴⁸ *Id.* at § 8013 (emphasis added).

⁴⁹ See U.S. Immigration and Customs Enforcement, News Releases, “Operation In Our Sites protects American online shoppers, cracks down on counterfeiters: ICE-led IPR Center seizes 150 website domains selling counterfeit and pirated merchandise,” November 28, 2011, <http://www.ice.gov/news/releases/1111/111128washingtondc.htm> .

⁵⁰ See 123 Stat. 2148-50.

⁵¹ *Id.*

⁵² See *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (“‘It is generally presumed that Congress acts intentionally and purposely’ when it ‘includes particular language in one section of a statute but omits it in another.’” (citation omitted)).

⁵³ 123 Stat. 2148.

⁵⁴ 123 Stat. 2165.

notwithstanding that Congress had an opportunity to specifically authorize ICE to create so-called PSAs and other promotional videos with public money, it pointedly declined to do so and instead further delimited individual agencies' discretion to use the taxpayers' money for publicity, propaganda, or so-called public-awareness purposes.⁵⁵

The text of Article VI, Clause 2 of the federal Constitution makes clear that agencies may not unilaterally take actions that are manifestly contrary to statute: "This Constitution, *and the Laws of the United States which shall be made in Pursuance thereof* . . . shall be the supreme Law of the Land . . ."⁵⁶ Agencies do not have untrammelled discretion to use the taxpayers' hard-earned money in any way that they deem fit but rather are subject to and must abide by duly enacted federal legislation. **Here, ICE has openly and willfully ignored congressionally imposed strictures on its "public awareness" activities.** Instead of limiting its use of taxpayer funds to producing PSAs that promote awareness of child exploitation-related activities, thereby adhering to the plain language of the statute and honoring Congress's intent, ICE elected to create or obtain and subsequently disseminate videos that advance a government-approved message concerning entirely unrelated topics.

Specifically, aside from the Creative America video, discussed *supra*, ICE has produced numerous videos that serve no purpose other than **self-aggrandizement and puffery**. These videos appear to have no value except as pro-ICE and IPR Center propaganda. For example, in an elaborate, professionally produced five-minute YouTube video posted by ICE, entitled "How to Steal an American Job," ICE Director John Morton goes so far as to claim that "[e]very time . . . [ICE or the IPR Center] make[s] a bust, every time they make an arrest, an American job is saved."⁵⁷ Director Morton then highlights all of the "news coverage" ICE and the IPR Center have received.⁵⁸ In fact, on the YouTube site, "How to Steal an American Job" is described this way: "In this wrapup [sic] of achievements in 2011, ICE Director John Morton shows how American jobs are being stolen through IP theft—and how the National IPR Coordination Center is fighting back."⁵⁹ The foregoing examples are not exhaustive but rather illustrative. As of January 23, 2012, ICE has posted *fifty-six* videos on YouTube.⁶⁰

ii. ICE and IPR videos violate statutory restriction on publicity and propaganda

As discussed *supra*, the DDFYCAA explicitly prohibits the use of appropriated money "for publicity or propaganda purposes not authorized by the Congress." The Government Accounting Office ("GAO") has "consistently held that [these prohibitions were] intended to prohibit 'publicity of a nature tending to emphasize the importance of the agency or activity in

⁵⁵ See *supra* notes 45-54 and accompanying text.

⁵⁶ U.S. CONST. art. VI, cl. 2 (emphasis added).

⁵⁷ "How to Steal an American Job," uploaded by www.ICE.gov, 00:01:55-00:01:59, <http://www.youtube.com/watch?v=Y1d4xjU8DpQ> (last visited January 20, 2012).

⁵⁸ See *id.* at 00:01:59-00:02:30.

⁵⁹ "How to Steal an American Job," uploaded by www.ICE.gov, <http://www.youtube.com/watch?v=Y1d4xjU8DpQ> (last visited January 20, 2012).

⁶⁰ See *id.*

question.”⁶¹ Further, “the restriction is directed typically toward activities whose obvious purpose is ‘self-aggrandizement’ or ‘puffery.’”⁶² Here, even a cursory review of the myriad videos ICE has uploaded onto YouTube reveals that an untold sum of appropriated money, i.e., taxpayers’ money, is being used to fund videos that serve no purpose other than self-aggrandizement and puffery of the agency, its personnel, and its activities.

C. ICE’s Seizure of Domain Names Constitutes a Prior Restraint on Speech that Raises Serious Constitutional Concerns

Although not the subject of this Request for Investigation, it is worth noting that ICE’s domain-name seizures raise grave constitutional concerns, because these seizures amount to, in essence, an *ex parte*, *ex ante* restraint on speech and deprivation of property without a meaningful adversarial hearing and adequate notice. The potential constitutional shortcomings of these domain-name seizures are compounded by the simple fact that ICE is not only restraining the speech of others but displacing that speech with government-approved speech.

As the U.S. Supreme Court has explained, “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,” because “[a] prior restraint, . . . by definition, has an immediate and irreversible sanction.”⁶³ “Any system of prior restraints of expression comes to th[e Supreme] Court bearing a heavy presumption against its constitutional validity.”⁶⁴ It bears reminding that the First Amendment not only protects speakers *but also listeners and viewers*.⁶⁵ Many of the websites that were using the domain names ICE has seized in connection with Operation In Our Sites did not merely allegedly offer counterfeit goods or the like; rather, these domain names allowed users to access links to other websites, read and view content, and participate in forum discussions—all forms of speech. These seizures prevent Internet users from participating in speech *ex ante* and are thus prior restraints on speech. It is open to serious question whether the prior restraints on speech that are directly traceable to Operation In Our Sites fall into the narrow category of prior restraints on speech that are constitutionally permissible.⁶⁶

III. Conclusion

As the attached exhibits demonstrate, there is more than reasonable cause to believe that ICE and the IPR Center have engaged in conduct that violates well-established federal law. Therefore, we respectfully request an investigation of the conduct described above.

⁶¹ U.S. GENERAL ACCOUNTING OFFICE, *Decision of the Comptroller General*, B-223098 (Oct. 10, 1986) (quoting 31 Comp.Gen. 311, 313 (1952)).

⁶² *Id.* (quoting U.S. GENERAL ACCOUNTING OFFICE, *Restriction Violations on the Use of Appropriations in a Press Release by the Office of Personnel Management*, B-212069, (Oct. 6, 1983).

⁶³ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

⁶⁴ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

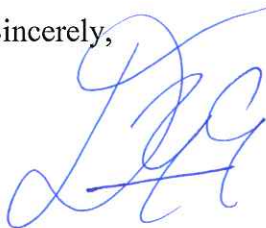
⁶⁵ *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (“[T]he protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both.”).

⁶⁶ *See Near v. Minnesota*, 283 U.S. 697 (1931); *see also Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004).

The Honorable Charles K. Edwards
January 25, 2012
Page 13 of 13

If you do not understand this request or any portion thereof or believe that you require clarification of this request or any portion thereof, please do not hesitate to contact us via Michael Pepson (Michael.Pepson@causeofaction.org) or Daniel Epstein (Daniel.Epstein@causeofaction.org) or at (202) 507.5880.

Sincerely,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

Encl. Exhibit Nos. 1-6

cc: The Honorable Carl Levin

U.S. Senator

Chairman, Permanent Subcommittee on Investigations

269 Russell Senate Office Building

Washington, DC 20510

The Honorable Tom Coburn

U.S. Senator

Ranking Member, Permanent Subcommittee on Investigations

172 Russell Senate Office Building

Washington, DC 20510

Office of Special Investigations

Government Accountability Office

441 G St., NW

Washington, DC 20548

EXHIBIT 1

Home > Newsroom > Video > Anti-Piracy

Anti-Piracy



Partner News

- FBI News Releases
- ICE News Releases
- CBP News Releases
- More

Navigation

- Images
- Video

Twitter Facebook Share

U.S. Department of Homeland Security | USA.gov | Freedom of Information | Privacy & Usage Policy | Site Map | Contact Us

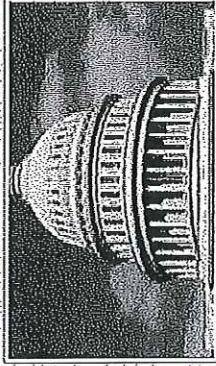
EXHIBIT 2



Action Home | Congressional Directory

TELL YOUR SENATORS AND REPRESENTATIVE:
 Protect Our Creative Jobs Now by Supporting
 the Stop Online Piracy Act (H.R. 3261) and the
 PROTECT IP Act (s.968)

Take Action



Find Your Lawmakers

Zip Code:

Empower by Zetia

Facebook Activity

Sign Up
 Create an account or log in to see
 what your friends are doing.

TELL YOUR SENATORS AND REPRESENTATIVE: Protect Our Creative Jobs Now by Supporting the Stop Online P
 13 people recommend this.

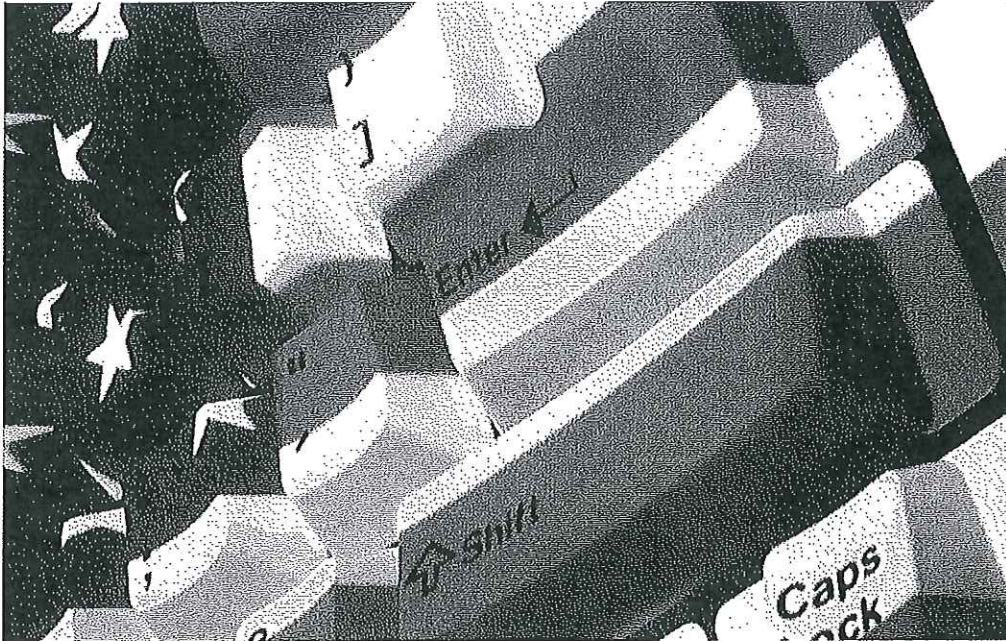
TELL YOUR REPRESENTATIVE: Protect

Back	Save Background As...
Forward	Set as Background
Copy Background	Copy Background
Select All	Print
Print	Blog with Windows Live
Print with Windows Live	E-mail with Windows Live
Translate with Bing	All Accelerators
Create Shortcut	Add to Favorites...
View Source	Encoding
Print Preview...	Refresh
Append to Existing PDF	Convert to Adobe PDF
Export to Microsoft Excel	Send to OneNote
Properties	

Internet | Protected Mode On

5:53 PM
1/18/2012

EXHIBIT 3



STOP FOREIGN INTERNET CRIMINALS FROM STEALING AMERICAN JOBS.

Dear Members of Congress:

Every day, internet criminals use illegal foreign websites to steal from New York companies and hardworking Americans.

They traffic in dangerous counterfeit products and unsafe consumer goods. They sell phony medications. They steal movies, television broadcasts, music and books.

These illegal foreign websites are destroying American jobs and causing billions in lost revenue.

They threaten the jobs of some of the best-known creative talent in the world, many of whom belong to New York guilds and unions. And they threaten the jobs of hundreds of thousands of musicians, songwriters, artists and professionals in entertainment companies, worldwide sports organizations and telecasters — in New York and across America.

That's why we all strongly urge you to protect the jobs and intellectual property of American citizens by supporting the PROTECT IP Act (S. 968) and the Stop Online Piracy Act (H.R. 3261).

Please help us stop online piracy — and protect American jobs.

Sincerely,

ABC
 AFTRA - American Federation of Television
 and Radio Artists
 AFM - American Federation of Musicians
 AAP - Association of American Publishers
 ASCAP
 BMG Chrysalis
 BMI
 CBS Corporation
 Cengage Learning
 DGA - Directors Guild of America
 Disney Publishing Worldwide, Inc.
 EMI Music Publishing
 ESPN
 Graphic Artists Guild
 Hachette Book Group
 HarperCollins Publishers L.L.C.
 Hyperion
 IATSE - International Alliance of Theatrical
 Stage Employees, Moving Picture Technicians,
 Artists and Allied Crafts of the United States,
 its Territories and Canada
 International Brotherhood of Teamsters
 Kaufman Astoria Studios
 Macmillan
 Major League Baseball
 Marvel Entertainment, LLC
 McGraw-Hill Education

MPA - The Association of Magazine Media
 NFL - National Football League
 National Music Publishers' Association
 NBCUniversal
 News Corporation
 New York Production Alliance
 New York State AFL-CIO
 Pearson Education
 Penguin Group (USA), Inc.
 The Perseus Books Group
 Producers Guild of America East
 Random House
 Reed Elsevier
 SAG - Screen Actors Guild
 Scholastic, Inc.
 Silvercup Studios
 Simon & Schuster, Inc.
 Sony Music Entertainment
 Sony/ATV Music Publishing
 Time Warner Inc.
 United States Tennis Association
 Universal Music Group
 Universal Music Publishing Group
 Viacom
 Warner Music Group
 W.W. Norton & Company
 Wolters Kluwer

**PLEASE PROTECT NEW YORK AND AMERICAN JOBS:
 Support the PROTECT IP Act & the Stop Online Piracy Act.**

EXHIBIT 4

- Yellow Card Sign
- News Releases
- Publications
- PAC
- Email Subscriptions
- Forum
- Contact Us
- Disclaimer
- Site Map
- Useful Links for Members
- Home

Office of the General Secretary-Treasurer
 Fax: 212-521-7699

Email: Web Master

The Web Master Email address is intended to be used for questions or comments that are related to the web site.

Email: Organizing Department

The Organizing Email address is intended to be a link for individuals interested in having the IATSE become their bargaining agent.

Email: Stagecraft Department

The Stagecraft Email address is intended to allow the international to receive inquiries regarding traveling attractions and/or issues relating to the Pink Contract.

Email: IATSE-PAC

The IATSE-PAC Email address is intended to be used by IATSE Local Unions and/or members with inquiries and comments relating to the IATSE-PAC and its "Stand Up, Fight Back" Campaign.

General inquiries for membership are handled by local unions. Please refer to the Local Union Directory section of this web site to find the appropriate local union for your area.

All other inquiries must be submitted in writing to the IATSE General Office

IATSE West Coast Office
 10045 Riverside Drive
 Torrance, CA 91602
 818-980-3439 Fax: 818-980-3435

IATSE Canadian Office
 22 St. Joseph Street
 Toronto, Ontario, Canada M4Y 1J9
 416-362-3589 Fax: 416-362-3483

IATSE-PAC
 1430 Broadway, 20th Floor
 New York, New York 10018
 212-730-1770
 Fax: 212-730-7809
 Contact: Deborah Reid

IATSE National Benefit Funds Office
 417 Fifth Avenue Third Floor
 New York, NY 10016
 Telephone: 212-560-5092 or 800-456-3863
 Fax: 212-787-3607
 www.iatseintl.org

Canadian Entertainment Industry Plan Office
 22 St. Joseph St.
 Toronto, Ontario, Canada M4Y 1J9
 Tele: 416-362-2565

EXHIBIT 5

Copyright Infringement Policy

The Site values intellectual property and respects the intellectual property rights of others, and will remove materials on its Site that infringe the copyrights of others. If you believe that your copyrighted material may have been infringed by material contained on this Site, then pursuant to Title 17, United States Code, § 512, you may notify Site's Designated Agent in writing as follows:

Name of Designated Agent: Copyright Administrator

E-mail Address:
10045 Riverside Drive, 2nd Floor,
Toluca Lake, CA 91602

Telephone number: 818-980-1048

Electronic Mail Address:

In your notice, you must include the following:

- (i) a physical or electronic signature of the owner of an exclusive right that is being infringed or of a person authorized to act on behalf of such owner;
- (ii) identification of the copyrighted work(s) that is (are) allegedly being infringed;
- (iii) identification of the materials that are causing the infringement and that are to be removed, along with sufficient information to allow Site to locate such materials;
- (iv) contact information (i.e., name, address, email address) sufficient to enable Site to contact you;
- (v) a statement to the effect that you have a good faith belief that the complained of use of the material was not authorized by the owner of the copyright, its agent or the law; and
- (vi) a statement that the information in the notification is accurate, and under penalty of perjury, and that the complaining party is authorized to act on behalf of the owner of the exclusive right that is allegedly being infringed.

Registration and Voting Information

Registration and voting information and services provided by Site shall be made available without regard to the voter's political preference. Information and other assistance regarding registering or voting shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular political party.

Contact Us

If you have any questions concerning this Site or any of the policies set forth in these Terms and Conditions, please contact us at

10045 Riverside Drive, 2nd Floor
Toluca Lake, CA 91602
Electronic Mail Address:

EXHIBIT 6

Clerk of the House of Representatives
Legislative Resource Center
B-106 Cannon Building
Washington, DC 20515
<http://lobbyingdisclosure.house.gov>

Secretary of the Senate
Office of Public Records
232 Hart Building
Washington, DC 20510
<http://www.senate.gov/lobby>

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - All Filers Are Required to Complete This Page

1. Registrant Name Organization/Lobbying Firm Self Employed Individual

Thorsen French Advocacy LLC

2. Address Check if different than previously reported

Address1 **405 First Street, SE** Address2 _____
City **Washington** State **DC** Zip Code **20003** - Country **USA**

3. Principal place of business (if different than line 2)

City _____ State _____ Zip Code _____ - Country _____

4a. Contact Name

BETH ANNE COLE

b. Telephone Number

International Number
(202) 506-5673

c. E-mail

bethannec@gmail.com

5. Senate ID#

400599826-101

7. Client Name Self Check if client is a state or local government or instrumentality

International Alliance of Theatrical and Stage Employees

6. House ID#

413140009

TYPE OF REPORT 8. Year **2011** Q1 (1/1 - 3/31) Q2 (4/1 - 6/30) Q3 (7/1-9/30) Q4 (10/1 - 12/31)

9. Check if this filing amends a previously filed version of this report

10. Check if this is a Termination Report Termination Date _____ 11. No Lobbying Issue Activity

INCOME OR EXPENSES - YOU MUST complete either Line 12 or Line 13

12. Lobbying

INCOME relating to lobbying activities for this reporting period was:

Less than \$5,000
\$5,000 or more \$ **\$30,000.00**

Provide a good faith estimate, rounded to the nearest \$10,000, of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSE relating to lobbying activities for this reporting period were:

Less than \$5,000
\$5,000 or more \$ _____

14. REPORTING Check box to indicate expense accounting method. See instructions for description of options.

- Method A. Reporting amounts using LDA definitions only
 Method B. Reporting amounts under section 6033(b)(8) of the Internal Revenue Code
 Method C. Reporting amounts under section 162(e) of the Internal Revenue Code

Signature _____ Filed Electronically

Date **04/20/2011**

Printed Name and Title **James French, Principal**

LOBBYING ACTIVITY. Select as many codes as necessary to reflect the general issue areas in which the registrant engaged in lobbying on behalf of the client during the reporting period. Using a separate page for each code, provide information as requested. Add additional page(s) as needed.

15. General issue area code

CPT	COPYRIGHT/PATENT/TRADEMARK
-----	----------------------------

 (one per page)

16. Specific lobbying issues

Rogue Sites Legislation
Streaming Legislation

17. House(s) of Congress and Federal agencies Check if None

U.S. HOUSE OF REPRESENTATIVES, U.S. SENATE, Office of Management & Budget (OMB)

18. Name of each individual who acted as a lobbyist in this issue area

First Name	Last Name	Suffix	Covered Official Position (if applicable)	New
James	French		Counsel, House Judiciary Committee	<input type="checkbox"/>
				<input type="checkbox"/>
				<input type="checkbox"/>
				<input type="checkbox"/>
				<input type="checkbox"/>
				<input type="checkbox"/>
				<input type="checkbox"/>
				<input type="checkbox"/>
				<input type="checkbox"/>

19. Interest of each foreign entity in the specific issues listed on line 16 above Check if None

Printed Name and Title James French, Principal