

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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LAVA RECORDS LLC, a Delaware limited liability company; WARNER BROS. RECORDS INC., a Delaware corporation; CAPITOL RECORDS, INC., a Delaware corporation; UMG RECORDINGS, INC., a Delaware corporation; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; ARISTA RECORDS LLC, a Delaware limited liability company; and BMG MUSIC, a New York general partnership,	:	
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Plaintiffs,	:	
	:	
-against-	:	
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ROLANDO AMURAO,	:	
	:	
Defendant.	:	
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 : Civil Action No.: 7:07-cv-00321-CLB  
 : *Electronically Filed*  
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 : **PLAINTIFFS' OPPOSITION TO**  
 : **EFF'S MOTION FOR LEAVE TO**  
 : **FILE AMICUS BRIEF**

Plaintiffs respectfully submit this opposition to the motion by the Electronic Frontier Foundation ("EFF") seeking leave to file an amicus brief in this matter. Plaintiffs submit that the criteria for permitting EFF to appear as an amicus are not met in this case and that, therefore, EFF's motion for leave should be denied.

**ARGUMENT**

Traditionally, the role of amici has been to act as a friend of the court, providing guidance on questions of law. The function of an amicus is to serve for the Court's benefit in assisting the Court in cases of general public interest and in providing assistance to existing counsel. *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991). The usual rationale for amicus submissions is that "they are of aid to the court and offer insights not available from the parties." *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, at \*33-34 (W.D.N.Y.

2007); *United States v. El-Gabrownny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994)). As there is no provision for amicus briefs in the Federal Rules of Civil Procedure, or in the local rules of this District, the decision to grant leave to proceed as an amicus at the trial court level is discretionary. *Kemphorne*, 471 F. Supp. 2d at \*33; *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992) (same).

A motion for leave to file an amicus brief should not be granted unless the court “deems the proffered information timely and useful.” *See Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985) (quoting 3A C.J.S. Amicus Curiae § 3 (1973)). Accordingly, courts should be slow to exercise their discretion to grant motions for leave to appear as amici, especially where one of the parties objects to the filing of an amicus brief, as is the case here. *See Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). (“[A] district court lacking joint consent of the parties should go slow in accepting . . . an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say . . .”).

In determining whether to permit amici at the trial level, the Court should take into consideration (1) whether amici would assist the court, (2) whether amici have a special interest in the subject matter of the suit, or (3) whether existing counsel is in need of assistance. *Strasser*, 432 F.2d at 569; *Gotti*, 755 F. Supp. at 1158; *see also Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (holding that amicus brief should only be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide).

None of the factors justifying submission of an amicus brief are present here. Nor would the information EFF purports to offer be useful in determining the motion to dismiss counterclaims in this case, as information presented in an amicus brief should be. *See Yip*, 606 F. Supp. at 1568.

First, EFF's contention that it has a perspective that is not represented by the parties is unsubstantiated and without merit. To the contrary, EFF adds nothing new and its proposed brief (which was improperly filed without leave) is nothing but a tirade against the recording industry based on conclusory, unsupported assertions. EFF's proposed brief does not cite any significant, relevant legal authority that was not addressed in the parties' briefs and adds nothing regarding the cases and legal theories cited by the parties. Indeed, it does not even address the significant cases cited in the parties' briefs. EFF's views are also contrary to existing law. Courts routinely dismiss duplicative and redundant declaratory judgment counterclaims, *see Green Bay Packaging, Inc. v. Hoganson & Associates, Inc.*, 362 F. Supp. 78 (N.D. Ill. 1973) (holding that "[i]t is well settled that such repetitious and unnecessary pleadings should be stricken"), and no court has ever recognized copyright misuse as an affirmative claim for relief, *see Broadcast Music, Inc. v. Hearst/ABC Viacom Entm't Servs.*, 746 F. Supp. 320, 328 (S.D.N.Y. 1990) (dismissing purported claim of copyright misuse because "[s]uch a claim is unprecedented and the Court declines to create the claim"). In sum, EFF provides no new facts, no unique perspective, and no legal analysis of the issues presented in this case that would assist the Court. Permitting the amicus brief, therefore, would not aid the Court in the least, and would serve no purpose other than to increase the time and expense of this case for the Court and for one side in this case. For this reason alone, the motion requesting leave to file the amicus brief should be denied. *See Gotti*, 755 F. Supp. at 1158 (denying leave to file amicus brief on the grounds that

the amicus applicant discussed no new case law, failed to discuss the significant cases in the defendant's brief, and thus would not "assist the court in the least").

EFF also has no special interest in this case that the parties have not already sufficiently brought before the Court or that would justify acceptance of its amicus brief. EFF paints itself as a public interest group that acts as a defender of civil liberties in the technology context. As is demonstrated from EFF's brief, however, EFF has firmly taken a position in favor of Defendant's side of this case. Indeed, EFF attorney Ray Beckerman operates a blog on the internet called "Recording Industry vs. The People" that regularly accuses the record company plaintiffs of wrongdoing and aims to assist defendants in defending cases like this one. Blog available at <http://recordingindustryvspeople.blogspot.com/> (last visited April 19, 2007).<sup>1</sup> This blog is notable for its fervor and passion, but not for its accuracy or fairness. As a result, EFF lacks the special interest and the dispassionate view of this case that would justify granting leave to file an amicus brief, and, thus, EFF's motion for leave to proceed as an amicus should be denied. *Gotti*, 755 F. Supp. at 1159 (denying leave to file amicus brief where rather than seeking to come as a 'friend of the court' and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that the [amicus] has come as an advocate for one side, having only the facts of one side at the time. In doing so, it does the court, itself and fundamental notions of fairness a disservice").

Finally, both parties are represented by competent and experienced counsel, who are very familiar with the issues presented by this case. As such, neither party requires the additional assistance of an amicus. EFF and Mr. Beckerman bring nothing to this case but their own biases

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<sup>1</sup> As just one example, EFF and Mr. Beckerman accuse Plaintiffs of acting as "a cartel of multinational corporations [that] collude to abuse our judicial system, distort copyright law, and frighten ordinary working people and their children." *Id.*

against Plaintiffs, and their hopes that the attempt to file an amicus brief in this case will add to their internet notoriety. Thus, allowing EFF's brief would provide no benefit to the Court, and would only increase the costs of this lawsuit unnecessarily. For these reasons too, and especially because EFF lacks both parties' consent to file its amicus brief, leave to file the brief should be denied. *See Strasser*, 432 F.2d at 569 (stating that it "may be thought particularly questionable" for the court to accept an amicus when it appears that the parties are well represented and that their counsel do not need supplemental assistance and where the joint consent of the parties to the submission by the amicus is lacking").

**CONCLUSION**

For all of the reasons discussed above, Plaintiffs respectfully request that this Court deny EFF's motion for leave to file an amicus brief.

Dated: Stamford, Connecticut  
April 19, 2007

By:   
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE AMICUS BRIEF** was forwarded in accordance with the Federal Rules of Civil Procedure on this 19th day of April, 2007, via ECF and facsimile, as follows:

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