UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBERTY MEDIA HOLDINGS, LLC,	:	
	:	
Plaintiff,	:	1:12-cv-02234-LAK
	:	
-against-	:	
	:	
CARY TABORA and SCHULYER WHETSTONE,	:	
	:	
Defendants.	:	

PLAINTIFF'S OPPOSITION TO ELECTRONIC FRONTIER FOUNDATION'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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I. INTRODUCTION

A non-party, the Electronic Frontier Foundation ("EFF"), seeks leave to appear and file a brief as an amicus in support of Defendant Cary Tabora's ("Tabora's") motion to dismiss. However, this request is not as the EFF would have it appear. By way of this amicus brief, the EFF attempts to distract the court, not only with respect to its involvement in this case, but in the substance of its proposed brief. First, the EFF is already, essentially, counsel for Tabora in this case. Second, the EFF's proposed brief is in part duplicative of, and merely restates Tabora's arguments. Third, the brief is in part a fallacy: it sets up a straw man not present in this case, only to melodramatically knock him down. The court should deny the EFF's motion.

II. LEGAL STANDARDS

There is no rule permitting amicus briefs in district courts. However, appellate rules provide some guidance as to when they might be proper. A proposed amicus must show that its contribution is "desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b). The Federal Rules Advisory Committee explained the importance of the relevancy requirement.

> An amicus curiae brief, which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help the Court. An amicus curiae brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored. (Emphasis added).

Fed. R. App. P. 29, 1998 Advisory Committee Notes.

Judge Posner further explained that most amicus briefs are improper.

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a

party. *Ryan v. Commodity Futures Trading Com'n*, 125 F. 3d 1062, 1063 (7th Cir. 1993) (Posner, C.J.)

Thus, the Court should deny a motion for leave to appear as an amicus if the proposed amicus brief is simply duplicative of the existing briefing, does not bring any new information before the Court, is brought for the amicus' self-interest, or tries to expand the scope of the litigation before the court. The EFF's proposed brief does all of the above. *Appropriate* amicus curiae fulfill the "classic role" of "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Where this standard is not met, the Court should deny leave to submit an amicus curiae brief. *Northern Sec. Co. v. U.S.*, 191 U.S. 555 (1903); *Ryan,* 125 F.3d at 1063; *Am. College of Obstetricians and Gynecologists, Penn. Section v. Thornburgh,* 699 F.2d 644, 645 (3d Cir. 1983); *Rucker v. Great Scott Supermarkets,* 528 F.2d 393, 394 n.2 (6th Cir. 1976); *Strasser v. Doorley,* 432 F.2d 567, 569 (1st Cir. 1970) (questioning propriety of amicus curiae brief when it appeared "that side of the case is already well represented"). The EFF's proposed submission fails to provide any new information, does not make any relevant arguments, mischaracterizes Liberty's position, and improperly asks this Court to expand its analysis to issues beyond the scope of the matter before it. The EFF does seek to improperly, for its own self-interest, muddy the waters in this case. It should not be permitted to do so.

III. THE EFF'S INVOLVEMENT IN THIS CASE

Naturally, many amici enter cases at a party's request. Coordination between parties and amici strikes nobody as surprising. However, there is a line, and the EFF has crossed it.

The instant dispute began in the Southern District of California, where Mr. Tabora was represented by an EFF attorney, William Skinner. See Exhs. A, B. The case was dismissed

for a lack of personal jurisdiction, so the Plaintiff re-filed the case in this court. Tabora, again, is represented by an EFF attorney. See Exh. B. Despite the fact that the EFF appears to be coordinating the defense, it now *also* seeks to enter the case as an amicus. While there might be no particular rule preventing an advocacy organization from taking the field for both party and amicus, the practice certainly runs afoul of the proscriptions set forth in *Ryan* and *Strasser*, *supra*.

Despite being involved in this case, on some level or another, for the better part of a year, the EFF sprang a request on Plaintiff on Wednesday, June 13, to file an a duplicative and factually and legally misleading amicus brief in order to simply triple the number of pages that Mr. Tabora is filing in order to try to dismiss the Plaintiff's case. Judge Posner's admonishment that amici are not properly admitted when they are merely friends of a party is doubly resonant in this case.

IV. ARGUMENTS

1. The EFF's Proposed Submission Mischaracterizes the Legal Issue and Would Confuse, Rather than Elucidate, the Issues for the Court

The EFF's motion should be denied because their proposed brief grossly mischaracterizes Liberty's position and the legal and factual posture of this case. This will serve to confuse, rather than elucidate, the issues for the Court. For example, the EFF takes the position that allowing litigation to proceed on a negligence theory under these facts would "have a devastating impact on many public and private efforts to expand Internet access by deploying wireless Internet connections ... in public areas and businesses, who would then have to police closely the activities of thousands of customers and strangers in order to avoid costly litigation." Doc. 20 at 2. The EFF's claims that it seeks to ensure that *innocent*

operators of wireless networks are not held liable for their users' infringement. However, this plainly misstates the facts at issue in this case, and Liberty's position in the Complaint.

The question at issue is whether an Internet account holder bears legal responsibility where he has **knowledge** that he is providing to another person the instrumentality of a **crime**, and where that other person **actually and repeatedly** uses that instrumentality to commit that crime. The EFF's attempt to mis-cast this case in order to make a media circus of it, should neither be permitted nor rewarded.

2. The EFF Improperly Seeks to Expand the Issues in this Action.

"[A]n amicus may not assume the functions of a party, nor may it initiate, create, extend or enlarge the issues." *County of Marin v. Martha Co.,* No. C 06-0200 SBA, 2007 WL 987310 at *1 (N.D. Cal. April 2, 2007). However, the proposed brief does all of the above. As shown above, the EFF has somehow decided that the EFF attorney assigned to the case, Mr. Talcott, did an insufficient job, so it seeks to stand in as counsel for Mr. Tabora.[1] Worse yet, the EFF then tries to serve its own agenda by expanding the case to cover far more factual and legal scenarios than either party has introduced thus far.

The EFF states that it is "deeply concerned that LMH's negligence theory of liability, if accepted, would open a chasm of legal risks of unsuspecting wireless Internet ("Wi-Fi") providers. LMH's allegations against Mr. Tabora, however, boil down to this: Mr. Tabora provided Internet access to Mr. Whetstone in return for a share of a monthly fee, and Mr. Tabora knew that Mr. Whetstone made infringing downloads using that Internet access. On

[1] Liberty does not intend to convey any disrespect for Mr. Talcott's work. Liberty believes that Talcott's brief was sufficient, professional, void of invective, and is in all ways an example of good briefing. The other EFF attorneys, despite being supposed amici, should not be permitted to inject irrelevant and misleading rhetoric into this dispute.

that basis LMH claims, *inter alia*, that Tabora is guilty of negligence; *i.e.,* he negligently allowed Whetstone to infringe LMH's copyright."

If the EFF's interest is in protecting unsuspecting WiFi providers, the EFF has an ally – Liberty Media. Liberty does not take the position that an "unsuspecting" party would be liable under the theory of its case.

The EFF tries to re-frame this case about open-wireless connections and unwitting commercial entities, despite the fact that this issue has not been raised by either party to date. The EFF further tries to make this case about commercial wireless provides, when again, neither party has so much as hinted that commercial providers are relevant. The only relevant issue in play is that Mr. Tabora knew that Mr. Whetstone was using his Internet connection for illegal purposes and yet allowed him to continue doing so for a prolonged period of time anyway – and whether that gives rise to Tabora's liability.

The EFF dishonestly states that it is seeking to protect the rights of "unsuspecting wireless Internet ... providers." If that was the EFF's concern, then the EFF could have approached Liberty to ask if that was Liberty's intent. It could have asked if Liberty would stipulate that it was not seeking to hold anyone liable under the "unsuspecting victim" theory. If Liberty's complaint does not already make this clear, Liberty hereby stipulates that it does not seek any liability to be imposed upon anyone who was "unsuspecting." In this case, the reason that Tabora is a Defendant is because he **knew** of Mr. Whetstone's illegal activities, he **knew** that they were illegal, he **knew** that they were harmful, yet he still permitted Whetstone to use his Internet connection to continue his illegal activities.

The EFF argues that "negligence ... can turn on a mere failure to take reasonable care. No Court has ever accepted such a low standard for copyright liability." Doc. 20-1 at 4

(citations omitted). However, the EFF once again mischaracterizes the law and the facts. Copyright infringement is already a strict liability offense. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008); *Byrne v. BBC*, 132 F. Supp. 2d 229, 232 (S.D.N.Y. 2001); see also *Playboy Enters. v. Russ Hardenburgh*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (holding that where defendants willfully copied and distributed copyrighted material, liability for copyright infringement attached and no further intent, state of mind or wrongful act was necessary); *Educational Testing Service v. Simon*, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (holding copyright infringement occurred because the plaintiff owned the copyright and the defendant copied protected material).

The EFF sets up a straw man stating "basing copyright liability on mere negligence would have a chilling effect on the growth of publicly available wireless networks." It then rattles off locations that provide free Wi-Fi service to customers. Again, as discussed above, Liberty does not take the position that Starbucks needs to police its users. Liberty does not take the position that the San Francisco International Airport would be liable if one of the users of its free wi-fi service engaged in copyright infringement while waiting for a flight. In these scenarios, the provider would be truly unaware of the infringement. The EFF knowingly misstates Plaintiff's position when it argues "the negligence standard LMH proposes would put all of this at risk." Doc. 20-1 at 5. The only people that Liberty's theory puts at risk are those who knowingly provide the instrumentalities of a crime to people who they know will use those instrumentalities for that purpose – and who choose to do nothing about it.

The parade of horribles that the EFF waves about should create no fear. There are decades upon decades of case law involving copyright infringement in which courts routinely

separate those who are materially participants in copyright infringement from those who are mere innocent bystanders. For example, as discussed in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996), absentee landlords who "lacked knowledge of the infringing acts of [their] tenant[s] and who exercised no control over the leased premises...were held not liable for the infringement committed by tenants on the premises." See, e.g., *Deutsch v. Arnold*, 98 F.2d 686, 688 (2d Cir. 1938). On the other hand, "the operator of an entertainment venue was held liable for infringing performances when the operator (1) could control the premises and (2) obtained a direct financial benefit from the audience, who paid to enjoy the infringing performance." 76 F.3d at 262 (citing *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 51 S. Ct. 410, 75 L. Ed. 971 (1931), and *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929)).

Similarly, the duty that the Plaintiff argues for in this case will not be open to abuse. Those who are truly innocent, and not acting in concert with infringers, will have nothing to fear from a court finding Mr. Tabora to be negligent. On the other hand, those like Mr. Tabora -- who know that someone is using their connection to infringe -- will have to make a decision as to whether they wish to be a part of that infringement. Such a decision may come with financial or friendship rewards, but such a decision must also come with responsibility.

Liberty has made it very clear in its complaint that the only reason it believes Tabora is negligent, and thus liable, is because he had **knowledge** of Whetstone's infringing activities. This is a far cry from the innocent, unknowing network operator postulated by the EFF. Consider a hypothetical suggested by the EFF's own papers: A coffee shop provides wireless access to its customers. If the coffee shop's manager is standing over a customer's shoulder and asks the customer "are you engaging in illegal activity on this store's network?"

and the user says, "yes, I am," then the manager should refuse to provide that customer access to the Internet. If the manager simply shrugs his shoulders and walks away, content with the knowledge that the customer had paid for a cup of coffee, then yes, Liberty would seek to hold that particular coffee shop liable. This is just the type of negligence exhibited by Tabora, and the facts that the EFF ignores in its proposed brief.

3. Tabora is Represented by Experienced Counsel, Who is an EFF Lawyer to Boot.

Generally, a brief is appropriate where the amicus has "unique information or perspective" that can assist the Court beyond what counsel for the parties can provide. The criterion for permitting an amicus brief "is more likely to be satisfied in a case which a party is inadequately represented." *Voices for Choices, et al. v. Illinois Bell Telephones Co., et al,* 339 F.3d 542, 545 (7th Cir. 2003).

The EFF cannot claim that Tabora is not adequately represented – another reason to refuse to consider their brief. In fact, Mr. Talcott is an EFF copyright defense attorney. See Exh. B. Therefore, the EFF is taking two bites at the apple: It first provides Mr. Tabora with one of its attorneys and then, at the eleventh hour, after it has reviewed that attorney's briefing, injects is own supplemental briefing rather than simply allowing Mr. Talcott to take the positions raised in its brief.

Worse, many of the EFF's assertions in its brief are false or irrelevant, and it is understandable why Mr. Talcott did not raise them himself. In representing his client, his credibility matters. In this scenario, Mr. Talcott plays the straight man while the EFF, as a party with nothing to lose, raises straw men, parades of horribles, and other absurd arguments in order to muddy the waters and unnecessarily increase the costs of litigation for Liberty.

4. If the Brief is Allowed, Liberty Seeks Leave to File a Full Response

Liberty does not wish to, at this point, expend resources refuting the EFF's briefing point by point. If the amicus brief is accepted, Liberty should be afforded a meaningful and complete opportunity to respond. *Parravano, et al. v. Babbitt*, 861 F. Supp. 914, 917 (N.D. Cal. 1994); *Nat'l Aviation, et al. v. The City of Hayward*, 418 F. Supp. 417, 418-19 (N.D. Cal. 1976) (discussing taking motion under "submission pending the filing of the amicus and necessary reply briefs by the parties.")

Given that the EFF's brief was filed in the midst of Liberty briefing the regularly noticed motion to dismiss, Liberty will not be afforded a true opportunity to address many of the lengthy arguments raised in the EFF's brief. If this Court grants the EFF's motion, Liberty respectfully requests two weeks from the entry of the Court's order to file a full response to their brief.

V. CONCLUSION

The EFF has no place in this case. The proposed brief is untimely, replete with misleading statements, erroneous factual assertions, is procedurally improper, offers no new information or perspective, and is simply the result of a previously arranged collusion between the amicus and Mr. Tabora. This non-party should not be permitted to insert itself into this litigation in order to promote its own agenda. The motion should be denied and the simple legal issues in play should be resolved by the Court on the papers submitted by the parties. If other amici seek to enter the case, Liberty may very well consent to their participation. However, Liberty has not yet seen any request by any proposed amicus that would actually add something new to this case.

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June 20, 2012

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