

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

IN RE:)	
)	
VERIZON INTERNET SERVICES, INC.)	
Subpoena Enforcement Matter)	
)	Appeal No. 03-7015
RECORDING INDUSTRY)	
ASSOCIATION OF AMERICA)	On Appeal From the United States District Court for the District of Columbia, Miscellaneous Action Case No. 1:02MS00323 (JDB)
v.)	
VERIZON INTERNET SERVICES, INC.)	
)	

**RESPONSE OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA TO
THE MOTIONS OF AMICI CURIAE FOR LEAVE TO FILE MULTIPLE AMICUS
BRIEFS AND TO EXCEED THE COURT-MANDATED PAGE LIMITS**

Appellee Recording Industry Association of America (“RIAA”) hereby responds to both the Motion for Leave to File a Brief Amicus Curiae Supporting Neither Party filed by Public Citizen (“Public Citizen’s Motion”) and the Joint Motion of *Amici Curiae* Supporting Appellant Verizon For Amendment of Briefing Order to Allow Filing of Separate Briefs In Excess of Word Limits, And to Exclude Description of the Amici From the Word Count (“Joint Motion”) filed by a number of organizations seeking to file multiple amicus briefs and to obtain an increase in the word count for these briefs.

The Court should deny the Joint Motion. First, this Circuit’s Rules prohibit the filing of multiple amicus briefs on one side unless *amici* can demonstrate that it is impracticable to file a single brief (Circuit Rule 29(d)). These rules also forbid expansions of the word count limit for briefs absent “extraordinarily compelling reasons” (Circuit Rule 27(h)(3)). *Amici* have not met their burden to alter these rules.

Second, Verizon sought and obtained an agreement from RIAA that there would only be a single amicus brief per side. In discussing the schedule for this appeal, Verizon proposed to RIAA that each party would consent to only a single amicus brief per side (consistent with the Court's rules), and RIAA agreed. That agreement was a condition to RIAA not opposing Verizon's proposed briefing schedule in this Court and agreeing to the Joint Motion to Amend the Briefing Schedule filed by the parties on March 24, 2003. That motion states that there was to be a single "Joint Brief for Amici Curiae . . . (not to exceed 7,000 words)" on each side. *See* Joint Motion to Amend Briefing Schedule, Appeal No. 03-7015, at 3 (filed March 24, 2003).

Having now rounded up numerous *amici*, Verizon seeks to be released from its agreement. RIAA asks this Court – especially given Verizon's representations – not to alter its ordinary rules to allow multiple, over-length amicus briefs to be filed. This Court should deny the Joint Motion in its entirety and allocate a brief of appropriate length for Public Citizen.

BACKGROUND

Subject Matter of this Case

This case concerns the right of copyright holders to obtain, through a process carefully crafted by Congress, the identity of a Verizon subscriber who is openly infringing their copyrights. *See* 17 U.S.C. § 512(h). In the Digital Millennium Copyright Act, Congress authorized copyright holders to subpoena very limited information from the only entities that know the identity of people committing widespread copyright infringement on the Internet – the Internet service providers (ISPs) who provide infringers with access to the Internet. In this case, RIAA, on behalf of its members, seeks such information to stop the ongoing infringement of its members' copyrights on the Internet. Verizon seeks to conceal the infringer's identity.

As the District Court recognized, RIAA's members and copyright holders worldwide are facing an epidemic of digital piracy over the Internet. *In re: Verizon Internet Services, Inc. Subpoena Enforcement Matter*, 240 F. Supp. 2d 24, 35-36 (D.D.C. 2003). Using traditional Internet access service offered by ISPs, such as Verizon, copyright infringers can make available pirated copies of thousands of copyrighted works, each of which can be copied again by anyone in the world with the click of a mouse. Those copies are then available for further dissemination, thus compounding the irreparable harm to the copyright owner.

Congress enacted the DMCA to ensure that ISPs and copyright holders would have "strong incentives" to work together to stop Internet piracy. S. Rep. 105-190, at 40 (1998). ISPs, however, have contrary economic incentives because they profit directly from the infringement occurring over their networks. Indeed, Verizon has advertised that its broadband services can be used for copyright infringement; in recent advertisements, Verizon trumpets its subscribers' ability to quickly "download[] the latest singles" and suggests to users that, rather than obtaining music from legal web sites where they will have to pay for music, they should download music from places where music is free (and almost always pirated). *See Declaration of Frank Creighton* ¶10 (filed in Misc. Act. No. 1:03MS00040, D.D.C.) (March 27, 2003) (attaching Verizon advertisements); *Supplemental Declaration of Frank Creighton* (filed in Misc. Act. No. 1:03MS00040, D.D.C.) (March 31, 2003) (attaching Verizon advertisement).

Proceedings Below

Two subpoena enforcement actions were before the district court. The first subpoena action is the subject matter of this appeal. The second subpoena action is still pending before the District Court.

On July 24, 2002, the RIAA issued a subpoena to Verizon, pursuant to 17 U.S.C. § 512(h), seeking the identity of a Verizon subscriber who was offering hundreds of copyrighted sound recordings over the Internet to anyone who wanted to download them. The record below is undisputed that the individual is engaging in copyright infringement and is a Verizon subscriber. Verizon first delayed responding to the subpoena and then refused to do so. Verizon admitted that it knew exactly who was committing this infringement and that it took only about 15 minutes to determine the infringer's identity. *See* Declaration of Scott Lebrede, Manager of Operations Security for Verizon Internet Services, Inc., ¶12 (filed with Verizon's Opposition to the Motion to Enforce) (Aug. 30, 2002) (admitting that compliance would take 15-25 minutes).

On January 21, 2003, Judge John Bates granted RIAA's motion to enforce its subpoena. In an extremely thorough and well-reasoned opinion, Judge Bates wholly rejected the "*strained reading of the Act*" proposed by Verizon and its *amici*, *Verizon Internet Services*, 240 F. Supp. 2d at 32 (emphasis added), finding that "[n]othing in the language or structure of the statute suggests . . . Congress intended the DMCA" to be read in the constricted manner Verizon proposes, *id.* at 36. The District Court similarly found that Verizon and *amici's* reading was totally contrary to the legislative history of the DMCA, *id.* at 36-37, and "makes little sense from a policy standpoint," *id.* at 35. The District Court also quite properly refused to consider the constitutional arguments that *amici* sought to inject into the case. As the Court noted, Verizon did not raise those arguments and mentioned them only in two sentences and a footnote. *Id.* at 41-42. The Court did, however, cast doubt on the arguments made by *amici*, *id.* at 44, and noted that Section 512(h) contains precisely the sort of procedural protections that *amici* asked the court to impose, *id.* at 41 n.15

During the pendency of this first subpoena action, RIAA issued a second subpoena to Verizon for the identity of another significant copyright infringer who also was using Verizon's network to disseminate hundreds of copyrighted works owned by RIAA's members. *See In re: Verizon Internet Services, Inc. Subpoena Enforcement Matter*, Misc. Act. No. 1:03MS00040 (D.D.C.). Verizon again refused to comply, this time adopting the arguments previously made by its *amici* and arguing to the District Court that 17 U.S.C. § 512 violates the separation of powers and the First Amendment rights of users of the Internet. The District Court has held argument on that matter, but has yet to rule on it.

ARGUMENT

RIAA does not oppose the filing of a single amicus brief in support of each side within the word limits established by this Court's Rules. Nor does RIAA oppose allocating a modest number of words for Public Citizen's brief in support of neither party, even though the legal argument Public Citizen seeks to make is identical to the one made below by the *amici* filing the Joint Motion.¹ But RIAA does oppose the relief sought by *amici* in the Joint Motion. For all of the reasons stated below, this Court should deny the Joint Motion.

I. The Court Should Deny the Joint Motion in Its Entirety Because Verizon Agreed to the Contrary.

Following the filing of its notice of appeal, counsel for Verizon discussed with RIAA the filing of amicus briefs on each side. The parties came to an agreement – each would consent to a

¹ Although Public Citizen concedes that “it seems unlikely that there is any basis for reversing the order granting enforcement of subpoenas in this case,” Public Citizen Motion at 7, the legal argument Public Citizen seeks to make is the same as that made by the “consumer” *amici* below. *Compare* Public Citizen Motion at 4 (espousing analysis from *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001)) *with* Brief Amicus Curiae of Electronic Frontier Foundation, *et al.*, at 16 (filed Aug. 24, 2002) (advocating for analysis in *Dendrite v. Doe*, *supra*). RIAA has no objection to Public Citizen filing an amicus brief in support of neither party. If the Court determines to alter its normal rules on amicus briefs, RIAA believes the word count for Public Citizen's brief should come out of that allotted to Verizon's *amici*.

single amicus brief in this Court, as contemplated by this Court's rules. RIAA relied on that agreement when it did not oppose Verizon's first proposed schedule in this Court (even though RIAA argued to this Court that Verizon had not met the test for expediting the appeal). RIAA similarly relied on that agreement when it agreed to file a Joint Motion with Verizon in this Court to amend the briefing schedule in light of further proceedings in the District Court. The parties put this proposed schedule before the Court in the parties' Joint Motion to Amend Briefing Schedule, filed on March 24, 2003. That pleading states that there would be only one "Joint Brief for Amici Curiae . . . (not to exceed 7,000 words)" on each side. *See* Joint Motion to Amend Briefing Schedule, Appeal No. 03-7015, at 3 (filed March 24, 2003).

It is now clear that Verizon has been rounding up *amici* and seeks to be released from its agreement.² While Verizon's agreement does not bind this Court, Verizon should not be rewarded for its conduct, and RIAA should not be prejudiced by being forced to respond to multiple amicus briefs in this expedited proceeding. The *amici* on RIAA's side are prepared to file a single 7,000 word amicus brief, consistent with the parties' agreement and this Court's Rules. The Court should require Verizon's *amici* to do the same.

II. The Court Should Require *Amici* to Comply with Its Rules and File a Single Brief.

This Court's Rules recognize that amicus briefs are intended to supplement the briefs of the parties, not to create more paper for the Court to read. For that reason, ordinarily only one amicus brief is permitted per side. *See* Circuit Rule 29(d) ("Amici curiae on the same side must join in a single brief to the extent practicable."). This rule presumes that in many cases *amici* with somewhat differing interests will have to negotiate the content of an amicus brief that is satisfactory to all. Only if a party can demonstrate that it is impracticable for the *amici* to write a

² Verizon's response to Public Citizen's Motion, filed on March 27, 2003, makes clear that Verizon does not intend to abide by its agreement.

single brief will the Court allow multiple briefs. Moreover, it is not enough, as *amici* suggest in the Joint Motion, for parties to claim that they need more pages to make all of the arguments they would like to make, or that *amici* were allowed to file multiple briefs in the District Court. *See* Circuit Rule 29(d). Rather, there has to be some concrete reason why they *cannot* file a single brief.

Amici in the Joint Motion have only argued that they would rather file multiple amicus briefs – not, as they must, that they cannot file a single one. The sole argument that *amici* have made is to suggest that only the “consumer” *amici* can articulate the interests of subscribers of ISPs, because the “business” *amici* will articulate only their own economic interests. But, as the litigation below demonstrates, the interests of both groups of *amici* are precisely aligned. Throughout this case, Verizon has argued that ISPs are entitled to assert the rights of their subscribers and has sought to make this case a *cause celebre* demonstrating how hard Verizon is fighting to “protect” its subscribers from being called to account for their illegal conduct. Moreover, the “business” *amici* below argued that they were filing their brief to protect the interests of their subscribers and adopted all of the First Amendment and privacy arguments made by the consumer *amici* below. *See* Brief of *Amici Curiae* USIIA, *et al.*, Case No. 1:02MS00323, at 3 (D.D.C.) (filed Sept. 9, 2002) (explaining that brief was being filed to “protect the interests of their customers”); *id.* at 16 (adopting the First Amendment and privacy arguments made by the “consumer” *amici*).

Nor do *amici* make any effort to suggest that their legal arguments are in any way inconsistent. That is because they are not. In the District Court, both sets of *amici* made the same counter-textual statutory interpretation argument that was rejected by Judge Bates. Both sets of *amici* made the same First Amendment argument. As the District Court noted, the *only*

argument that Verizon and its *amici* can make is a facial overbreadth challenge to Section 512. *Verizon Internet Services*, 240 F. Supp. 2d at 44 n.22 (explaining the “heavy burden” that Verizon and its *amici* must meet). That is because the record below is undisputed that the infringer whom Verizon and *amici* seek to shield is engaging in blatant copyright infringement, which is not protected by the First Amendment. *Id.* at 43-45.³ Finally, it is hard to imagine how anything in the “consumer” or “business” nature of the various *amici* has any impact on the question of whether Congress has overstepped its bounds here (and it has not).

Finally, alteration of the ordinary rules governing amicus filing are particularly inappropriate here in an expedited proceeding. The parties will have less than the ordinary time to write their briefs and prepare for oral argument; they should not also have to respond to multiple amicus briefs that are longer than that ordinarily authorized absent some compelling reason, which *amici* have not provided.

For all of these reasons, *amici* filing the Joint Motion have failed to demonstrate that it is impracticable for them to file a single brief in accordance with this Court’s Rules.

³ The “business” *amici* also appear to want to make a “due process” argument. Besides being implausible, the “due process” claim that “business” *amici* want to make – that a subpoena compelling the disclosure of the identity of a single subscriber who is breaking the law is an unconstitutional taking of an ISP’s property – is simply not at issue in this case. Verizon never mentioned that argument except in a single sentence in a footnote in the second subpoena action. It is thus not available to Verizon here, and should not provide any basis for giving *amici* more pages for briefing. See *Building Owners & Managers Ass’n Int’l v. FCC*, 254 F.3d 89, 100 n.14 (D.C. Cir. 2001) (where petitioners raised argument “in two brief sentences, without supporting citation,” court “decline[d] to address an issue that was presented in such a cursory fashion.”).

III. The Court Should Not Permit *Amici* to Exceed the 7000 Word Limit and Should Not Alter Its Rules that Require the Statement of Interest to Be Included in the Word Count.

As Circuit Rule 27(h)(3) makes clear, motions to exceed the page limits are “disfavor[ed]” and “will be granted only for extraordinarily compelling reasons.” *Amici* here have presented no such “extraordinarily compelling” grounds here.


Amici’s sole basis for an expansion of the page limits appears to be the interest of news entities in this case. But that says nothing about how much space is required to brief issues in this case. The parties will have no trouble in fully briefing the statutory interpretation and constitutional issues in this case within their allotted 14,000 words (provided they are not saddled with responses to long amicus briefs). *Amici* similarly should have no trouble performing the proper role of *amici* – supplementing the arguments of the parties, not repeating them or injecting new arguments – within the word count that this Court regularly allots.

Finally, the Court should also deny *amici*’s unusual request to exclude the “statement of interest” section of the brief from the page limits. As this Court is well aware, the “statement of interest” section of an amicus brief provides a forum for *amici* to argue their view of the importance of the case and the potential harms they believe (incorrectly) will occur if the District Court’s decision is upheld. Thus, the Joint Motion is simply a back-door attempt for a substantial increase in the page limitations without good cause, much less an “extraordinarily compelling reason.” For that reason, the motion should be denied.

CONCLUSION

For all of these reasons, the Court should deny the Joint Motion and allocate an appropriate word count for an amicus brief supporting neither party to be filed by Public Citizen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 7th day of April, 2003, I caused copies of the Recording Industry Association of America's Response to the Motions of *Amici Curiae* for Leave to File Multiple Amicus Briefs and to Exceed the Court-Mandated Page Limits, to be delivered to the following recipients by first-class U.S. Mail, postage prepaid, and by electronic mail:

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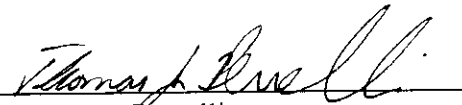
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