

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES OF AMERICA FOR AN ORDER
AUTHORIZING (1) INSTALLATION AND USE OF A
PEN REGISTER AND TRAP AND TRACE DEVICE OR
PROCESS, (2) ACCESS TO CUSTOMER RECORDS,
AND (3) CELL PHONE TRACKING

§
§
§
§
§
§
§
§
§

MAGISTRATE NO. H-06-356M

**MEMORANDUM OF LAW OF ELECTRONIC FRONTIER FOUNDATION IN
SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

The Electronic Frontier Foundation (“EFF”) and other parties who may join EFF as amici move the Court for leave to file, on or before June 30, 2006, a memorandum of amicus curiae in opposition to the government’s application seeking access to post-cut-through dialed digits pursuant to 18 U.S.C. § 3123 in the above captioned matter. This is in response to the Court’s order of May 24, 2006, indicating the Court’s willingness to consider briefing from interested parties.

I. INTERESTS OF PROPOSED AMICI

The Electronic Frontier Foundation is a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF has more than 10,000 members and represents the interests of telephone and Internet users in court cases and in the broader policy debates surrounding the application of law in the digital age. EFF publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, <http://www.eff.org>.

II. ARGUMENT

Federal courts have “broad discretion” to allow briefing by amici curiae. *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982) (noting district court’s broad discretion and finding that its appointment of the Department of Justice as amicus curiae was not an abuse of that discretion). “There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is

useful to or otherwise desirable by the court.” *In re Roxford Foods Litig.*, 790 F.Supp. 987 (E.D.Cal. 1991).

In this matter of first impression regarding a statutory regime that is a “complex, often convoluted area of the law,” *United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998), EFF’s substantial experience in the area of communications privacy and electronic surveillance would be of great use to the court. EFF has served as counsel or amicus in a number of key cases addressing the Electronic Communications Privacy Act (“ECPA”), the Communications Assistance for Law Enforcement Act (“CALEA”) and related electronic privacy statutes. *See, e.g., Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994) (counsel); *U.S. Telecom Ass’n v. F.C.C.*, 227 F.3d 450 (D.C. Cir. 2000) (petitioner); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003) (amicus); *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004) (amicus); *U.S. v. Councilman*, 418 F.3d 67 (1st Cir. 2005) (en banc) (amicus); *In r: Application of the U.S. for an Order (1) Authorizing Use of Pen Register and Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information*, 396 F.Supp.2d 294 (E.D.N.Y. Oct. 24, 2005) (amicus); *Snow v. DirecTV, Inc.*, --- F.3d ---, 2006 WL 1493817 (11th Cir. June 1, 2006) (amicus); and *O’Grady v. Sup. Ct.*, --- Cal.Rptr.3d ---, 2006 WL 1452685 (Cal.App.6th May 26, 2006) (counsel).

This is a case of complete first impression: no published decision has directly addressed whether the government may obtain all post-cut-through dialed digits pursuant to an order under the Pen/Trap Statute. *See U.S. Telecom Ass’n*, 227 F.3d at 462. Considering this, and further considering EFF’s unique expertise in the law and technology of communications privacy and surveillance, it is particularly appropriate for the Court to allow EFF to assist in insuring a complete and plenary presentation of these difficult issues. EFF’s briefing will assist the Court in navigating that statutory framework while providing an adversarial balance to the government’s otherwise unchallenged claims, offering the Court a crucial opposing viewpoint.


III. CONCLUSION

For the above reasons, EFF respectfully requests that this Court grant its Motion for Leave to File as Amicus Curiae.

DATED: June 14, 2006

Respectfully submitted,

By



Kevin S. Bankston (CA Bar No. 217026)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x 126
Facsimile: (415) 436-9993

PROOF OF SERVICE

**In the Matter of the Application of the United States
CASE NO. H-06-356M
US District Court, Southern District of Texas**

I am over the age of 18 years, am not a party to this action and am employed by Amicus Electronic Frontier Foundation.

On June 14, 2006, I served the within:

**MEMORANDUM OF LAW OF ELECTRONIC FRONTIER
FOUNDATION IN SUPPORT OF MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE**

on the parties in said action by U.S. Mail, first class, postage prepaid, as follows:

Robert Stabe
U.S. Attorney's Office
Southern District of Texas
P.O. Box 61129
Houston, TX 77208

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 14, 2006



Barak R. Weinstein