

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:12-cv-00886

MALIBU MEDIA, LLC,

Plaintiff,

v.

JEFF FANTALIS, BRUCE DUNN, and
STEPHEN DEUS,

Defendants.

**FIRST AMENDMENT LAWYERS ASSOCIATION'S
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

The First Amendment Lawyers Association (“FALA,” or the “*Amicus*”) hereby moves for leave to file the accompanying *amicus curiae* brief in the above-captioned matter, in response to Defendant Jeff Fantalis’ (“Fantalis[’]” or the “Defendant[’s]”) First Amended Answer and Counterclaim (the “Counterclaim”) (Doc. # 39). *Amicus* seeks leave to file a brief to address the legal issue raised in Count II of Fantalis’ counterclaim, i.e., concerning Fantalis’ position that pornography is not copyrightable. *Amicus* takes no position on any other issues raised in this litigation, and while *Amicus* disagrees with this particular counterclaim, *Amicus* supports neither party on any other issue or claim in the litigation.

As required by D. Colo. L.R. 7.1(a), *Amicus*’ counsel have made good faith efforts to meet and confer with all parties prior to filing this motion by exchanging phone calls and e-mails with Plaintiff and Counterclaimant, and attempting to contact defaulted defendant Bruce Dunn via U.S. Mail.

Amicus is a national non-profit organization formed in the late 1960s that today boasts more than 180 members, all of whom are attorneys who are dedicated to the protection of free

expression.¹ *Amicus*' central mission is to protect and defend the First Amendment. *Amicus* has no fiscal or direct interest in this litigation, but is concerned about its outcome by virtue of its organizational mission.

Amicus' membership has been involved many in landmark cases defending erotic expression and adult entertainment, and have been on the front lines of defending free expression since the organization's founding. Most recently, *Amicus*' members have participated in prominent, vigorous defenses of free speech including *U.S. v. Extreme Associates, Inc.*, 431 F.3d 150 (3d Cir. 2005) (questioning whether a federal statute criminalizing the commercial distribution of obscene materials should be struck down); *U.S. v. Stagliano*, 693 F.Supp.2d 25 (D.D.C. 2010) (challenging the constitutionality of federal statutes that criminalize the interstate trafficking of obscenity); *U.S. v. Little*, 2008 WL 2959751 (M.D. Fla. 2008) (determining whether the traditional community standards of the *Miller* test should be applied to Internet speech); *Alameda Books v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000) (determining whether City of Los Angeles ordinances were adequately supported by evidence of adverse secondary effects); and *U.S. v. Investment Enterprises, Inc.*, 10 F.3d 263 (5th Cir. 1993) (involving the shipment of obscene materials in interstate commerce).

Trial courts regularly consider *amicus* briefs. Within this very district, *amicus* briefs illuminated contentious and complex legal issues like the one presently before the Court and addressed in *Amicus*' proposed brief. *Righthaven LLC v. Wolf et al.*, Case No. 1:11-cv-00830 (Doc. # 26) (D. Colo. Sept. 6, 2011) (granting leave for *amici* Electronic Frontier Foundation and Citizens Against Litigation Abuse, Incorporated to file their respective *amicus* briefs). District courts' acceptance of *amicus* briefs is well-established not just in this District, *id.*, and nationally as well. *On the Cheap LLC v. Does 1-5011*, Case No. C10-4472 BZ (N.D. Cal. Sept. 6, 2011) (accepting *amicus* brief from Electronic Frontier Foundation); *Elektra Enter. Group. v. Barker*, 551 F. Supp. 2d 234, 237 (S.D.N.Y. 2008). As this submission is legally permissible, *Amicus* submits that the accompanying brief will be useful to this Court in ruling in considering the legal merits of Defendant's Counterclaim.

¹ The organization occasionally admits non-lawyer members on a case-by-case basis.

For the foregoing reasons, the First Amendment Lawyers Association requests that the Court grant the motion for leave to file the accompanying *amicus curiae* brief.

Dated this 13th day of August, 2012.

COUNSEL FOR AMICUS CURIAE:

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CERTIFICATE OF SERVICE

Undersigned hereby certifies that a true and accurate copy of the foregoing **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** was sent through the District of Colorado's ECF system on this 13th day of August 2012. A copy was also sent via U.S. Mail to Defendant Jeff Fantalis at the address listed on the Court's docket.

/s/ Marc J. Randazza
Marc J. Randazza