

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

IN RE:)
)
)
VERIZON INTERNET SERVICES, INC.)
Subpoena Enforcement Matter)
_____)
)
RECORDING INDUSTRY)
ASSOCIATION OF AMERICA)
)
v.)
)
)
VERIZON INTERNET SERVICES, INC.)
_____)

Miscellaneous Action
Case No. 1:02MS00323
Honorable John D. Bates

**RIAA’S MOTION TO STRIKE THE DECLARATION OF PETER P. SWIRE
APPENDED TO VERIZON’S MOTION & MEMORANDUM
FOR A STAY PENDING APPEAL**

The Recording Industry Association of America (“RIAA”) hereby moves this Court to strike the Declaration of Peter P. Swire appended to the Motion and Memorandum of Points and Authorities In Support of Verizon Internet Services, Inc.’s Motion for a Stay Pending Appeal. Per LCvR 7.1(m), counsel for Verizon Internet Services, Inc. (“Verizon”) was contacted and indicated that Verizon would oppose this motion.

ARGUMENT

I. Declarations Comprised of Ultimate Conclusions of Fact or Law or That Are Otherwise Speculative Should Be Stricken

It is well-settled that affidavits and declarations must be supported by specific facts based on first hand knowledge. *See* Fed. R. Civ. P. 56(e) (Affidavits must “be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show

affirmatively that the affiant is competent to testify to the matters stated therein.”). Affidavits and declarations become wholly improper, as well as unhelpful, when they assert “self-serving” or ultimate conclusions of either law or fact. *See, e.g., BellSouth Telecomms., Inc. v. W.R. Grace & Co. – Conn.*, 77 F.3d 603, 615 (2d Cir. 1996) (finding that the district court’s disregard of affidavits that advocated conclusions of law was proper); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 295 (5th Cir. 1987) (“Affidavits . . . setting forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment . . . Affidavits must be based on personal knowledge, setting forth facts admissible in evidence.”); *see also Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985); *Hampton Inns, Inc. v. Ameritel Inns, Inc.*, No. 93-459-S, 1995 WL 762148, at *6 (D. Idaho Oct. 19, 1995) (“An affiant’s opinion that is not founded on the facts of the case and consists largely of legal conclusions does not conform to the dictates of Rule 56(e) and is not sufficient to raise a genuine issue of fact.”).

Thus, when lawyers or law professors submit affidavits or declarations that simply opine as to their personal view of a legal issue, courts routinely strike such material from consideration. To hold otherwise would permit a party (and its designated affiants) to usurp the role of the court. *A&M Records, Inc. v. Napster, Inc.*, No. C 9905183MHP, 2000 WL 1170106, at *8 (N.D. Ca. Aug. 10, 2000) (striking declaration of law professor that “merely offers a combination of legal opinion and editorial comment on Internet policy.”), *aff’d*, 239 F.3d 1004 (9th Cir. 2001); *Hampton Inns, Inc.*, 1995 WL 762148, at *16 (striking portions of legal expert’s declaration and holding that “[i]ndividual lawyers may harbor different views of what they perceive to be the status of the law in this area, but as all counsel in this case can appreciate, it is the function of this Court – not retained legal experts – to discern the legal standard to be applied in this case.”); *Wahad v. FBI*, 179 F.R.D. 429, 435 (S.D.N.Y. 1998) (Court struck portions of lawyer’s affidavit

which were “fraught with improper legal conclusions, ultimate facts, conclusory statements, and inadmissible hearsay.”); *State Farm Fire & Casualty Co. v. Woods*, 925 F. Supp. 1174, 1179 (E.D. Tex. 1996) (disregarding defendant attorney’s legally conclusory affidavit); *Topp’s Chewing Gum, Inc. v. Imperial Toy Corp.*, 686 F. Supp. 402, 409 (E.D.N.Y. 1988) (“A word is in order about Ogden’s last-minute affidavit. It is for the Court alone to make the final decision as to whether or not the licensing agreement is enforceable. The Ogden affidavit is nothing more than an opinion containing the conclusions of law of an alleged attorney expert. The affidavit does not meet the requirements of Fed.R.Civ.P. 56(e) in that it is not made on personal knowledge and, in addition, it does not cover a proper area for expert testimony.”), *aff’d*, 895 F.2d 1410 (2d Cir. 1989).

II. The Declaration of Peter P. Swire Should Be Stricken Because It is Comprised Solely of Legal Conclusions and Rank Speculation That Are Not Based on Personal Knowledge.

The declaration of Peter P. Swire is comprised solely of legal conclusions, speculation of the highest order, and conclusory assertions and should therefore be stricken in its entirety.

In paragraph 1 of his declaration, Mr. Swire outlines his credentials, as a law professor and government official during the last year and 10 months of the Clinton administration. Despite Mr. Swire’s belief to the contrary, such credentials do not thereby render Mr. Swire capable of divining Congress’ intent in drafting § 512(h) of the Digital Millennium Copyright Act, as he purports to do throughout his declaration. Nor do Mr. Swire’s credentials allow him to make unsubstantiated or conclusory statements that amount to nothing more than blatant speculation.

Even if declarations as to the intent of Congress were proper, Mr. Swire’s declaration would hardly shed any light on that subject. He does not suggest that he participated in any way

in the drafting of the DMCA, which, as this Court has recognized, was the product of intense negotiation between copyright holders, ISPs and Congress. *See In re Verizon Internet Services, Inc. Subpoena Enforcement Matter*, CA 02-MS-0323, slip op. at 23 n.11 (D.D.C. Jan. 21, 2003) (hereinafter “Op.”). As his background indicates, Mr. Swire was not an employee of the Executive Branch at the time the DMCA was passed and has never been an employee of the Congress. Indeed, his unsupported conclusions are directly contrary to those of this Court as to the intent of Congress and contrary to the views of at least one member of Congress who participated in the crafting of the DMCA. *See* Att. D to RIAA’s Opposition to Verizon’s Motion for a Stay Pending Appeal (comments of Congressman Goodlatte).

In paragraph 2, Mr. Swire makes a series of assertions about what he believes Congress “wished” to do in enacting the DMCA and what would have been rational for Congress to do. These statements are no more than Mr. Swire’s own beliefs improperly imprinted on Congress as a whole. Failing actually being a member of Congress (or, more to the point, being *all* members of Congress), Mr. Swire cannot base his assertion on personal knowledge. Mr. Swire’s analysis of congressional intent should not displace this Court’s own determination as to Congress’ intent in enacting the DMCA and is no more reliable than any other lawyer’s opinion.

In paragraphs 3 and 4, Mr. Swire offers his legal analysis on First and Fourth Amendment constitutional protections, complete with citations to two Supreme Court cases. Swire Decl. ¶¶ 3, 4. These paragraphs are clearly nothing more than legal arguments and conclusions that are plainly inappropriate subjects for a declarant. *See, e.g., Carey v. Beans*, 500 F. Supp. 580, 583 (E.D. Pa. 1980) (“affidavits which contain conclusions of law, ultimate facts, assertions, arguments and inferences” are inappropriate and should be stricken), *aff’d*, 659 F.2d 1065 (3d Cir. 1981) (unpublished table decision). Indeed, as this Court is well aware, Verizon

did not bring a constitutional challenge to the DMCA, Op. at 30, nor would one have been successful. *See* Op. at 35 n.22 (noting heavy burden had Verizon elected to challenge the constitutionality of the DMCA).

In paragraph 5, Mr. Swire once again returns to his personal beliefs about Congress's intent in drafting the DMCA. Mr. Swire backs this contention "based on [his] own [less than 2 years] experience in government," failing to recognize that such experience does not entitle him to declare (under penalty of perjury) what Congress intended. As noted above, his tenure in government service did not begin until well after the negotiation and enactment of the DMCA.

Thereafter, in paragraphs 6-9, Mr. Swire speculates as to the scope and consequences of subpoenas permitted by the DMCA's § 512 (h), riding the coattails of the amicus briefs already filed with the Court. *Id.* ¶¶ 6-9. Citing only a law review article, Mr. Swire offers not a shred of factual data to support his sweeping assertions (which are completely irrelevant to the specific subpoena at hand), speculating only about what he thinks "could" happen, and essentially seeks to substitute his view of the world for the balance that Congress struck in enacting the DMCA.

In paragraphs 10-12, Mr. Swire returns to his view of what Congress wanted and what Congress intended, arguing, in conclusory fashion, that "Verizon's legal position" reflects the policy views of Congress. Once again, Mr. Swire has no possible basis for asserting such a conclusion under penalty of perjury. Moreover, such obvious self-serving legal conclusions are entirely improper material for a sworn declaration.

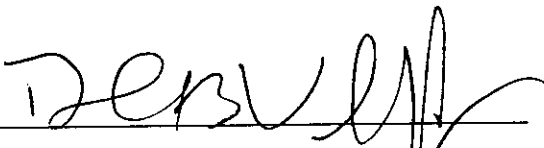
At bottom, Mr. Swire's declaration boils down to nothing more than a twelve-paragraph legal brief, largely derived from speculation – most if not all of which directly contradicts this Court's prior ruling. While his "sworn" statements may have a place in law review articles and policy debates, they have no place in a court of law and should not be relied upon by this Court

for any purpose.

CONCLUSION

For the foregoing reasons, this Court should grant RIAA's Motion to Strike the declaration of Peter P. Swire.

Respectfully submitted,

By: 

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Dated: February 7, 2003

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**PROPOSED ORDER GRANTING RIAA'S MOTION TO STRIKE
DECLARATION OF PETER P. SWIRE**

IT IS HEREBY ORDERED, that RIAA's Motion to Strike the Declaration of Peter P.

Swire is hereby GRANTED;

Dated Feb. _____, 2003

The Honorable Judge John Bates

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

Pursuant to Local Civil Rule of Procedure 7.1(k), listed below are the names and addresses of all attorneys entitled to be notified of the proposed order's entry.

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CERTIFICATE OF SERVICE

I certify that on Friday, February 7, 2003, I caused RIAA's Motion to Strike the Declaration of Peter P. Swire and Proposed Order to be delivered via U.S. Mail, along with courtesy copies via electronic transmission, to the following recipients:

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