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DIEBOLD, INCORPORATED, AND DIEBOLD
6 ELECTION SYSTEMS, INCORPORATED

7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA / SAN JOSE

10
11 **ONLINE POLICY GROUP, NELSON
CHU PAVLOSKY, and LUKE
12 THOMAS SMITH,**

13 **Plaintiffs,**

14 **v.**

15 **DIEBOLD, INCORPORATED, and
DIEBOLD ELECTION SYSTEMS,
16 INCORPORATED,**

17 **Defendants.**

Case No. 03-4913JF

**RESPONSE TO PLAINTIFFS' POST-
HEARING LETTER AND
SUPPLEMENTAL NG DECLARATION,
AND REQUEST FOR EARLY STATUS
CONFERENCE OR REFERENCE TO
18 MEDIATION**

Hearing Date: November 17, 2003
Time: 9:00 a.m.
Courtroom: 3

19
20 Defendants respectfully request leave of the Court to file this response to the November
21 17 letter by plaintiffs' counsel and the supplemental declaration of Mr. Ng enclosed therewith.
22 We also advise the Court that Diebold, having issued notifications in good faith compliance with
23 the DMCA, has decided not to take the additional step of suing for copyright infringement for the
24 materials at issue. Given the widespread availability of the stolen materials, Diebold has further
25 decided to withdraw its existing DMCA notifications and not to issue any further ones for those
26 materials. In light of these developments, we request that the Court hold an early status
27 conference to discuss resolution of the action, or refer the parties to mediation.
28

1 Diebold remains committed to helping America vote better, and to an open discussion of
2 ways to accomplish that goal. Diebold recognizes the value of the First Amendment to our
3 democracy, including the protection of copyright interests and robust debate on matters of public
4 interest. Diebold's foregoing decisions underscore these commitments.

5 **I. THE SUPPLEMENTAL NG DECLARATION DOES NOT ESTABLISH**
6 **IRREPARABLE INJURY.**

7 Plaintiffs' post-hearing submission attempts to create "irreparable harm" for plaintiff OPG
8 where none exists. As demonstrated by Mr. Ng's first declaration, Diebold's DMCA notification
9 to Hurricane had no material impact on Hurricane's relationship with OPG. Hurricane did not
10 take down OPG's website, or even threaten to do so. To the contrary, Hurricane represented that
11 it "would not take any action against OPG for its clients' links, pending this legal action." Ng
12 10/31/03 Decl., par. 18.

13 Like the first notification, Diebold's second notification requested Hurricane's assistance
14 in terminating infringing activity on the identified websites or "whatever steps you are required to
15 take pursuant to your" DMCA policy. It neither threatened legal action nor asserted that
16 Hurricane is liable for copyright infringement. And it is clear from Mr. Ng's supplemental
17 declaration that Hurricane still has not decided to comply with Diebold's request. He states only
18 that "if the court does [not] grant OPG's motion, or indeed, if the court does not rule
19 expeditiously," Hurricane "will have to seriously consider" terminating OPG's contract. Contrary
20 to the assertion in plaintiffs' post-hearing letter, Hurricane has not "conclude[d]" anything, except
21 that it "would not take any action against OPG for its clients' links, pending this legal action." In
22 short, Hurricane has not caused any injury to OPG. The material stolen from Diebold remains
23 linked to websites hosted by OPG.

24 **II. DIEBOLD'S DECISION NOT TO SUE FOR INFRINGEMENT**
25 **UNDERScores THE LACK OF IRREPARABLE INJURY TO THEM.**

26 As a threshold technical matter, Diebold's DMCA notification to Swarthmore College did
27 not refer to the student plaintiffs' website. *See* Opposition to Motion for Preliminary Injunction,
28 p. 4 n. 4. Thus, plaintiffs' implication that Swarthmore was required by Diebold's notification

1 to take down the infringing material from plaintiffs' website is erroneous. To the contrary,
2 Swarthmore's action was evidently based on the evaluation of its legal counsel that the students'
3 wholesale publication of stolen material was contrary to Swarthmore's policy on Internet use.
4 *Id.*, p. 3.

5 In any event, the students have now availed themselves of the DMCA's counter-
6 notification procedure and, in light of Diebold's decision not to sue for infringement, the
7 students have no basis for complaint. Under well-established copyright law, the wholesale
8 publication of stolen material with no transforming analysis was not "fair use," and issuing
9 DMCA notifications was entirely proper. At this point, however, attempting to take further
10 steps to enforce copyright interests when infringing material has proliferated across the Internet
11 would not only be cost-prohibitive but in all likelihood futile. Diebold has informally
12 encouraged the students to refrain from publishing passwords, source codes, information
13 protected by employees' privacy interests and trade secret-type information, none of which is
14 essential for purposes of criticism.

15 **III. AN EARLY STATUS CONFERENCE OR MEDIATION MAY RESOLVE**
16 **THIS ACTION.**


17 In these circumstances, there is no reason for this action to proceed. If, however, plaintiffs
18 or their counsel are intent on turning this action into a "test case" despite the absence of any
19 present controversy that harms plaintiffs, an early status conference or mediation may be the best
20 way to resolve this action in keeping with Rule 1 of the Federal Rules of Civil Procedure. As
21 noted in Diebold's opposition papers, Count I (contract interference) is fatally flawed because no
22 contract or breach thereof is alleged, and because a copyright owner is justified in giving notice of
23 infringement. Count II (copyright misuse) is non-existent. Count III (section 512(f)
24 misrepresentation) is meritless, *inter alia*, because the challenged notification did not identify the
25 students' website, because Diebold had a good faith belief that wholesale posting or linking to
26 stolen material protected by copyright constitutes infringement, and because employing the
27 DMCA notification procedures without taking the subsequent step of suing for infringement is
28 not bad faith. Count IV (declaratory relief) is either premature given the lack of injury to

1 plaintiffs, moot in light of Diebold's decision not to sue, or wrong on the merits for the reason
2 just stated.

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Dated: November 24, 2003

JONES DAY

By: 
Robert A. Mittelstaedt

Attorneys for Defendant
DIEBOLD, INCORPORATED, AND
DIEBOLD ELECTION SYSTEMS,
INCORPORATED

1 **PROOF OF SERVICE**

2
3 I, Yumi Bennett, declare:

4 I am a citizen of the United States and employed in San Francisco County, California. I
5 am over the age of eighteen years and not a party to the within-entitled action. My business
6 address is 555 California Street, 26th Floor, San Francisco, California 94104. On November 24,
7 2003, I served a copy of the within document(s):

8
9 **1. RESPONSE TO PLAINTIFFS' POST-HEARING LETTER AND
10 SUPPLEMENTAL NG DECLARATION, AND REQUEST FOR
11 EARLY STATUS CONFERENCE OR REFERENCE TO
12 MEDIATION**

- 13 by transmitting via facsimile the document(s) listed above to the fax number(s) set
14 forth below on this date before 5:00 p.m.
- 15 by placing the document(s) listed above in a sealed envelope with postage thereon
16 fully prepaid, in the United States mail at San Francisco, California addressed as
17 set forth below.
- 18 by placing the document(s) listed above in a sealed FEDERAL EXPRESS
19 envelope and affixing a pre-paid air bill, and causing the envelope to be delivered
20 to a FEDERAL EXPRESS agent for delivery.
- 21 by personally delivering the document(s) listed above to the person(s) at the
22 address(es) set forth below.

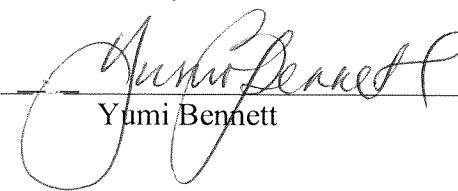
23
24 Jennifer Stisa Granick, Esq.
25 STANFORD LAW SCHOOL
26 CENTER FOR INTERNET &
27 SOCIETY
28 559 Nathan Abbott Way
Stanford, CA 94305-8610
Phone: (650)724-0014
Fax: (650)723-4426

29 I am readily familiar with the firm's practice of collection and processing correspondence
30 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
31 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
32 motion of the party served, service is presumed invalid if postal cancellation date or postage
33 meter date is more than one day after date of deposit for mailing in affidavit.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 24, 2003, at San Francisco, California.



Yumi Bennett