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NELSON CHU PAVLOSKY and LUKE
11 THOMAS SMITH

12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 ONLINE POLICY GROUP, NELSON CHU No.
PAVLOSKY, and LUKE THOMAS SMITH,)
16)
Plaintiffs,) **DECLARATION OF NELSON CHU**
17) **PAVLOSKY IN SUPPORT OF**
v.) **PLAINTIFF'S APPLICATION FOR**
18) **TEMPORARY RESTRAINING ORDER**
DIEBOLD, INCORPORATED, and) **AND FOR PRELIMINARY INJUNCTION**
19 DIEBOLD ELECTION SYSTEMS,
INCORPORATED,)
20)
Defendants.
21)

22 _____)
23
24 I, Nelson Chu Pavlosky, declare under penalty of perjury that the following is true and
25 correct:

26 I am a plaintiff in the above-captioned case am a sophomore at Swarthmore
27 College am nineteen years old. My address is 500 College Avenue, Swarthmore, Pennsylvania
28

1 19081. I have not yet declared a major.

2 2. I am one of two founding members of the Swarthmore Coalition for the Digital
3 Commons (hereinafter "SCDC"), a student organization. My friend Luke Smith and I conceived
4 the idea for the SCDC in the summer of 2003. The first official meeting of the SCDC was
5 September 14, 2003. The SCDC is not currently chartered with Swarthmore, although I plan on
6 submitting a charter application for the SCDC as soon as Swarthmore's student government begins
7 accepting a new round of charter applications. The SCDC is not currently funded, but a charter
8 would bring funding.

9 3. On October 21, 2003, our organization posted on our web page e-mail archives that
10 appeared to be from Diebold employees discussing problems with the company's electronic voting
11 machine. One day later, the college administration told us that they had received a letter from
12 Diebold claiming that we were infringing their copyright by posting these e-mail archives and the
13 school disabled internet access to the e-mail archives on October 22, 2003.

14 4. The SCDC is dedicated to promoting a bottom-up, participatory structure for society
15 and culture characterized by the free and open exchange of information. The group was inspired
16 by the Electronic Frontier Foundation, Laurence Lessig, Creative Commons, and the Free Software
17 Foundation. The SCDC is also dedicated to finding a balance between the growth of new
18 technologies and the interests of creators and consumers. The SCDC chooses projects from this
19 general interest area for student members to research and discuss.

20 5. The SCDC operates a website on the Swarthmore network, at
21 <<http://scdc.sccs.swartmore.edu>>, that describes the organization's goals and mission, notifies
22 members and interested students of upcoming meetings, and publishes articles and facts relating to
23 the free and open exchange of information. The SCDC site also provides links to resources,
24 including newspaper articles and other websites. SCDC student members, including myself, post
25 information and add links to this website. Swarthmore provides Internet connectivity to students as
26 a service included in Swarthmore's \$36,000 a year tuition fee.

27 6. As a first-time voter, I am particularly interested in open standards in voting and
28 discussed SCDC studying the issue of voting transparency as early as the first SCDC meeting. I

was interested in exploring a non-proprietary or open-source voting system as an alternative to voting technologies developed by private companies with proprietary interests. I worry that election results may depend on voting technologies developed in secret. I believe that the only way the public can know if voting software works the way it should is if they can see its source code. Otherwise, the future of our nation depends on a business's representation that their product is accurate enough to use as a voting system

7. I first heard about the Diebold employee e-mail archives from friends in another Swarthmore student organization, Why-War? The Why-War? website contained links to the Diebold e-mail archives. I immediately recognized the significance of these e-mail archives to the SCDC's mission. The e-mail archives exposed flaws in Diebold voting machines that could affect the outcome of elections. I felt that making the e-mail archives available was a unique opportunity for the SCDC to inform people about how closed electronic voting could hurt the democratic process by possibly producing false election results. I thought the e-mail archives would help people evaluate a system by which many will exercise one of their most fundamental rights--the right to vote. The following excerpts from the e-mail archives illustrate my concern:

"Elections are not rocket science. Why is it so hard to get things right! I have never been at any other company that has been so miss [sic] managed."
[source: <http://chroot.net/s/lists/announce.w3archive/200110/msg00002.html>]

"I need some answers! Our department is being audited by the County. I have been waiting for someone to give me an explanation as to why Precinct 216 gave Al Gore a minus 16022 when it was uploaded. Will someone please explain this so that I have the information to give the auditor instead of standing here "looking dumb.""
[source:<http://chroot.net/s/lists/support.w3archive/200101/msg00068.html>]

8. In early October, I learned that Diebold had asked Why-War's off-campus internet service provider to disable access to the Diebold e-mail archives. In response, members of Why-War? and other interested Swarthmore students began hosting the e-mail archives on their personal sites. However, bandwidth issues made hosting on personal sites impracticable. The SCDC decided to preserve public access to these e-mail archives by hosting the e-mail archives on its website on the Swarthmore College Computing Society server. SCDC put up the e-mail archives

1 on Tuesday the 21st of October.

2 9. The next day, Wednesday the 22nd of October, Swarthmore Dean Robert Gross
3 called Why-War? and the SCDC and asked us to have a meeting with him that afternoon. He said
4 that he had been in contact with Swarthmore's legal counsel about a letter he had received from
5 Diebold asking Swarthmore to disable access to the e-mail archives hosted on its network. A copy
6 of that letter is attached at Exhibit A. At the meeting, Dean Gross listened to other students' and
7 my thoughts on the merits of Diebold's demands and on whether or not Swarthmore should comply
8 with those demands. Dean Gross did not explicitly state what action Swarthmore would take in
9 response to the Diebold letter.

10 10 I received an email from a Swarthmore systems administrator at 6:12 pm that
1 evening informing me that Swarthmore ITS had told the Swarthmore College Computing Society
12 ("Computing Society") to remove the e-mail archives hosted on SCDC's site. The Computing
13 Society removed the Diebold e-mail archives from the SCDC site at approximately 6:30 pm on
14 Wednesday the 22nd. The e-mail archives were up on the SCDC site for approximately one day.

15 11 At this point, I knew Swarthmore had resolved to take website posts of the e-mail
16 archives off of Swarthmore's servers. However, I did not know the policy on linking from a
17 Swarthmore website to another website that hosted the e-mail archives. Co-plaintiff Luke Thomas
18 Smith added a link from the SCDC website to Why-War?'s website, which hosted the memos.
19 The following day, Thursday October 23rd, Why-War? member Micah White sent me an e-mail
20 informing me that it was now against Swarthmore's policy to link from a Swarthmore website to an
21 outside website that hosted the e-mail archives. After reading the e-mail, I promptly removed the
22 link from SCDC's website.

23 12 I am not currently hosting or linking to the e-mail archives on the SCDC site or on
24 any personal website.

25 13 Diebold's actions have negatively affected my academic research and plans to
26 educate myself and the public about the state of the voting process in our country. When the
27 SCDC first acquired the e-mail archives, we intended to start a project to read and study the e-mail
28 archives, in the same way other colleges have studied the "Tobacco Papers" which revealed

questionable practices of the tobacco industry. However, upon discovering that the SCDC could not post the e-mail archives on the web due to Diebold's claims of "copyright infringement", we realized that doing this research would be difficult if not impossible. I feared that Diebold would accuse us of "copyright infringement" if we copied the e-mail archives onto CD. I also feared that sharing the e-mail archives with other students could be construed as "copyright infringement," that printing out the e-mail archives could be considered "copyright infringement," that indeed any dissemination of this information could put us at risk of a lawsuit from Diebold. Working on research with other people is impossible under these conditions. I now fear that we cannot discuss some of the most relevant issues in voting technology because Diebold's threats force us to suppress the e-mail archives that reveal the flaws in these voting systems. An upcoming symposium on voting transparency that the SCDC is organizing could have benefited from such research; we may be able to hold a successful conference without researching the e-mail archives, but we may now never know what impact knowledge of the e-mail archives could have had.

14. Diebold's actions have also affected my experience as a Swarthmore student. For me, Swarthmore is no longer the environment of academic freedom it once was. I am afraid to discuss the Diebold e-mail archives with friends and with other students. I fear that Diebold will come after me if I engage in discussion about the problems with voting technology revealed in the e-mail archives. It frightens me that my college didn't have the courage to stand up for my fellow students and me. I have a feeling of abandonment and vulnerability because I face a massive and unknown danger whenever I speak. I also believe the imposed silence runs afoul of Swarthmore's own tradition of responsibility and participation.

15. If SCDC posts e-mail archives or links to the Diebold e-mail archives from its website, the school administration may force the Swarthmore College Computing Society to take the SCDC website off of the Computing Society's webserver. This would seriously hamper communication between members about meetings and events, and remove access to any resources that the SCDC publishes, such as tutorials for using Linux. The group might not be able to get chartered if it cannot function as an organization through its website. The SCDC's future would also be threatened by a lack of internet exposure.

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16. I am very concerned about the chilling effects of not being able to host the Diebold e-mail archives. Diebold's actions have stifled my efforts to use the SCDC as a tool for learning and debate. My group, the SCDC, cannot fully dedicate itself to elevating our knowledge and the public's knowledge about issues that affect our ability to participate in our government and in our society in general. I fear that the resulting lack of transparency in the voting process will mean flawed election results and will decrease voter confidence and participation.

I declare under penalty of perjury under the laws of the State of Pennsylvania that the foregoing is true and correct and that this declaration was executed in Swarthmore, Pennsylvania

Date: 2003-11-02


NELSON CHU PAVLOSKY

~~-6-~~
DECLARATION OF NELSON CHU PAVLOSKY IN SUPPORT OF
PLAINTIFFS' APP FOR TRO AND FOR PRELIM INJUNCTION

Ralph E. Jocke
Patent
&
Trademark Law

October 9, 2003

Judy Downing
Director of Information Technology Services
Swarthmore College
Beardsley Hall
500 College Avenue
Swarthmore, PA 19081

downing@swarthmore.edu

Re: Copyright Infringement

Dear Ms. Downing:

We represent Diebold, Incorporated and its wholly owned subsidiaries Diebold Election Systems, Inc., and Diebold Election Systems ULC (collectively "Diebold").

Diebold is the owner of copyrights in certain correspondence and other material relating to its electronic voting machines that were stolen from a Diebold computer ("Diebold Property").

It has recently come to our clients' attention that you appear to be hosting a web site that contains Diebold Property. The web site you are hosting infringes Diebold's copyrights because the Diebold Property was placed on this web site without Diebold's consent.

The web site and Diebold Property are identified in a chart attached to this letter.

The purpose of this letter is to advise you of our clients' rights and to seek your agreement to the following: (1) to remove and destroy the Diebold Property contained at the web site identified in the attached chart and (2) to destroy any backup copies of the Diebold Property in your possession or under your control.

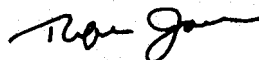
Please confirm, in writing, that you have complied with the above requests.

To the best of my knowledge and belief the information contained in this notification is accurate as of the time of compilation and, under penalty of perjury, I certify that I am authorized to act on behalf of Diebold.

Our clients reserve their position insofar as costs and damages caused by infringing activity with respect to the Diebold Property. Our clients also reserve their right to seek injunctive relief to prevent further unauthorized use of Diebold Property, including reproduction, distribution, public display, or the creation of derivative works, pending your response to this letter. We suggest you contact your legal advisors to obtain legal advice as to your position.

We await your response within 24 hours.

Very truly yours,



Ralph E. Jocke

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INFRINGING MATERIALS POSTED ON <http://d176.whartonab.swarthmore.edu/>

<p>http://why-war.com/resources/files/diebold_internalmemos.pdf http://d176.whartonab.swarthmore.edu/diebold_internalmemos.pdf</p>	<p>This site consists of Diebold Property, stolen from Diebold and posted at this web site without the consent of Diebold.</p>
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