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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ONLINE POLICY GROUP, NELSON CHU PAVLOSKY, and LUKE THOMAS SMITH, Plaintiffs, v. DIEBOLD, INCORPORATED, and DIEBOLD ELECTION SYSTEMS, INCORPORATED, Defendants.	No. _____ **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION**

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Plaintiffs Online Policy Group ("OPG"), Nelson Chu Pavlosky, and Luke Thomas Smith submit this memorandum of points and authorities in support of their application, pursuant to Fed. R. Civ. P. 65, for a Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction restraining Defendants Diebold Election Systems, Inc. and Diebold, Incorporated (collectively, "Diebold") from issuing further unfounded legal threats to discourage or block publication of certain information critical of the company's electronic voting machine product.

I. INTRODUCTION

This case arises out of an unvarnished attempt by a large corporation to stifle public criticism of its product through a claim of copyright infringement. It is made more egregious by the fact that the product at issue is fundamental to our democracy – voting machines.

Defendant Diebold makes electronic voting machines. Its machines are currently being purchased and used by election officials across the nation, including in Alameda County. Yet as election officials race to purchase these machines, a growing public chorus of concern has arisen, led by computer security specialists, that these machines are not sufficiently secure for something so important as our electoral process. This discussion is taking place in the mainstream media,[1] at public forums,[2] and, most relevant to this case, on the Internet.

The facts are as follows: As part of ongoing public discussions about the electronic voting process, certain individuals not a party to this action discovered an electronic e-mail archive containing day-to-day discussions among Diebold employees about the company's electronic voting machines ("e-mail archive"). This e-mail archive includes many individual e-mails and discussion threads that collectively educate the public about problems with the Diebold electronic

[1] *See, e.g.,* John Schwartz, *Computer Voting Is Open to Easy Fraud, Experts Say*, N.Y. TIMES, July 24, 2003 at A16; Nelson Hernandez & Lori Montgomery, *Md. Democrats Want Outside Voting Machine Audit*, WASH. POST, October 21, 2003, B01; Rachel Konrad (Associated Press), *Diebold issues threats to publishers of leaked documents*, SAN JOSE MERCURY NEWS, October 28, 2003; Steven Levy, *Black Box Voting Blues*, NEWSWEEK, October 2003; AP, *Worries grow over new voting machines' reliability, security*, CNN.COM, October 30, 2003 (Exhs. C-F, I to Seltzer Decl.)

[2] For instance, on October 30, 2003, Congressman Rush Holt quoted documents from the e-mail archive at issue here in his radio interview with Amy Goodman on Democracy Now concerning critical flaws in Diebold's electronic voting machines. *See* "Can Democracy in America Survive Electronic Voting?" archive online at <http://www.democracynow.org/article.pl?sid=03/10/30/1624227>.

voting machines. Among the messages are internal discussions about security problems and ways to solve, or in some cases, obfuscate those problems. For instance, in response to a question about preparing for a product demonstration in El Paso County, Colorado, a Diebold agent responded:

> For a demonstration I suggest you fake it. Progam [sic] them both so they look the same, and then just do the upload fro [sic] the AV. That is what we did in the last AT/AV demo.

(Seltzer Decl., Exh. B); *see also* Smith Decl., ¶8; Pavlosky Decl., ¶7.

After the initial dissemination of the e-mail archive by unknown third parties, many other web users engaged in this debate posted and linked to copies of the e-mail archive on the Internet. Plaintiffs Pavlosky and Smith, founding members of the Swarthmore Coalition for the Digital Commons ("SCDC"), posted copies of the e-mail archive on the SCDC website. Pavlosky Decl., ¶ 8; Smith Decl., ¶ 11. Others, including San Francisco IndyMedia, the San Francisco branch of the international independent media collective, linked to the e-mail archive in the course of their coverage of the electronic voting controversy. Plaintiff Online Policy Group ("OPG") provides Internet connectivity to SF IndyMedia. Weekly Decl., ¶ 8. Plaintiffs thus stand in varying relations to the posting of the e-mail archive but share an interest in publishing or supporting publication of the e-mail archive. All have had their ability to publish or link to these critical documents prevented or threatened by Defendants.

Diebold's response has not been to counter the concerns and criticisms raised in these discussions, but instead to invoke copyright law to squelch them. Using provisions of the Digital Millennium Copyright Act ("DMCA"), Diebold has sent a flurry of takedown demands:

1. To the Internet service providers ("ISPs") of those posting the e-mail archive, *see* the threat to Swarthmore regarding the SCDC website, Pavlosky Decl., ¶ 9, Exh. A; Smith Decl., ¶ 6;
2. To the ISPs of those hyperlinking to the archive, *see* the threat to OPG for hosting IndyMedia's linking site. Weekly Decl., ¶ 9, Exh. B;
3. And, most egregious, to the upstream provider for the ISP that merely provided Internet access to an entity that linked to the information, *see* the threat to Hurricane Electric for OPG's hosting of Indymedia's links. Weekly Decl., ¶ 14; Ng Decl., ¶ 8,

Exh. A.

The threats to the Plaintiffs here were just a few of the many issued by Diebold. *See* Seltzer Decl., Exh. J. In each of these demands, and others across the country, Diebold asserted to ISPs that their users' posting or linking infringed Diebold copyrights and that the ISPs receiving the threats risked liability if they did not remove the posts or disable the links. Moreover, in the case of OPG and Hurricane Electric, since neither had the technical ability to disable only certain links from the IndyMedia website, the threats essentially demanded termination of access to the Internet.

These threats have been effective. For Plaintiffs Pavlosky and Smith, the threats have resulted in the removal of material from their website by their ISP, Swarthmore College, and an edict from the College forbidding students even to link from sites on the campus network to the discussion site Why-War.com that links to the e-mail archive. Pavlosky Decl., ¶¶ 10-12; Smith Decl., ¶ 12. For OPG the threats have resulted in disruption of its relationship with its upstream provider, Hurricane Electric, including a reasonable apprehension that OPG will face termination of its Internet access if Hurricane receives further threats from Diebold regarding OPG's hosting of websites that link to or publish the e-mail archive. Ng Decl., ¶ 21; Weekly Decl., ¶ 19.

Copyright law does not countenance such abuse. The postings are a protected fair use of thinly copyrighted material and they are important contributions to a deeply political debate. Even assuming the postings were infringing, copyright liability does not extend to ISPs that merely host websites with links to infringing material. Yet through the DMCA, Diebold continues to bully Internet service providers into terminating user connections and limiting users' freedom to participate in this debate. If Diebold is not immediately enjoined from making such unfounded threats, it will continue to cause service providers to censor the speech of their users or face the loss of their own upstream connectivity.

II. ARGUMENT

A preliminary injunction will be granted upon a showing of either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) serious questions regarding the merits and that the balance of hardships tips sharply in favor of the moving party. *Sony Computer Entertainment, Inc. v. Connectix Corp.,* 203 F.3d 596, 602 (9th Cir. 2000);

Cadence Design Systems, Inc., v. Avant! Corp., 125 F.3d 824, 928 (9th Cir. 1997).

A. Plaintiffs have Demonstrated Serious Questions on the Merits.

Plaintiffs claim intentional interference with contractual relations, misrepresentation of infringement under 17 U.S.C. § 512(f), and copyright misuse. Finding a basis for a preliminary injunction under any one of these theories will support the issuance of a temporary restraining order and preliminary injunction.

Diebold is engaged in an intentional, ongoing effort to use unfounded legal claims to block dissemination of and commentary on embarrassing disclosures in its e-mail archive. To that end, it has threatened and continues to threaten the contractual relations by which its critics get Internet access. These actions not only trigger liability under the DMCA's own statutory protection against misrepresentations, they stretch the thin copyright Diebold might have in the e-mail archive past the breaking point and therefore warrant holding that copyright unenforceable. Plaintiffs, as well as all others similarly situated, are entitled to immediate injunctive relief to allow them to continue their respective provision of links or access to lawful, non-infringing, newsworthy material.

1. Posting of the E-Mail Archive Is Protected Fair Use.

The Copyright Act provides, "the fair use of a copyrighted work … for purposes such as criticism, comment, news reporting,… or research, is not an infringement of copyright." 17 U.S.C. § 107. The fair use defense affords considerable "latitude for scholarship and comment," *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985). Fair use serves as a critical First Amendment safeguard to copyright law. *Eldred v. Ashcroft*, 537 U.S.186, 219 (2003). OPG subscriber IndyMedia is a news organization whose links to the e-mail archive give background to its ongoing discussion of the e-voting controversy. Weekly Decl., ¶ 8. IndyMedia linked to the e-mail archive as part of news reports on the risks of election tampering or erroneous election results that may arise from use of Diebold's voting machines. SCDC is a student-run public interest group that posted the e-mail archive to educate web visitors, including students, about the mechanisms by which many would exercise their fundamental right to vote. Pavlosky Decl., ¶ 7. The student plaintiffs wanted to let readers evaluate for themselves the security of these e-voting systems. Smith Decl., ¶ 9.

The First Amendment plainly protects speech about this very essence of our democracy – the right to a free and fair election. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Even if Diebold has an enforceable copyright in the archive, the posting serves the public interest and should be deemed fair and non-infringing on all four factors of the Section 107 analysis.

(a) The Purpose and Character of Defendants' Uses: Non-Commercial Criticism.

The first of the Section 107 factors concerns the character of the use, including whether the use is for commercial or non-profit purposes. *See e.g., Meeropol v. Nizer*, 560 F.3d 1061, 1069 (2d Cir. 1977) ("[I]t is relevant whether or not the Rosenberg letters were used primarily for scholarly, historical reasons, or predominantly for commercial exploitation."). Plaintiffs' use falls squarely on the non-commercial side of the line. Both IndyMedia and SCDC are non-profit, non-commercial associations who derived no economic advantage from the posting; OPG, IndyMedia's host, is non-profit and charges nothing for its hosting services. Weekly Decl., ¶¶ 2, 4.

The first factor also inquires into the "transformative" character of the use. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Posting of the e-mail archive in the context of discussion about democracy and the mechanics of elections is transformative in that it uses the day-to-day discussions as documentation, otherwise unavailable to the public, of the e-voting systems.

(b) The Nature of the Copyrighted Work: Predominantly Factual.

"The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row Publishers, Inc. v. The Nation Enterprises*, 471 U.S. at 563. Accordingly, the scope of fair use is greater when "informational" as opposed to more "creative" works are involved. *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983). *See also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 at n.40 (1984) ("Copying a news broadcast may have a stronger claim to fair use than copying a motion picture.") Facts themselves are wholly outside of copyright protection. *Feist Publications Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340 (1991).

The e-mail archive is a collection of questions to and answers from Diebold support staff, feature requests, bug reports, and update notes, one-line headers with attachments, and forwards of copyrighted news articles from outside sources. *See* Seltzer Decl., Exh. B. Very little of the archive is expressive or creative in nature. None of it appears to have been created based on the promise of copyright protection. "Works that are creative in nature are 'closer to the core of intended copyright protection' than are more fact-based works." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (*quoting Campbell*, 510 U.S. at 586). These archives are far from that core.

(c) The Amount and Substantiality of the Portion Used: No More Than Necessary.

The third factor asks whether "'the amount and substantiality of the portion used in relation to the copyrighted work as a whole,' § 107(3) … are reasonable in relation to the purpose of the copying." *Campbell,* 510 U.S. at 586. As the Supreme Court noted in *Campbell,* "[w]e recognize that the extent of permissible copying varies with the purpose and character of the use." *Id*. (citing *Sony*, 464 U.S. at 449-450 (reproduction of entire work "does not have its ordinary effect of militating against a finding of fair use" as to home videotaping of television programs) and citing *Harper & Row*, 471 U.S. at 564 ("[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir).

Here, plaintiffs have copied and/or linked to a portion of Diebold's vast e-mail archive, which should be considered in relationship to the body of Diebold's e-mail correspondence to determine whether to analyze it as an "entire work." Since a Diebold spokesperson has asserted that the documents quoted are being taken out of context or deliberately corrupted, the context of the entire email archive is needed to rebut that assertion.[3]

Further, even should the e-mail archive be construed as constituting the entirety of Diebold's work, this by itself cannot support Diebold's claim of infringement. As noted above, the

[3] *See* Kristin Smith, *Swarthmore students refuse to comply with Diebold Co.*, DELAWARE COUNTY DAILY TIMES, October 24, 2003 at 7, Seltzer Decl., Exh. G.

Supreme Court decision in *Sony*, 464 U.S. 417, stands for the proposition that copying an entire work does not necessarily preclude fair use. Given the critical and transformative use of the material here, Plaintiffs have taken no more than necessary to support their claim that Diebold's electronic voting machines may be insecure and subject to manipulation.

(d) Effect Upon Potential Market: None.

The last element in a fair use analysis is the impact of the use on the "potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). This factor considers "'whether unrestricted and widespread conduct of the sort engaged in by the defendant … would result in a substantially adverse impact on the potential market' for the original." *Campbell,* 510 U.S. at 590 (citing M. Nimmer, D. Nimmer, *Nimmer on Copyright* § 13.05[A][4], p. 13-102.61). "This last factor is undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. *See Sony*, 464 U.S. at 450 ("[A] use that has no demonstrable effect upon the market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create.").

While courts have been creative in finding "markets" for works and licensing of works, there is no plausible argument that any market exists for Diebold's internal e-mail archives. Diebold may argue that the market for its e-voting systems is harmed, but that is outside the scope of this test. As in cases involving effective parody, *critical* use of copyrighted material that diminishes the market value of the original does not satisfy this fourth fair use element. *See e.g., Campbell,* 510 U.S. at 591-92 ("We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,' B. Kaplan, *An Unhurried View of Copyright* 69 (1967), the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.' *Fisher v. Dees*, 794 F. 2d 432, 438 [(9th Cir.. 1986)]."). Thus, there is no argument for copyright damages based upon the fear that publication of the e-mail archive might lead some to conclude that Diebold's product is inferior.

(e) Secondary and Linking Liability.

Finally, if the posting of the e-mail archive is fair use, the linking to and hosting of those postings is plainly non-infringing as well. Secondary liability for copyright infringement cannot exist absent direct infringement by a third party. *A&M Records, Inc.*, 239 F.3d at 1013 n.2 (*citing Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F.Supp. 1361, 1371 (N.D.Cal. 1995)).

2. Fair Use Notwithstanding, Linkers and Their Hosts Are Not Liable.

Even if the Court withholds decision whether the underlying posting of the e-mail archive is fair use, OPG, as host of a site that merely linked to that posting is still entitled to emergency relief. Defendants' claim against OPG – for tertiary liability – is far removed from the underlying claimed infringement: OPG provides co-location space and connectivity to SF IndyMedia, which in turn provided only a hyperlink to the allegedly infringing documents. The claim against Hurricane, OPG's host, is still further attenuated. Providing a mere location pointer to a newsworthy document neither infringes copyright nor materially contributes to infringement. "[H]yperlinking does not itself involve a violation of the Copyright Act … since no copying is involved." *Ticketmaster v. Tickets.com*, 54 U.S.P.Q.2d 1344, 2000 WL 525390 at *2 (C.D. Cal. 2000). At most, the hyperlink is a textual pointer indicating to web readers where to find a copy. The link is not a conduit.[4]

3. Defendant Has Intentionally Interfered with Plaintiffs' Contracts.

Plaintiff OPG has a contractual relationship with Hurricane Electric for its Internet connectivity. That relationship, and OPG's benefits from it, are currently disrupted by Defendants' unfounded copyright threats against Hurricane for the hosting or linking activities of downstream customers. OPG need not wait until its relationship is forcibly terminated, but is entitled to have the interfering conduct enjoined now to protect OPG's and its clients' Internet connectivity. Likewise, Pavlosky and Smith's relationship with their ISP, Swarthmore College, is currently disrupted by the limitations Swarthmore has imposed on its students' posting and linking.

[4] The single case to impose contributory infringement liability for linking involved a defendant who had first posted infringing copies of a work on his own website, then, during the litigation, substituted hyperlinks to unauthorized copies elsewhere in an effort to evade liability. *Intellectual Reserve v. Utah Lighthouse Ministry*, 75 F.Supp.2d 1290 (D.Utah,1999). This is not such a case.

The elements of a cause of action for intentional interference with contractual relations are "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, 960 P.2d 513, 530 (Cal. 1998) (*quoting Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587, 589 (Cal. 1990)). "Wrongfulness independent of the inducement to breach the contract is not an element of the tort of intentional interference with *existing* contractual relations." *Quelimane Co., Inc.*, 960 P.2d at 530.

OPG has a contract with Hurricane Electric for the provision of Internet connectivity and services, which has been in effect since June 2002. That contract, attached as Exhibit A to the Declaration of David Weekly, is valid and subsisting. Ng. Decl., ¶ 3; Weekly Decl., ¶ 7. Pavlosky and Smith have valid contractual arrangements with Swarthmore College for their internet connectivity. Pavlosky Decl., ¶ 5, and Smith Decl., ¶ 4.

Defendant admits knowledge of the OPG-Hurricane contract in its e-mail to Hurricane, which expressly notes that OPG is Hurricane's subscriber, requesting that Hurricane "act in accordance with your 17 U.S.C. 512(i)(1)(A) policy that 'provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's network who are repeat infringers.'" Ng Decl., Exh. A. The same is true for Swarthmore College and its students Pavlosky and Smith.

Defendant's demand that Hurricane "assist in removing the identified infringing material" from OPG's account or act to terminate OPG as a subscriber or account holder was intended to disrupt that contractual relationship.[5] Ng Decl., Exh. A. The same is true for Diebold's demands of Swarthmore. Pavlosky Decl., Exh. A. Diebold may argue that its primary intent was elsewhere, but that is irrelevant. "[T]he tort of intentional interference with performance of a contract does not

[5] See also the letter from Diebold to OPG, attached to the Diebold-Hurricane letter: "The purpose of this letter is to advise you of our clients' rights and to seek your agreement to the following: To disable or remove the information location tool(s) identified in the attached chart. In addition to disabling or removing any hyperlink, the disabling or removal should include destroying the usefulness as an information location tool of any textual directory or pointer information contained therein." Ng Decl., Exh. A.

require that the actor's primary purpose be disruption of the contract." *Quelimane Co., Inc.*, 960 P.2d at 531. Intentional interference may be found even where "the actor does not act for the purpose of interfering with the contract or desire it, but knows that the interference is certain or substantially certain to occur as a result of his action." *Id.* Because Defendant did not intend that its letters should be ignored, but rather that Hurricane and Swarthmore would share them with their respective customers and students and preferably act upon them to disrupt or terminate those users' Internet service, it acted with the requisite intent.

The interference tort does not require that the contract be breached; disruption is sufficient. The limitations placed on OPG's and the Swarthmore students' service – that it not post or allow its users to post the Diebold e-mail archives – is significant disruption, especially since OPG is an Internet service provider whose mission is to support freedom of speech online and equal access to the Internet. Ng. Decl., ¶¶ 19-20; Weekly Decl., ¶¶ 15, 19; Pavlosky Decl., ¶¶ 13-15; Smith Decl., ¶¶ 13-16, 18. Moreover, it is "clear that it is the contractual relationship, not any term of the contract, which is protected against outside interference." *Pacific Gas & Elec.*, 791 P.2d at 590. Even were it within the rights of Hurricane or Swarthmore to impose "acceptable use" policies on the activities of their respective customers and students, it is not within Diebold's rights to impose its own version of those policies on OPG or Pavlosky and Smith through pressure on their ISPs. Likewise, if Hurricane were to terminate the contract because it received a subsequent notice, that termination would be actionable against Diebold even if within Hurricane's rights.

OPG, Pavlosky, and Smith have already been damaged by the limitations on their conduct; they are entitled to an injunction before they are harmed further. OPG need not wait until its Internet access has been terminated and approximately 1000 websites have been cut off from the World-Wide Web, to file suit. *See Pacific Gas & Elec.*, 791 P.2d at 593 n.9, "Injunctive relief is available to restrain unjustified interference with contractual relations when damages would not afford an adequate remedy." Since OPG and SCDC undertake none of their activities for money, money damages plainly could not compensate them, OPG's 77,700 individual users, or SCDC's student members for the loss of connectivity.

Finally, unfounded cease and desist demands are not legally privileged, as the 10th Circuit

held *en banc* in a case with strong analogies to this one. *Cardtoons, L.C. v. Major League Baseball Players Association*, 208 F.3d 885 (10th Cir, 2000) (*en banc*). That court allowed the tortious interference claim of the producer of parody baseball cards whose print run was disrupted by a cease-and-desist letter from the Players Association to the printer claiming violation of the players' "property rights." *Id.* Here, as in *Cardtoons*, Diebold asserted rights it knew it did not have. *See also Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 797 F.2d 70, 77-78 (2d Cir. 1986) (upholding punitive damages for coercive assertion of inapplicable trademark rights, finding the claims amounted to "abuse of judicial processes" and "harm to the public as a whole").

4. Defendant's Conduct Amounts to Misrepresentation Under DMCA, 17 U.S.C. § 512(f).

The DMCA offers copyright claimants an expedited mechanism by which to get infringing material removed from the Internet. In exchange, Section 512(f) imposes liability upon those who misrepresent that protected activity is infringing and thereby interrupt connectivity or disable access to non-infringing material. SCDC Plaintiffs were harmed when Defendants' baseless threats led Swarthmore University to disable access to the Diebold archives they were hosting.

Specifically, the statute provides:

> Any person who knowingly materially misrepresents under this section (1) that material or activity is infringing […] shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing….

17 U.S.C. § 512(f). Defendants misrepresented that fair use reproduction of the e-mail archive was infringing to induce the takedown of the SCDC Plaintiffs' archive, and many others. As Diebold admits, it used ill-fitting copyright claims because it wanted to take advantage of the DMCA's expeditious removal procedure: "[W]e want those links to be removed. Looking at it from a legal perspective, we were advised the DMCA was the best resource for getting that done. All we're really requesting that the links be removed from the site, although it does seem that the ISPs wind up taking down the whole site." (Diebold spokesman Mike Jacobsen, *See* Seltzer Decl., Exh. H).

5. Defendant's Claims Are Barred by Copyright Misuse.

Finally, Diebold's claims are barred by the doctrine of copyright misuse, which the courts of this Circuit have used to prevent copyright holders from leveraging copyright's monopoly into other areas. Copyright is not intended to promote the suppression of criticism. By misrepresenting the terms on which copyrighted works are available to the public, Defendants forfeit the right to enforce any copyright they might have in the e-mail archive.

The doctrine of copyright misuse "forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office." *Practice Management Information Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir. 1997) (*quoting Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 977- 79 (4th Cir.1990)). The Ninth Circuit has adopted a broad public policy version of the test that goes beyond the doctrine's origins in the patent and antitrust context: "whether plaintiff's use of his or her copyright violates the public policy embodied in the grant of a copyright, not whether the use is anti-competitive." *In re Napster, Inc. Copyright Litigation*, 191 F.Supp.2d 1087, 1103 (N.D. Cal. 2002) (permitting discovery on misuse defense; *citing Practice Mgmt.*, 121 F.3d. at 521). *See generally* Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 Berkeley Tech.L.J. 865, 888-893 (Fall 2000).

Defendants have used the thin veneer of copyright in their collected e-mail archive in an attempt to suppress publication of the archive as critical commentary. Defendants have falsely asserted to Internet service providers that their users' activities, posting or linking to the archive, violate copyright, and that the service providers themselves violate copyright by providing hosting or connectivity to such users. None of these extravagant claims can stand, and the misstatement should bar Diebold from asserting even any narrower copyright to which it might be entitled.

B. The Balance of Hardships Tips Sharply in Favor of the First Amendment Rights of the Plaintiffs.

Plaintiffs are entitled to injunctive relief because the balance of hardships tips sharply in their favor. First, the Swarthmore students are currently unable to publish or link to the e-mail archive by the fears of their ISP, Swarthmore College. Pavlosky Decl., ¶¶ 11, 12; Smith Decl.,

¶ 12. Those fears are the direct result of Diebold's legal threats. Additionally, OPG's ISP has indicated that it will consider terminating OPG's contract completely if it continues to receive cease and desist letters or if OPG agrees to its clients' request to host the e-mail archive directly. Ng Decl., ¶ 19.

If publication of the e-mail archive constitutes fair use and Diebold is permitted to continue to chill its publication by threatening Plaintiffs and others, they will be unable to fully exercise their First Amendment rights to criticize Diebold, specifically by using evidence of Diebold's own admissions of wrongdoing and security problems as part of the public debate. Moreover, the public will lose the benefit of that evidence if Diebold is allowed to continue its campaign of threatening publishers, their ISPs, the linking websites, their ISPs and the upstream ISPs of the primary ISPs. Indeed, with such a campaign, Diebold could successfully reduce or even eliminate public discussion about the admissions of security problems and the covering up of those problems detailed in the e-mail archive.

On the other hand, even if Diebold has legitimate copyright claims in its e-mail archive, and even if those claims can plausibly be extended to threaten OPG (who merely hosts a website that linked to but did not copy or distribute that archive) Defendant faces only a slight delay in notifying the parties involved in the publication, hosting, or linking to that material. Further, the e-mail archive itself has no independent financial value. It does not contain software, schematics or any other material at the core of a traditional copyright claim. Its continued availability is thus of substantial benefit to the public but only minimal copyright-cognizable harm to Defendants.

C. Plaintiffs Will Suffer Irreparable Injury if Diebold Is Not Enjoined.

It is well established that irreparable injury exists when the First Amendment rights of individuals are lost. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); 11A Charles A. Wright, Arthur R. Miller and Mary Kane, *Federal Practice and Procedure,* § 2948.1 at 161 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary"). Here, there is no question that the e-mail archive constitutes protected expression for purposes of the First Amendment and that the

express aim of the Diebold threats is to prevent publication of that expression.

III. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that their Ex Parte Application for Temporary Restraining Order, and Order to Show Cause Re: Preliminary Injunction as to Diebold be granted.

DATED: November 3, 2003

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