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12

13 **UNITED STATES DISTRICT COURT**

14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 ONLINE POLICY GROUP, NELSON CHU)
PAVLOSKY, and LUKE THOMAS SMITH,)

16)
17 Plaintiffs,)

18 v.)

19 DIEBOLD, INCORPORATED, and DIEBOLD)
ELECTION SYSTEMS, INCORPORATED,)

20)
21 Defendants.)

No. _____

22) **COMPLAINT FOR INJUNCTIVE**
23) **RELIEF FOR INTENTIONAL**
24) **INTERFERENCE WITH CONTRACT;**
25) **FOR COPYRIGHT MISUSE; FOR**
26) **DAMAGES FOR**
27) **MISREPRESENTATION OF**
28) **COPYRIGHT CLAIMS UNDER THE**
29) **DIGITAL MILLENNIUM COPYRIGHT**
30) **ACT; AND FOR DECLARATORY**
31) **RELIEF**

(Jury Trial Demanded)

32
33
34 1. This is a civil action seeking injunctive relief for intentional interference with
35 contract; for copyright misuse; for damages for misrepresentation of copyright claims under the
36 Digital Millennium Copyright Act; and for declaratory relief.

37 2. This case arises out of legal threats issued by the Defendants, namely threats of
38 copyright litigation made in an attempt to stifle public discussion and criticism of the Defendant

1 companies' products, electronic voting machines. The threats have successfully induced the
2 removal of the information from the websites run by Plaintiffs Pavlosky and Smith, due to actions
3 taken by their ISP, Swarthmore College. The threats have also interfered with the contractual
4 relationship between Plaintiff Online Policy Group and its upstream Internet service provider,
5 Hurricane Electric and that between Plaintiffs Pavlosky and Smith and Swarthmore College.

6 **PARTIES**

7 3. Plaintiff Online Policy Group ("OPG") is a California public benefit corporation
8 with its principal place of business in the State of California, county of San Francisco.

9 4. Nelson Chu Pavlosky ("Pavlosky") is an individual residing at 500 College Avenue
10 at Swarthmore College, Swarthmore, Pennsylvania. Pavlosky is a sophomore at Swarthmore
11 College and one of the co-founders of the Swarthmore Coalition for the Digital Commons
12 ("SCDC").

13 5. Luke Thomas Smith ("Smith") is an individual residing at 500 College Avenue at
14 Swarthmore College, Swarthmore, Pennsylvania. Smith is a sophomore at Swarthmore College
15 and the other co-founder of the SCDC.

16 6. On information and belief, Diebold, Inc. is an Ohio corporation with its principal
17 place of business in the State of Ohio. On information and belief, Defendant Diebold Election
18 Systems, Inc. is a wholly owned subsidiary of Diebold, Inc. Both Defendants will be collectively
19 referred to as "Diebold."

20 7. On information and belief, Diebold manufactures and sells electronic voting
21 systems and software, including voting systems used in Alameda, Fresno, Humboldt, Lassen,
22 Marin, Modoc, Placer, San Luis Obispo, Santa Barbara, Siskiyou, Trinity, and Tulare counties in
23 California. Diebold systems have also been sold for use in Georgia, Maryland, Massachusetts,
24 Ohio, and Texas.

25 **JURISDICTION AND VENUE**

26 8. This court has subject matter jurisdiction over the federal claims pursuant to the
27 Copyright Act (17 U.S.C. §§ 101 et seq.), 28 U.S.C. §§ 1331 and 1338 and the Declaratory
28 Judgment Act (28 U.S.C. § 2201). This court has supplemental subject matter jurisdiction over

1 state law claims pursuant to 28 U.S.C. § 1367(a) in that the state law claims form part of the same
2 case or controversy as the federal claims.

3 9. Plaintiffs are informed, believe and thereon allege that Defendants, and each of
4 them, have sufficient contacts with this district generally and, in particular, with the events herein
5 alleged, that each such Defendant is subject to the exercise of jurisdiction of this court over the
6 person of such defendant and that venue is proper in this judicial district pursuant to 28 U.S.C.
7 § 1391.

8 10. Plaintiffs are informed, believe and thereon allege that, based on the places of
9 businesses of the Defendants identified above and/or on the national reach of Defendants, and each
10 of them, a substantial part of the events giving rise to the claims herein alleged occurred in this
11 district and that Defendants, and each of them, and/or an agent of each such Defendant, may be
12 found in this district.

13 **FACTUAL ALLEGATIONS RELATED TO ALL COUNTS**

14 **ONLINE POLICY GROUP**

15 11. OPG is a San Francisco-based volunteer organization providing pro bono Internet
16 hosting services and colocation services to nonprofit organizations and individuals who are under-
17 represented, underserved, or facing unfair bias, discrimination, or defamation. Founded in July
18 2000, OPG now serves approximately 1000 websites; it provides collocation facilities to more than
19 100 users who themselves host more than 110 websites. Overall, OPG serves more than 77,700
20 individuals.

21 12. OPG's users include San Francisco IndyMedia, a branch of the international
22 Independent Media Center news media collective. San Francisco IndyMedia hosts a website
23 available at both <<http://www.indybay.org>> and <<http://www.sf.indymedia.org>>. The San
24 Francisco IndyMedia website resides on a webserver co-located with OPG. "Colocation" means
25 that the San Francisco IndyMedia server is not owned or controlled by OPG; it simply resides in
26 physical premises leased from OPG alongside OPG's own servers and utilizes OPG's Internet
27 connection.

28 13. OPG receives its "upstream" Internet connection from Hurricane Electric, an

1 upstream ISP (also known as a Business Technical Service Provider) based in Fremont, California.
2 Attached hereto as Exhibit A is a true and correct copy of the written contract between OPG and
3 Hurricane Electric.

4 14. On October 10, 2003, Diebold sent OPG a cease-and-desist letter under 17 U.S.C.
5 § 512 through its attorney, Ralph E. Jocke, threatening copyright infringement litigation if OPG
6 failed to remove links and other information from the IndyMedia website. A true and correct copy
7 of the cease-and-desist letter is attached as Exhibit B hereto and incorporated herein by reference.

8 15. The October 10, 2003 letter asserts that an IndyMedia web page hosted by OPG
9 links to online locations at which Diebold correspondence was posted, specifically an e-mail
10 archive of communications among Diebold employees about the company's electronic voting
11 machine product ("e-mail archive"). The letter asserts that Diebold holds copyright to the
12 correspondence, and further asserts that the IndyMedia webpages that link to the locations where
13 the e-mail archive is "infringe[s] Diebold's copyrights."

14 16. Further, the October 10, 2003, letter purports to "advise [OPG] of our clients' rights
15 and to seek [OPG's] agreement to the following: To disable or remove the information location
16 tool(s) identified in the attached chart. In addition to disabling or removing any hyperlink, the
17 disabling or removal should include destroying the usefulness as an information location tool of
18 any textual directory or pointer information contained therein."

19 17. The October 10, 2003 letter expressly asserts that Diebold "reserve[s] their position
20 insofar as costs and damages caused by" OPG's hosting of the IndyMedia website with links to the
21 e-mail archive and further asserts that it "reserve[s] their right to seek injunctive relief to prevent
22 further" hosting of the IndyMedia website with links to the e-mail archive by OPG. In other
23 words, the letter included a threat of litigation against OPG if it did not comply with the demands
24 in the letter.

25 18. The October 10, 2003 letter states that Diebold "looks forward to a response within
26 24 hours."

27 19. The October 10, 2003 letter to OPG caused great apprehension, concern and
28 disruption to OPG. OPG sent a brief response indicating that it was consulting with counsel.

1 20. Because OPG does not control the San Francisco IndyMedia computer hosting the
2 website, instead only providing Internet connectivity to that computer through colocation, OPG
3 could not comply by merely disabling or removing the hyperlink and related information
4 demanded by Diebold. OPG's only option to comply with the demand was to cut off IndyMedia's
5 Internet connectivity entirely. This would disable the entire website and any other information
6 stored on that computer from connection to the Internet.

7 21. While fearful of the potential of ruinous litigation, OPG board decided not to
8 comply, because the demand would require OPG to restrict speech by its users that OPG believed
9 was lawful, in ways antithetical to the OPG mission of promoting free speech.

10 22. On October 22, 2003, OPG's counsel wrote a response to Diebold's counsel stating
11 that OPG would not comply with the demand and explaining why it had come to that decision.
12 Attached hereto as Exhibit "C" is a true and correct copy of the letter sent by OPG counsel to
13 Diebold counsel.

14 23. At about the same time, another user of OPG's web hosting services indicated that it
15 wished to publish the e-mail archive.

16 24. Also on October 22, 2003, OPG received notice that its upstream Internet provider,
17 Hurricane Electric, had received a cease-and-desist letter from Diebold. Attached hereto as Exhibit
18 "D" is a true and correct copy of the letter sent by Diebold Counsel to Hurricane Electric.

19 25. Diebold's October 21, 2003, cease-and-desist letter to Hurricane Electric, which
20 Hurricane forwarded to OPG, demanded that Hurricane Electric "assist in removing the identified
21 infringing material or act in accordance with your 17 U.S.C. 512(i)(1)(A) policy that 'provides for
22 the termination in appropriate circumstances of subscribers and account holders of the service
23 provider's network who are repeat infringers.'"

24 26. Again, Diebold's actions caused tremendous apprehension, concern and disruption
25 to OPG. This time, however, the threat carried much more severe consequences. As with the
26 technical structure between OPG and IndyMedia, the technical structure between Hurricane and
27 OPG meant that Hurricane Electric could not simply remove the link from the IndyMedia website
28 hosted by OPG. Instead, Diebold's demands, if complied with by Hurricane Electric, would result

1 in the disconnection of all of OPG's users from the Internet and the disabling of all of the
2 approximately 1000 websites and other Internet services provided by OPG to the more than 77,700
3 individuals served by OPG. Such disconnection by Hurricane Electric in response to Diebold's
4 demand would threaten the continued existence of OPG. The volunteer board held an emergency
5 board meeting to discuss the Diebold letter to Hurricane Electric.

6 27. In a discussion with OPG on October 22, Hurricane Electric informed OPG that it
7 took Diebold's copyright demands seriously.

8 28. After OPG indicated that it intended to seek relief from this Court against further
9 threats from Diebold, Hurricane Electric informed OPG that it would not take action to terminate
10 OPG's contract based on this single complaint regarding IndyMedia's links.

11 29. However, Hurricane Electric has stated that it might be forced to terminate OPG's
12 contract in the future, if it received further demands from Diebold.

13 30. In particular, Hurricane Electric has stated that it might be forced to terminate OPG
14 if it received complaints alleging that OPG's clients were hosting Diebold material directly, rather
15 than just linking to it.

16 31. Based upon the conversation with Hurricane Electric, OPG told other users that they
17 may not host the e-mail archive pending clarification from this Court.

18 MR. PAVLOSKY AND MR. SMITH

19 32. Plaintiffs Pavlosky and Smith co-founded SCDC, an unincorporated student
20 association, in September of 2003 to advocate a bottom-up participatory structure for society and
21 culture, characterized by the free and open exchange of information. The group is dedicated to the
22 promotion of free and open-source technological standards to enable such participation.

23 33. SCDC operates an Internet website on the Swarthmore College network at
24 <<http://scdc.sccs.swarthmore.edu>>. Internet connectivity and the right to set up websites for
25 student organization use are among the services provided as part of Swarthmore College tuition.

26 34. The SCDC website describes the organization's goals and mission, alerts members
27 and interested students of meetings, and provides updates on organizational activities and projects.
28 The website also provides links to resources, including newspaper articles and other websites,

1 relevant to SCDC's goals and mission.

2 35. SCDC members discussed the effect of technology on government, and particularly
3 the issue of voting transparency, as early as their first meeting in September 2003. Plaintiff
4 Pavlosky considered studying non-proprietary, open-source alternatives to voting technologies
5 developed by private companies with proprietary interests.

6 36. Plaintiffs Pavlosky and Smith first heard about the Diebold email archive from
7 friends active in another Swarthmore student group, Why-War? The www.Why-War.com website
8 hosted the e-mail archive between October 8 and 10, 2003. After hearing that the e-mail archive
9 contained information on, among other topics, the (lack of) accuracy, security and accountability of
10 Diebold's electronic voting machines widely used in the United States, Plaintiffs Pavlosky and
11 Smith viewed and downloaded the archive.

12 37. Plaintiffs Pavlosky and Smith determined that the e-mail archive was directly
13 relevant to the SCDC's study project.

14 38. Plaintiffs Pavlosky and Smith learned at some time in early October that Diebold
15 had asked Why-War?'s off-campus Internet service provider to disable access to the e-mail
16 archive, at which point student members of Why-War? and other Swarthmore students began to
17 host the archive on personal websites. This arrangement was impracticable due to the size of the
18 archive and bandwidth issues.

19 39. Thereafter, Plaintiffs Pavlosky and Smith decided to post the e-mail archive on the
20 SCDC website to preserve public access to the documents. On October 21, 2003, SCDC posted the
21 e-mail archive on its website to show the public the serious and deep-seated problems with the
22 Diebold machines, and to educate the public about the need for a transparent voting system. A true
23 and correct copy of the e-mail archive is attached hereto as Exhibit "E".

24 40. On October 22, 2003, Swarthmore College administration told SCDC that the
25 school had received a letter from Diebold claiming that SCDC was infringing Diebold's copyright
26 by posting the e-mail archive. A true and correct copy of the cease-and-desist letter, which
27 Plaintiff Pavlosky later obtained, is attached hereto as Exhibit "F".

28 41. On October 23, 2003, Swarthmore disabled Internet access to the e-mail archive on

1 the SCDC website.

2 42. Plaintiff Smith subsequently added a link from the SCDC website to the e-mail
3 archive posted on a remote site. Plaintiff Pavlosky removed this link after being informed that even
4 linking from a Swarthmore website to an outside website hosting the e-mail archive contravened
5 Swarthmore policy.

6 43. Neither Plaintiff Pavlosky nor Plaintiff Smith is currently hosting or linking to the e-
7 mail archives on the SCDC website or any other site.

8 44. Plaintiffs Pavlosky and Smith are concerned for their ability to learn more about the
9 e-voting debate, including their ability to plan a symposium, "Choosing Clarity: Symposium on
10 Voting Transparency," that SCDC had set for the week of December 1, 2003.

11 THE PUBLIC DEBATE ABOUT THE SECURITY OF ELECTRONIC VOTING MACHINES

12 45. The security and independent verifiability of the accuracy of electronic voting
13 systems, including those manufactured by Diebold, are subjects of intense national debate. Diebold
14 electronic voting machines have been criticized for overall lax security, both in the machines
15 themselves and in the processes used by Diebold to test, update and develop the product. Plaintiffs
16 are informed and believe, and based upon such information and belief allege that as a result of
17 independent research done on certain Diebold computer code that revealed serious security
18 problems, the State of Maryland commissioned a study of the Diebold code that confirmed "high-
19 risk vulnerabilities in the implementation of the managerial, operational and technical controls for"
20 Diebold's electronic voting system.

21 46. Moreover, some members of the public have raised concerns because the Diebold e-
22 voting machines, like many others, produce no paper records of votes cast that can be reviewed and
23 verified by individual voters for accuracy and then used as a separate audit trail in the case of a
24 question about the accuracy of the machines or other circumstances. Members of the public and
25 some election officials have raised concern that such systems, including Diebold's system, by
26 relying entirely on the security of the voting systems themselves for verification of election results,
27 create a tremendous risk of erroneous or fraudulent election results.

28 47. These concerns, among others, have resulted in significant public debate and media

1 coverage about the security of Diebold's voting machines.

2 48. Numerous Internet websites have posted news, reports, and internal Diebold
3 documents assessing the security of Diebold electronic voting systems, including the e-mail
4 archive.

5 49. Numerous traditional print, radio and television media have reported on the
6 controversy surrounding electronic voting machine security, including the security of Diebold's
7 electronic voting machines.

8 50. Numerous websites have linked to the Diebold e-mail archive as source material for
9 their commentary and criticism.

10 51. A Diebold spokesperson says the company has been issuing cease-and-desist
11 demands to everyone who has posted Diebold documents, asserting copyright in the documents.
12 Attached hereto as Exhibit E is a true and correct copy of a Delaware County Times article, dated
13 Friday Oct. 24, 2003, quoting Mike Jacobsen.

14 52. Many ISPs have taken down websites in response to Diebold's litigation threats.

15 53. Plaintiffs are informed and believe and based upon such information and belief
16 allege that Diebold will continue to send out these cease-and-desist letters unless restrained by this
17 court.

18 **COUNT I: TORTIOUS INTERFERENCE WITH CONTRACT**
19 **(All Parties)**

20 54. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding
21 paragraphs of this complaint.

22 **Online Policy Group**

23 55. OPG contracts with Hurricane Electric for Internet connectivity. Exhibit A.

24 56. Defendants' cease-and-desist letter of October 21, 2003, admits knowledge of the
25 contractual relationship between OPG and Hurricane Electric, specifically referring to OPG as one
26 of Hurricane Electric's "subscribers and account holders." Exhibit D.

27 57. Defendants' October 21, 2003, cease-and-desist letter to Hurricane Electric was
28 designed to cause Hurricane Electric to terminate, interrupt, or otherwise limit OPG's Internet

1 service by misrepresenting that the actions of OPG in hosting IndyMedia's website with links to
2 the e-mail archive violated Diebold's copyrights.

3 58. Diebold's threat did disrupt OPG's relations with Hurricane Electric, causing
4 Hurricane to make immediate demands to OPG, and to threaten interruption of OPG's Internet
5 service in the future if Diebold documents or links are hosted on machines OPG co-locates with
6 Hurricane. Because of the threats from Diebold, OPG has been made to fear for the continuity of
7 its Internet service from Hurricane.

8 59. As a result of these disruptions, and in order to assure that it is not disconnected
9 from the Internet, OPG may be forced to take down the links to the e-mail archive, and with them
10 IndyMedia's entire website, if it receives a further threat from Diebold.

11 60. As a result of these disruptions, and in order to assure that it is not disconnected
12 from the Internet, OPG has been forced to limit its clients' activities in ways that are contrary to the
13 OPG mission to support free speech, specifically by refusing to allow its users to host the e-mail
14 archive.

15 Pavlosky and Smith

16 61. Pavlosky and Smith obtain Internet connectivity and the ability to operate the SCDC
17 website on the Swarthmore network through Swarthmore College. They pay for that connectivity
18 as part of their student fees.

19 62. Defendants' letter of October 9, 2003, to Swarthmore College admits knowledge of
20 the contractual relationship between Pavlosky and Smith and Swarthmore. Exhibit F.

21 63. Defendants' cease-and-desist letter to Swarthmore was designed to cause
22 Swarthmore to terminate, interrupt, or otherwise limit the Internet service provided by Swarthmore
23 to Pavlosky and Smith – service to which they were contractually entitled – by misrepresenting that
24 the actions of students in publishing the e-mail archive violated Diebold's copyrights.

25 64. Diebold's threat did disrupt Pavlosky and Smith's relations with Swarthmore,
26 causing Swarthmore to make immediate demands to Pavlosky and Smith that they cease posting
27 and linking to the e-mail archive and to threaten interruption of Pavlosky and Smith's Internet
28 service in the future, if Diebold documents or links to such documents are hosted on machines that

1 SCDC or Pavlosky or Smith individually connects to the Swarthmore College network. Because of
2 the threats from Diebold, Pavlosky and Smith have been made to fear for the continuity of their
3 Internet service from Swarthmore.

4 65. As a result of these disruptions, and in order to assure that their Internet services are
5 not disconnected – in which case SCDC members would lose a critical avenue of expression –
6 Pavlosky and Smith have been forced to limit their and other SCDC members’ expression, in ways
7 that are contrary to the SCDC mission to support free and open exchange of information.

8 **COUNT II: MISUSE OF COPYRIGHT**
9 **(All Parties)**

10 66. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding
11 paragraphs of this complaint.

12 67. The publication of the e-mail archive is fair use, not infringement. Plaintiffs are
13 informed and believe and based upon information and belief allege that the facts that underlie this
14 conclusion include, but are not limited to:

- 15 a. The purpose and character of the use is to inform public discussion and political
16 debate on a matter core to American democracy, the functioning of our electoral
17 system;
- 18 b. The nature of the work is factual;
- 19 c. The archive does not embody any substantial expressive work and is necessary in
20 the aggregate for purposes of commentary and criticism;
- 21 d. The publication of the e-mail archive does not compete with Diebold in any current
22 or potential market. If the publication cuts into sales of Diebold’s e-voting
23 equipment it does so only because Diebold’s own statements have raised concerns
24 about the security of their electronic voting machines.

25 68. Plaintiffs are informed and believe and based upon such information and belief
26 allege that Diebold’s motivation in demanding the documents’ removal was not to protect any
27 market for distribution of its e-mail archive or other interest protected by copyright law, but instead
28 to stifle free speech in the form of criticisms of its electronic voting systems.

1 69. Plaintiffs are informed and believe and based upon such information and belief
2 allege that Diebold used copyright claims in its cease-and-desist demands because the “safe
3 harbor” provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512, provided a
4 mechanism by which it could demand expeditious takedown of materials alleged to infringe
5 copyright.

6 70. Plaintiffs are informed and believe and based upon such information and belief
7 allege that Diebold did not intend in good faith to follow up on its threats of litigation, because it
8 knew or should have know that linking to or publication of the documents constitutes a fair use of
9 copyrighted material protected under 17 U.S.C. § 107, *et seq.*

10 71. Defendants engaged in the misuse of their copyrights, including in the letters of
11 October 9, 10, and 21, 2003, by claiming that the publication of the e-mail archive by Swarthmore
12 College students constituted copyright infringement when they knew that it did not.

13 72. Defendants engaged in the misuse of their copyrights, including in the letters of
14 October 10 and 21, 2003, by claiming that OPG could be liable for copyright infringement for
15 hosting a website that merely linked to the e-mail archive.

16 73. Defendants engaged in the misuse of their copyrights, including in the letter of
17 October 21, 2003, by claiming that Hurricane Electric could be liable for copyright infringement
18 for providing upstream hosting services to an ISP that itself hosted a website that merely linked to
19 the e-mail archive.

20 **COUNT III: 17 U.S.C. 512(f) MISREPRESENTATION**
21 **(All Parties)**

22 74. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding
23 paragraphs of this complaint.

24 75. Plaintiffs are informed and believe and based upon such information and belief
25 allege that Diebold knew that the publication of the e-mail archive and of links to the e-mail
26 archive were not an infringement of copyright.

27 **Online Policy Group**

28 76. In its cease-and-desist letters of October 10 and 21, 2003, purportedly issued under

1 the authority of 17 U.S.C. § 512, Diebold knowingly materially misrepresented that publication of
2 and links to the e-mail archive to be infringing.

3 77. In its cease-and-desist letters of October 10 and 21, 2003, purportedly issued under
4 the authority of 17 U.S.C. § 512, Diebold knowingly materially misrepresented that OPG could be
5 liable under copyright law for hosting a website that merely contained a link to the e-mail archive
6 that it claimed was infringing.

7 78. In its letter of October 21, 2003, purportedly issued under the authority of 17 U.S.C.
8 § 512, Diebold knowingly materially misrepresented that Hurricane Electric could be liable under
9 copyright law for providing upstream services to an ISP whose users had a website that merely
10 contained a link to the e-mail archive that Diebold claimed was infringing.

11 79. OPG has been injured by the misrepresentation in that Hurricane Electric, its service
12 provider, relied upon the misrepresentation to forbid OPG from allowing its clients to post copies
13 of the e-mail archive.

14 Pavlosky and Smith

15 80. In its letter of October 9, 2003, issued under the authority of 17 U.S.C. § 512,
16 Diebold knowingly materially misrepresented that publication of the e-mail archive was infringing.

17 81. Plaintiffs Pavlosky and Smith have been injured by the misrepresentation in that
18 Swarthmore College, their service provider, relied upon the misrepresentation to terminate their
19 hosting of the e-mail archive and to forbid them from linking to the e-mail archive.

20 **COUNT IV: DECLARATORY RELIEF**
21 (All Parties)

22 82. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding
23 paragraphs of this complaint.

24 83. There is a real and actual controversy between Plaintiffs and Defendants regarding
25 whether the publication of or linking to the e-mail archive constitutes copyright infringement.

26 84. There is a real and actual controversy between Plaintiffs and Defendants regarding
27 whether an Internet Service Provider can be held liable for hosting a website that links to allegedly
28 infringing material.

1 85. There is a real and actual controversy between Plaintiffs and Defendants regarding
2 whether an upstream Internet Service Provider can be held liable for providing services to another
3 Internet Service Provider who hosts a website that links to allegedly infringing material.

4 86. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 and Federal
5 Rule of Civil Procedure 57 for the purpose of determining and adjudicating questions of actual
6 controversy between the parties.

7 87. Plaintiffs contend as it relates to the Defendants and the e-mail archive that,
8 consistent with the Copyright Act of the United States of America, including those laws prohibiting
9 direct, contributory or vicarious infringement, laws protecting fair use and the First Amendment to
10 the United States Constitution, and judicial decisions construing such laws, doctrines, and
11 provisions:

- 12 a) Publication of the e-mail archive is lawful;
13 b) Hosting or providing colocation services to websites that link to allegedly infringing
14 material is lawful;
15 c) Providing Internet services to others who host websites that link to allegedly
16 infringing material is lawful.

17 88. Plaintiffs are informed, believe and thereon allege that the Defendants contend the
18 contrary of each of above-stated propositions (a) through (c).

19 89. Wherefore, Plaintiffs request that the court determine and adjudge that each and
20 every of the above-stated propositions states the law applicable to the facts involved in this action.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, the Plaintiffs pray for judgment for themselves and all others similarly
23 situated as follows:

- 24 1. A declaratory judgment that that as it relates to the Defendants and the e-mail
25 archive that:
26 a) Publication of the e-mail archive is lawful;
27 b) Hosting or providing colocation services to websites that link to allegedly
28 infringing material is lawful;

1 c) Providing Internet services to others who host websites that link to allegedly
2 infringing material is lawful.

- 3 2. Injunctive relief restraining the Defendants, their agents, servants, employees,
4 successors and assigns, and all others in concert and privity with them, from
5 bringing any lawsuit or threat against Plaintiffs or any other person or entity for
6 copyright infringement of the e-mail archive in connection with the publication,
7 linking to or hosting services described above.
- 8 3. Damages for copyright misuse and intentional interference with contractual
9 relations according to proof;
- 10 4. Judgment barring Defendants from enforcing any copyright in the e-mail archive
11 unless and until their misuse has ceased;
- 12 5. Attorneys fees pursuant to 17 U.S.C. § 512(f), other portions of the Copyright Act,
13 on a Private Attorney General basis, or otherwise as allowed by law;
- 14 6. Plaintiffs' costs and disbursements within; and
- 15 7. Such other and further relief as the Court shall find just and proper.

16 Plaintiffs hereby request a jury trial for all issues triable by jury including, but not limited
17 to, those issues and claims set forth in any amended complaint or consolidated action.

18 DATED: November 3, 2003

19 By 

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