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16 **UNITED STATES DISTRICT COURT**

17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

19)
20 Plaintiffs,)

21 v.)

22 DIEBOLD, INCORPORATED, and DIEBOLD)
ELECTION SYSTEMS, INCORPORATED,)

23)
24 Defendants.)

No. C-03-04913 JF

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF THEIR MOTION FOR
PRELIMINARY INJUNCTION**

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

1 This case is not about copyright. It is about a company selling electronic voting machines, a
2 public keen to discuss the effect of electronic voting on the democratic process, and the abuse of
3 copyright to squelch critical information in that debate.

4 Nothing in the nature of the Internet or congressional regulation of it justifies silencing
5 speech with unfounded threats of copyright infringement. The student plaintiffs made fair use of an
6 e-mail archive whose contents included important information for public discussion, and Online
7 Policy Group (OPG) provided Internet hosting to a media organization that linked to the documents.
8 Key First Amendment rights depend on the public's ability to speak online, to take advantage of
9 the promise of digital communication without incurring frivolous threats against the ISPs who
10 make that speech possible. Those are the rights Plaintiffs ask this Court for emergency relief to protect.

11 I. Supplemental Facts

12 We need not repeat the facts here, but must clear up some misconceptions Defendants have
13 introduced. Plaintiffs Nelson Chu Pavlosky and Luke Thomas Smith run the Swarthmore Coalition
14 for the Digital Commons ("SCDC") organization and associated website, at
15 <<http://scdc.sccs.swarthmore.edu/>>. Pavlosky Decl. ¶ 5. The two posted the Diebold e-mail archive
16 to the SCDC website on October 21, that hosting was disabled October 22, 2003 after Swarthmore
17 received Diebold's cease-and-desist letter. Plaintiffs removed links to the archive on October 23
18 when they learned that even hyperlinking was against Swarthmore College policy. Pavlosky Decl.
19 ¶¶ 8-11. Neither hosted the archive elsewhere and neither is now hosting the archive on the SCDC
20 website or any other site. Smith Decl. ¶ 12, Pavlosky Decl. ¶ 12. According to Swarthmore counsel
21 Vincent V. Carissimi, Plaintiffs Pavlosky and Smith "have complied completely with
22 Swarthmore's request that the disputed memos and all links to them be removed from Swarthmore-
23 owned computers and have not engaged in any actual acts of 'civil disobedience' in response to the
24 letters."¹ Carissimi Decl. ¶ 6. Accusations of "switching the material to other websites" are
25 unwarranted (Diebold Opp. 3:15), and the website Defendants attack is not SCDC's. Diebold Opp.
26 11:5, quoting Reeves Decl. Exh. G, <<http://d176.whartonab.swarthmore.edu/>>.²

27 ¹ Swarthmore has also expressed doubt as to the strength of Diebold's copyright claims. *See*
28 Carissimi Decl., Exhs. A and B.

² Likewise, the reference to "electronic civil disobedience" in the news article at Complaint Exh. G,

1 works for a ‘further purpose,’ giving them a new ‘meaning or message.’” *Id.* at 23 (*citing*
2 *Campbell*, 510 U.S. at 579). It was “this transformation of the works into news - and not the mere
3 newsworthiness of the works themselves, that weigh[ed] in favor of fair use.” *Id.* The Ninth Circuit
4 relied on *Nunez* in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002), finding fair use in an
5 image search engine’s use of entire thumbnail images “because Arriba has created a new purpose
6 for the images.” *Id.*

7 **Unpublished Works:** Diebold urges protection because the e-mail archive was not
8 previously published outside of Diebold. Unpublished status does not preclude a finding of fair use.
9 *See Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 552-3 (1984). Indeed,
10 Congress was so concerned that courts might limit the fair use of unpublished works under the
11 *Salinger* case cited by Diebold, *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), that it
12 added language to Section 107 of the Copyright Act to clarify the applicability of fair use to
13 unpublished works. Nimmer on Copyright, § 13.05[A][2][b] at 13-187 (citing H.R. Rep. No. 102-
14 286 (1992)); *see also* 17 U.S.C. § 107. Congress indicated that *Wright v. Warner Books, Inc.*, 953
15 F.2d 731 (2d Cir. 1991), more properly balanced the fair use factors, though even it “did not reach
16 the outer limits of what might be regarded as fair use.” *Id.* at 13-179, n.198 (quoting H.R. Rep. No.
17 102-286). In *Wright*, the court found the use of unpublished material from author Richard Wright’s
18 letters and journals was a fair use. Thus, while this Court may consider lack of general publication
19 of the mostly factual e-mail archive as part of the ‘nature of the work’ factor, that factor does not
20 end the analysis. *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 146 (N.D. Cal. 1994).

21 **No Market Harm:** The fourth factor (“market harm”) calls for courts to strike a balance
22 “between the benefit the public will derive if the use is permitted and the personal gain the
23 copyright owner will receive if the use is denied.” *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir.
24 1981). If the Plaintiffs’ use is permitted, the public will benefit from understanding key flaws in the
25 system being used to select its representatives in government, while Diebold will suffer no loss to
26 any actual or potential markets for the e-mail archive because none such exist. “The market for
27 potential derivative uses includes only those that creators of original works would in general
28 develop or license others to develop.” *Campbell*, 510 U.S. at 592 (1994). Defendants speculate

1 about potential markets (Diebold Opp. 13), but their efforts to keep the public in the dark about
2 their voting machines' problems show they would never enter the market selling material exposing
3 these flaws. This is not unusual, as the Supreme Court has recognized that the "unlikelihood that
4 creators of imaginative works will license critical reviews of their own productions removes such
5 uses from the very notion of a potential licensing market." *Id.* Since there is no market for this e-
6 mail archive, the market harm factor strongly favors a finding of fair use.³

7 The statutory fair use factors "are not meant to be exclusive." *Harper & Row, Publishers v.*
8 *Nation Enterprises*, 471 U.S. 539, 560 (1984). Diebold's discussion of these messages as
9 "expressions and interpretations of events ... intended to be[] protected by copyright law" (Diebold
10 Opp. 11:26-27) almost obscures the fact that they are also documentary evidence of the company's
11 alleged failure to competently make and market an important technology. It would be as if the
12 tobacco industry could suppress evidence that it knew cigarettes cause cancer by proclaiming that
13 copyright law gives them the exclusive right to prevent publication of those smoking gun memos.
14 Nor could Enron could assert a takings defense to the publication of its internal e-mails
15 documenting accounting malfeasance. The fair use doctrine accommodates First Amendment
16 concerns. *Eldred v. Ashcroft*, 537 U.S.186, 219 (2003).

17 **The First Amendment:** Voting is fundamental to our democracy; the debates about our
18 voting systems are accordingly part of the heartland of the First Amendment. "[F]reedom of
19 expression upon public questions is secured by the First Amendment." *New York Times v. Sullivan*,
20 376 U.S. 254, 269 (1964). The Constitution and Bill of Rights were written with the intention to
21 protect both the substance and the processes of democracy from censorship, and "there is
22 practically universal agreement that a major purpose of that Amendment was to protect the free
23 discussion of governmental affairs," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*citing Mills v.*

24 _____
25 ³ The market harm factor is intended to prevent copiers from taking a copyright owner's
26 publication opportunity, and not at recompensing damages that may flow indirectly from copying.
27 *Consumers Union. v. General Signal Corp.*, 724 F.2d 1044, 1050-51 (2d Cir. 1983). Thus, this
28 Court need not consider any harm to Diebold's sales of electronic voting machines that may flow
indirectly from the exposure of flaws in the e-mail archive. *See also New Era Publications Int'l v*
Carol Publishing Group, 904 F.2d 152, 160 (2d Cir. 1990) ("the critique and the copyrighted work
serve fundamentally different functions by virtue of, among other things, their opposing
viewpoints").

1 *Alabama*, 384 U.S. 214, 218 (1966)).

2 The publication of and linking to the e-mail archive are unquestionably part of an ongoing
3 public discussion about governmental use of electronic voting machines. By providing the public
4 with critical information about the security of voting machines, Pavlosky and Smith – and OPG as
5 the provider of speech-enabling services – are part of “the profound national commitment to the
6 principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York*
7 *Times v. Sullivan*, 376 U.S. at 270.⁴ Uninhibited debate should, and indeed must, include the widest
8 possible range of information about the strengths and weaknesses of these new voting technologies
9 so that the public can make informed decisions about the future of its democracy. That Diebold
10 would rather the information not be published at this time (Diebold Opp. 13), or even that it was
11 originally published without permission, are simply not sufficient reasons to exclude this important
12 information from public consideration.

13 Equally plain is that Diebold’s cease-and-desist letter campaign is an attempt to abuse the
14 power of law, in this case the provisions of 17 U.S.C. § 512(a) and (c), to suppress critical speech.
15 Courts are familiar with such attempts to use legal claims to stifle public criticism. In *Organization*
16 *For A Better Austin v. Keefe*, 402 U.S. 415 (1971), for example, the speakers were pamphleteers
17 publishing information critical of a realtor’s business practices. The campaign included quotes of
18 the realtor’s own words (“I only sell to Negroes”) in the critical pamphlets. Reversing a lower court
19 decision granting an injunction against the pamphleteering, the Supreme Court observed:

20 No prior decisions support the claim that the interest of an individual in being free
21 from public criticism of his business practices in pamphlets or leaflets warrants use
22 of the injunctive power of a court. Designating the conduct as an invasion of
23 privacy, the apparent basis for the injunction here, is not sufficient to support an
injunction against peaceful distribution of informational literature of the nature
revealed by this record.

24 *Id.* at 419-420. Plaintiffs here are simply modern pamphleteers, and neither tort law nor legal threat

25 _____
26 ⁴ That the publication took place on the Internet is of no matter. In holding that the Internet is
27 entitled to the highest level of First Amendment protection, *Reno v. ACLU*, 521 U.S. 844, 868, 870
28 (1997), the Supreme Court recognized the medium’s role in that debate by providing a “vast
democratic for[um,]” *Reno v. ACLU*, 521 U.S. at 868, where anyone “can become a town crier with
a voice that resonates farther than it could from any soapbox” and “can become a pamphleteer.” *Id.*
at 870.

1 letters under 17 U.S.C. § 512(a) and (c) should be available to silence the peaceful distribution of
2 information that is of unquestioned value in the debate about the security of electronic voting machines.

3 **B. The DMCA Leaves Room for Suit to Vindicate Speech Rights**

4 Diebold asserts that Congressional enactment of Section 512 of the Digital Millennium
5 Copyright Act (DMCA) is the final word in a “carefully-crafted balance” on the subject of online
6 infringement, (Diebold Opp. 7:7), notwithstanding that the DMCA’s drafters explicitly disclaimed
7 so sweeping a scope. Rather, Congress provided the Section 512 limitation of liability as an option
8 to ISPs, but left the determination of liability for activities both in and out of that harbor to
9 “existing principles of law.”⁵ There was no intent – and no need – to preempt other law; nor was
10 there an intent to create new liability for hyperlinking.

11 First, the mere existence of the notice and takedown process in Section 512 does not
12 legitimize all takedown demands, any more than the existence of Rule 45, Fed.R.Civ.Pro.,
13 authorizes the collection of evidence by “massively overbroad” subpoenas. *Theofel v. Farey-Jones*,
14 341 F.3d 978, 981 (9th Cir. 2003). Diebold has no valid underlying copyright claim against the
15 posters of the e-mail archive or their ISPs, and cannot use Section 512 to legitimize its abusive activity.

16 Second, because the “safe harbor” is crafted to shield ISPs from being caught between
17 copyright holder and alleged infringer (and not primarily, as Diebold claims, “to create a speedy
18 remedy for copyright owners,” Diebold Opp. 9:9-10), it presents no barrier to a lawsuit between
19 alleged infringer and copyright holder. Congress intended that those parties dispute the liability
20 between themselves directly rather than embattle the ISP, not that copyright infringement should be
21 the only cause of action between proper parties. Both tortious interference and copyright misuse
22 properly address the injuries Diebold has inflicted upon Plaintiffs by frivolous accusations of
23 copyright infringement directed to their ISPs.

24 Hurricane Electric has imposed restrictions on OPG as a result of Diebold’s letter, and it is
25 immaterial that those restrictions do not amount to a full breach of contract. As described in

26 _____
27 ⁵ See, e.g., H.R. Rep.No. 105-796 at 73 (1998) (Conference Report) “Section 512 is not intended to
28 imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a
limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply
if the provider is found to be liable under existing principles of law.”

1 Plaintiffs' TRO brief, the law protects contracts against disruption short of breach. *Pacific Gas &*
2 *Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1125, 791 P.2d 587, 590 (1990). That is why
3 interference with an at-will contract is actionable despite the fact that either party to such a contract
4 may be free to terminate at any time with or without cause. *PMC, Inc. v. Saban Entertainment,*
5 *Inc.* 45 Cal App. 4th 579, 599 n.19, 52 Ca.Rptr.2d 877 (1996). OPG seeks immediate release from
6 these restrictions and the injunctive relief here provides it.

7 As regards misuse, Diebold apparently misses the Ninth Circuit's holding in *Practice*
8 *Management Information Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir. 1997), that
9 copyright misuse could support an affirmative declaratory judgment (there, the court held the
10 AMA's copyright in medical manuals unenforceable due to its improper exclusive licensing
11 demands). Like the *Practice Management* plaintiff, OPG, Pavlosky, and Smith seek a declaration
12 that any Diebold copyright in the e-mail archive is unenforceable, here due to Diebold's
13 overreaching assertion of its copyrights against ISPs.

14 Third, Diebold argues that the DMCA's safe harbor for information location tools somehow
15 shows that linking is infringement because "[t]here would be no need for a safe harbor if there were no
16 underlying liability." Diebold Opp. 14:21-22. This is the very argument that Congress sought to
17 prevent though Section 512(l), which preserves all defenses to ISPs under existing case law. As the
18 leading copyright treatise points out, Section 512(l) "forestalls the argument that antecedent law
19 under the 1976 Act would inexorably view the service providers' conduct as infringement, but for
20 the remission afforded by [Section 512]." Nimmer on Copyright, § 12B.06[B] at 12B-76.

21 **C. There Is No Copyright Liability for the Hosting of Hyperlinks**

22 Existing copyright law does not support hyperlinking liability. Defendants mischaracterize
23 all three cases by which they claim that such liability is "well established." Diebold Opp. 15:8
24 (citing to *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah
25 1999)⁶, *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), and

26 _____
27 ⁶ In their misguided attempt to demonstrate that OPG infringes, defendants overstate the holding of
28 *Utah Lighthouse*, where the court was clearly affected by the fact that defendants posted the links
to the infringing works after being ordered to remove the same material from their own site by the
court. *Utah Lighthouse*, 75 F. Supp. 2d 1290, 1292-93 (C.D. Utah 1999).

1 *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002)). That shaky
2 proposition is far from well-established. *See* Nimmer on Copyright, § 12B.01[A][2] at 12B-13.

3 Instead, the Copyright Act provides copyright holders a limited set of exclusive rights. *See*
4 17 U.S.C. § 106. Here, when IndyMedia posted a link to the Diebold e-mail archive, it did not
5 copy, distribute, or display the allegedly infringing material, it simply pointed to a location where
6 the e-mail archive could be found. Since a hyperlink is no more than HTML code giving directions
7 to another location on the Internet, it cannot contain a copy of the infringing work. And if a user
8 clicks on the link, the file is transmitted to the user from the location specified, not from the
9 website containing the linking code. As Professor Nimmer points out, extending copyright liability
10 to linking would be analogous to holding AOL, Dell, Microsoft, and Netscape liable simply
11 because someone using a Dell computer with Microsoft Windows, Netscape, and AOL accessed an
12 infringing file on the Internet. Nimmer on Copyright, § 12B.01[A][2] at 12B-14. OPG, as host to
13 the linking site, and Hurricane Electric, host to OPG, are even further removed. Diebold’s proposed
14 extension of liability to them is not supported by the case law.⁷

15 *Universal City Studios, Inc. v. Reimerdes* is not even about copyright infringement.
16 *Reimerdes* enjoined hyperlinking to a program for circumventing access controls on DVD movies,
17 under the anti-circumvention provisions of the DMCA, Section 1201 *et seq.* *Reimerdes*, 111
18 F.Supp.2d at 324 (noting that “[t]he dispositive question is whether linking to another web site
19 containing DeCSS constitutes ‘offering [DeCSS] to the public’ or ‘providing other otherwise
20 trafficking’ in it within the meaning of the DMCA” and analyzing hyperlinks in that light.)

21 Finally, *Perfect 10* merely found defendant Cybernet likely to face contributory and
22 vicarious liability for activities including “pay[ing]webmasters commissions directly based upon
23 the number of Adult Check users that register through the site”; “provid[ing] technical and content
24 advice”; and deriving a financial “symbiotic interest” from the infringing websites. *Perfect 10*, 213
25 F.Supp.2d at 1170, 1171. As to the hyperlinks, by contrast, the court held that plaintiff had “not

26 ⁷ Even if linking were an infringing activity, which it is not, defendants in *Utah Lighthouse* are not
27 analogous to OPG, which merely served as a colocation host for the website. Plaintiffs in *Utah*
28 *Lighthouse* were not suing defendants’ ISP, they were suing the people who wrote the link into
their website, and there is no suggestion in *Utah Lighthouse* that liability should be extended to the
defendants’ ISP.

1 established a strong likelihood of success on its direct copyright infringement claim against
2 Cybernet.” *Id.* at 1189.⁸

3 In short, no ISP of a hyperlinker has ever been held liable. The law does not recognize
4 contribution to a contributory infringement, or double-vicarious liability. Even if there were underlying
5 infringement at the bottom of this chain, the links to OPG are too weak to impose liability.

6 **D. Plaintiffs Have Demonstrated that the Balance of Hardships Tips Sharply in**
7 **Their Favor**

8 The respective hardships here are clear. On the one side is the ongoing, forced censorship
9 of clients by OPG under pain of losing Internet connectivity for more than 1,000 websites. Despite
10 all of Diebold’s protestations about the counter notice provisions of 17 U.S.C. § 512(c), those are
11 simply unavailable to OPG, since Diebold’s cease and desist letter to Hurricane Electric was
12 submitted under §512(a), which has no counter notice provision. Thus OPG has already had to
13 require one of its clients to remove the e-mail archive and prevent another from publishing it.
14 Without injunctive relief, this pattern will continue. Moreover, Pavlosky and Smith are currently
15 gagged and will remain so if Diebold decides to initiate litigation against them or issues another
16 cease-and-desist notice. Even under the best of circumstances they will remain unable to publish
17 for at least another week after the hearing on this matter. The loss of First Amendment rights, even
18 temporarily, constitutes irreparable harm under settled law. *Elrod v. Burns*, 427 US 347, 373
19 (1976).

20 Finally, the public interest will continue to suffer harm due to the removal from the public
21 debate of important and useful information about the security of electronic voting machines. The
22 harm will arise not only from the specific Diebold cease-and-desist letters at issue here, but from
23 the over a dozen more that they have already issued and will undoubtedly continue to issue unless
24 restrained by this court. The security of electronic voting machines is plainly an issue of special
25 urgency right now and in the next few months while election officials are in the process of

26 ⁸ Diebold cannot show vicarious liability on OPG’s part because OPG does not have the right to
27 control its clients’ websites and derives no financial benefit from the allegedly infringing activity.
28 *See, e.g. Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.2d 259 (9th Cir. 1996) (finding that plaintiffs
stated a claim for vicarious liability for leasing the grounds where the infringing sales of bootleg
recordings were made).

1 evaluating and choosing new voting equipment. Under a consent decree entered into by the
2 California Secretary of State, California election officials must replace “punch card” ballots prior
3 to the March, 2004 election. *Southwest Voter Registration Educ. Proj. v. Shelley*, 344 F.3d 914,
4 920 (9th Cir. 2003). Nationwide, the federal Help America Vote Act (HAVA) provides funding for
5 the purchase of new election equipment to replace punch card systems with a deadline of the
6 November, 2004 elections. 42 U.S.C. § 15302(a)(3) <http://fecweb1.fec.gov/hava/law_ext.txt>.
7 Thus without preliminary relief, the information contained in the e-mail archive may lose relevance
8 and importance as decisions to invest millions of taxpayer dollars are made without it.

9 On the other side is a large corporation facing embarrassment if the public – and the public
10 officials who are potential purchasers – are allowed to see the internal discussions of its employees
11 that reveal security flaws and other problems with the company’s product. Thus the only damage
12 they may suffer will be due to the fact that the truth may come out. Diebold has no credible
13 argument that preventing it from sending out cease-and-desist notices during the pendency of this
14 case will create a disincentive for its employees to “create” further e-mails. It has no copyright
15 claim of lost profits from potential sales of its archive.

16 Given the clear First Amendment interests on one side and the paucity of legitimate
17 copyright concerns on the other, a preliminary injunction is warranted.

18
19 DATED: November 14, 2003

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