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14 Attorneys for Plaintiffs  
NELSON CHU PAVLOSKY and LUKE  
15 THOMAS SMITH

16 **UNITED STATES DISTRICT COURT**  
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

19 Plaintiffs, )  
20 )

21 v. )

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

23 Defendants. )  
24 )

No. C-03-4913 JF

**DECLARATION OF VINCENT V.  
CARISSIMI REGARDING PLAINTIFFS'  
APPLICATION FOR PRELIMINARY  
INJUNCTION**

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

25 I, Vincent V. Carissimi, declare:

26 1. I am an attorney at law, licensed to practice before the courts of the State of  
27 Pennsylvania, and am a partner with the firm of Pepper Hamilton, LLP, based in Philadelphia,  
28 Pennsylvania. I am serving as counsel to Swarthmore College regarding the Diebold demands.

1           2.       On October 9, 2003 and October 20, 2003, attorneys for Diebold sent letters to  
2 Swarthmore College demanding that it take down the e-mail archive and links to that archive that  
3 had been published by Swarthmore students on websites provided by Swarthmore College.

4           3.       On October 23, 2003, I wrote to Diebold's counsel in response. The letter sought  
5 additional information from Diebold in support of its copyright claims, including evidence of  
6 registration and support of its legal claims and its factual claims that the memos had been stolen.  
7 My letter also notes that "[w]ithout acknowledging or conceding the validity of your client's claims  
8 of infringement, and without waiving the validity of any defenses Swarthmore College or its  
9 subscribers might have to those claims, including without limitation, fair use" Swarthmore had  
10 disabled access to the allegedly infringing material and links. Attached hereto as Exhibit A is a  
11 true and correct copy of my responsive letter on behalf of Swarthmore. I asked for a prompt  
12 response.

13           4.       I received no response. On October 30, 2003, I again wrote to Diebold's counsel  
14 expressing concern at Diebold's failure to respond and again asking for answers to my questions  
15 concerning Diebold's claims. In that letter I noted, "[b]ecause of the extraordinary nature of your  
16 request, and the non-obviousness of your claim of copyright infringement, we directed certain  
17 questions to you seeking information needed to evaluate your claim of infringement." Attached  
18 hereto as Exhibit B is a true and correct copy of my second letter to Diebold's counsel.

19           5.       To date, I have received no response from Diebold to either of my letters.

20           6.       To the best of my understanding, and that of my client, Plaintiffs Nelson Chu  
21 Pavlosky and Luke Smith have complied completely with Swarthmore's request that the disputed  
22 memos and all links to them be removed from Swarthmore-owned computers and have not  
23 engaged in any actual acts of "civil disobedience" in response to the letters.

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

26           Date: November 14, 2003

27             
28           VINCENT V. CARISSIMI

# **EXHIBIT A**

3000 Two Logan Square  
Eighteenth and Arch Streets  
Philadelphia, PA 19103-2799  
215.981.4000  
Fax 215.981.4750

Vincent V. Carissimi  
direct dial: 215.981.4351  
direct fax: 215.689.4625  
carissimiv@pepperlaw.com

October 23, 2003

**Via Facsimile and First Class Mail**

Ralph E. Jocke, Esquire  
Walker & Jocke  
231 South Broadway  
Medina, OH 44256-2601

**Re: Notice of Copyright Infringement to Swarthmore College**

Dear Mr. Jocke:

We represent Swarthmore College and are writing in response to your notices of October 9, 2003 and October 20, 2003 regarding alleged copyright infringement on various web sites hosted by Swarthmore.

Without acknowledging or conceding the validity of your client's claims of infringement, and without waiving the validity of any defenses Swarthmore College or its subscribers might have to those claims, including, without limitation, fair use, we write to inform you that, consistent with the protocols set forth under the Digital Millennium Copyright Act, 17 U.S.C. § 512 et seq., Swarthmore College has disabled access to each web address identified in your letters and accompanying charts as potentially containing allegedly infringing material or offering a direct link to a site that does so.

The action described above was taken on the basis of the representations made in your letters. In order to assist our client in confirming the validity of those representations, kindly promptly provide us with the following related to your those letters: (a) copies of all registrations for the materials in which Diebold claims a copyright interest;<sup>1</sup> (b) legal authority

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<sup>1</sup> If the works are not registered, for each such work in which you claim an interest, please provide us with the following information: (1) identify the: (a) author; (b) date of creation; (c) in what country the work was created; and (2) describe how Diebold acquired the copyright interest (i.e., assignment, work for hire, license). If Diebold acquired its copyright interest by assignment or license, please provide the writing effecting the conveyance of rights. If Diebold claims the works were "made for hire," please provide the details of the relationship between Diebold and the author.

Ralph E. Jocke  
October 23, 2003  
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supporting your allegation that the subscriber's use of a link to a website containing the allegedly infringing material constitutes direct or contributory infringement; (c) legal authority supporting your contention that Swarthmore is engaging in infringing activity if it continues to maintain a subscriber's site which merely offers a link to a site with the allegedly infringing materials after your notification; (d) how a subscriber's conduct in providing a link falls within the scope of 17 U.S.C. § 512(d) which refers to actions taken by a provider, not a user; and (e) the basis for your statement that the works were stolen. Finally, if Diebold has commenced any action to enforce its alleged copyrights in the specified works, please provide us with a copy of the Complaint.

Consistent with the Act, should we receive a counter-notification from the subscriber(s) under 17 U.S.C. §512(g)(2)-(3), we will promptly provide you with a copy and advise you of the College's intentions.

Sincerely,



Vincent V. Carissimi

VVC/kfv

cc: Judy Downing

## **EXHIBIT B**

3000 Two Logan Square  
Eighteenth and Arch Streets  
Philadelphia, PA 19103-2799  
215.981.4000  
Fax 215.981.4750

Vincent V. Carissimi  
direct dial: 215.981.4351  
direct fax: 215.689.4625  
carissimiv@pepperlaw.com

October 30, 2003

**Via Facsimile and First Class Mail**

Ralph E. Jocke, Esquire  
Walker & Jocke  
231 South Broadway  
Medina, OH 44256-2601

**Re: Notice of Copyright Infringement to Swarthmore College**

Dear Mr. Jocke:

By letter dated October 23, 2003, sent via Facsimile and First Class Mail, I notified you of our client, Swarthmore College's actions in response to your notices of October 9, 2003, and October 20, 2003 regarding alleged copyright infringement on various websites hosted by Swarthmore. Pursuant to those notices, we wrote to inform you that Swarthmore had taken appropriate action under the DMCA.

Because of the extraordinary nature of your request, and the non-obviousness of your claim of copyright infringement, we directed certain questions to you seeking information needed to evaluate your claim of infringement. We understand that Swarthmore was neither the only target of your notices on behalf of Diebold nor the most recent. Therefore, we assumed that the information requested would already have been assembled by Diebold prior to the issuance of the notices.

We are disappointed that a week has gone by and that the requested information has not been provided to us. Please either provide all of the requested information promptly or immediately let me know when we can expect to receive it. In the event the requested information and material is not forthcoming, we will presume that Diebold either refuses or is unable to provide the materials and information necessary to support its claims of infringement. We will counsel our clients accordingly.

Philadelphia

Washington, D.C.

Detroit

New York

Pittsburgh

Berwyn

Cherry Hill

Harrisburg

Princeton

Tysons Corner

Wilmington

Ralph E. Jocke, Esquire  
October 30, 2003  
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Thank you for your anticipated cooperation. I look forward to receipt of the requested information and materials no later than November 6, 2003.

Sincerely,

A handwritten signature in black ink, appearing to read 'V. Carissimi', written over a horizontal line.

Vincent V. Carissimi

VVC/kfv

cc: Judy Downing