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15 THOMAS SMITH

16 UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

18 ONLINE POLICY GROUP, NELSON CHU
PAVLOSKY, and LUKE THOMAS SMITH, et)
19 al.,)

20 Plaintiffs,)

21 v.)

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

24 Defendants.)

No. C-03-04913 JF

DECLARATION OF DAVID E. WEEKLY
IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

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

25
26
27 I, David E. Weekly, hereby declare as follows.

28 1. serve as Colocation Director for the Online Policy Group ("OPG") and am a

member of the OPG Board of Directors. I make this Declaration in support of OPG's motion for summary judgment and it incorporates by reference my previous declaration in this case in support of OPG's motion for temporary restraining order.

2. OPG is a nonprofit organization with tax-exempt status under federal law. OPG is dedicated to serving as the Internet Service Provider ("ISP") for groups and organizations that cannot afford commercial ISP services. We strive to help achieve "one Internet, with equal access to all."

3. OPG is funded through individual donations and has a completely volunteer staff and board of directors. OPG was founded in July, 2000.

4. OPG provides a variety of Internet services, all for no charge, to other non-profit organizations and individuals in the United States and abroad. This includes website hosting and colocation, a service where we provide connectivity to the Internet for a user but do not directly host any content (such as a website or e-mail) for the user.

5. OPG also provides e-mail hosting, domain registration, computer refurbishing, technical consulting and educational training for organizations and individuals. Its focus is on providing services to those who would not otherwise be able to afford Internet services and the constituencies it has targeted include the youth, elderly, disabled or ill individuals and those facing issues arising from their ethnic, cultural, religious, or sexual orientation. OPG also engages in political and research activity in support of freedom of speech online and related issues.

6. While OPG does not know the precise number, I believe we currently host over 1,000 websites altogether, including over 250 directly hosted websites and at least 750 on collocated machines. OPG hosts 907 e-mail mailing lists, and over 64 domain names. It collocates over 110 machines. Overall, OPG serves over 95,000 individuals who are either on email mailing lists, have websites or have domains hosted through OPG.

7. OPG receives its connection to the Internet from another ISP, called Hurricane Electric. In Internet parlance, Hurricane Electric is an "upstream" provider. Attached to my previous declaration in support of Plaintiffs' motion for preliminary injunction as Exhibit "A" is a true and correct copy of OPG's contract with Hurricane Electric.

8. Under its contract with Hurricane Electric, OPG pays Hurricane \$3,457 per month for its Internet connection.

9. OPG's relationship with Hurricane is also a colocation arrangement. Importantly, because the actual websites and other information that OPG and its users offer online is stored on their own computer and not on any computers owned or controlled by Hurricane Electric, Hurricane Electric has no ability to selectively filter websites, links, postings or any other information on OPG's own or collocated servers. Its only ability to prevent OPG or one of its users from linking to the archive, as Diebold demanded in its letter, was to pull the plug on all internet connectivity for all of OPG's users. Thus, Diebold's letter threatened OPG's entire contractual relationship with Hurricane Electric.

10. One of OPG's users is San Francisco IndyMedia, a news collective that is a branch of a larger, international news collective. Indymedia has a collocated computer that receives Internet connectivity through OPG and that computer hosts the websites <www.indybay.org> and <www.sf.indymedia.org>.

Just as in the relationship between OPG and Hurricane, OPG has no control over the Indymedia collocated computer other than an ability to unplug it entirely from the Internet. OPG cannot selectively block internet access for a single link, webpage, piece of information or other information on the collocated Indymedia computer.

Attempts to Disrupt OPG's Internet Connectivity May Recur

12. I, along with the rest of OPG's Board of Directors, remain deeply concerned that the situation we experienced with Diebold will recur. Given the depth of interest in the security of Diebold's evolving technologies, we reasonably anticipate that additional information about flaws in its systems will become public and that at least one of OPG's users will be interested in linking to the information.

13. I, along with the rest of the OPG Board of Directors, am also concerned that others may attempt to force OPG to censor or restrict its users free speech by issuing letters such as that sent by Diebold to our upstream provider, Hurricane Electric. Diebold's efforts were highly publicized and we reasonably believe that once one person or company discovers a method to

1 cheaply and easily silence critical speech online by through baseless threats of tertiary and
2 quaternary copyright infringement liability, others will follow suit.

3 14. OPG does not have the financial resources to bring litigation every time an
4 overreaching or unfounded claim is made to our upstream provider. We were able to secure pro
5 bono representation in this instance, but without declaratory relief we will be back in this same
6 position the next time Diebold or someone else tries to pressure us into preventing our users from
7 linking to information by threatening our upstream connectivity.

8 15. I, along with the rest of the OPG Board, am also concerned that Hurricane Electric
9 may not be as patient with OPG the second or third time this sort of problem occurs. We are
10 concerned that Hurricane Electric may begin to view us as a problem customer and seek to
11 terminate or change our contract for Internet connectivity.

12 OPG's Damages

13 16. As detailed in my previous Declaration, Diebold threatened OPG's connectivity
14 through Hurricane Electric starting with its letter to Hurricane Electric on October 10, 2003 and
15 continuing with its second letter on November 17, 2003 (See Second Declaration of Benny Ng in
16 support of preliminary injunction). As discussed in previous Declarations, only through assuring
17 Hurricane Electric that we would seek emergency relief from this court was OPG able to forestall
18 Hurricane Electric to maintain the status quo. The immediate threat was lifted on November 24,
19 2003.

20 17. Attached hereto as Exhibit A is a true and correct copy of a letter OPG received on
21 December 3, 2003 from the President of Diebold Election Systems, formally withdrawing the
22 DMCA notice for the noncommercial use of the Diebold email archive.

23 18. OPG's relationship with Hurricane was disrupted for a total of 45 days. The total
24 amount OPG paid for connectivity during the shadow of Diebold's claims was \$5,185.50.

25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct and that this declaration was executed in Hillsborough,
27 California.

28 Date: January 11, 2004


DECLARATION OF DAVID E. WEEKLY IN SUPPORT OF
PLAINTIFFS' APP FOR TRO AND FOR PRELIM INJUNCTION

EXHIBIT A

Diebold Election Systems, Inc.
1611 Wilmeth Road
McKinney, TX 75069
972 542-6000
fax 972 542-6044
www.dieboldes.com

December 3, 2003

Dear Mr. Doherty:

As President of Diebold Election Systems, Inc., I wish to inform you that our company is withdrawing the notification recently issued under the Digital Millennium Copyright Act of 1998. Diebold has decided not to sue ISPs or their subscribers now or in the future for copyright infringement for the non-commercial use of the materials posted to date, even though the uses may not qualify as "fair use" under the law.

From the outset, I want to emphasize that Diebold's overarching goal is to assist voters in exercising their most fundamental constitutional right: the right to vote. We believe that our touch screen and other electronic voting technologies are a major leap forward in helping more Americans vote with increased accuracy and accessibility. Touch screen technology eliminates "overvoting" and significantly reduces "undervoting." In addition, our touch screen technology offers multi-lingual ballot capability and enables the visually impaired to vote without assistance for the first time in their lives.

We recognize that how America votes is a matter of intense public interest, as it should be, and we support the electorate's right to participate in an open and robust debate on that topic. I want to assure you that my company's use of the Digital Millennium Copyright Act in response to the theft of internal information and development materials does not diminish our commitment to the constitutional values of our country.

No company-whether an ISP, a software developer, or any type of company-wants its internal conversations openly broadcast, and I am sure your internal business correspondence includes information involving the unique capabilities and insights that you feel are important to the successful operation of your company. The correspondence between individuals within our company often contains information concerning unique software, features and capabilities that provide Diebold with a potential advantage in a competitive marketplace. This type of information constitutes Diebold's work product and important intellectual property.

With that background, here is what led to the current situation. In January of this year, some software and other material was inadvertently exposed through a website of a predecessor company. In March, a hacker broke into one of our servers and stole a considerable quantity of our documents including a significant archive of information which is proprietary to Diebold. As you can imagine, the issue for Diebold, as for any other company in a similar circumstance, was what to do about the theft of its property in which it had a copyright interest, especially given the ease and quickness with which the stolen material could and did spread around the Internet.

In order to protect its intellectual property rights, Diebold chose to notify ISPs, as expressly permitted by the DMCA, that stolen material, in which Diebold has a copyright interest, was being hosted on or linked to websites under the ISP's control. Although we believe our legal position was and continues to be correct, we recognize that our DMCA efforts have become the story, and may be influencing the debate on how America's votes can be recorded and tallied most accurately.

To help refocus the public debate on that central issue, and recognizing that a considerable amount of the stolen email archive is now widely available on the Internet, Diebold has decided not to sue ISPs or their subscribers for copyright infringement for the non-commercial use of the materials. We are also withdrawing the DMCA notifications previously sent to you and other ISPs.

In taking this action, we are underscoring Diebold's commitment not only to provide the best voting systems in America, but to contribute to a robust public debate on how to record and tally the vote most accurately and efficiently. We welcome your input and suggestions concerning how we as citizens can further enhance the election process. Please let me know if you have any questions or comments concerning our position.

Sincerely,

Robert J. Urosevich
President