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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BANK JULIUS BAER & CO. LTD, a Swiss
entity, *et al.*,

Plaintiffs,

v.

WIKILEAKS, an entity of unknown form, *et al.*,

Defendants.

No. CV-08-0824 JSW

Action Filed: February 6, 2008

MOTION TO INTERVENE AND
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES
[Fed R. Civ. P. 24(a), 24(b)]

Date: May 9, 2008
Time: 9:00 a.m.
Place: Courtroom 2
Judge: Honorable Jeffrey S. White

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

This motion seeks the following relief: an order permitting Movants to intervene as Defendants and Cross-Complainants in the above-referenced action and to file their proposed Answer and Cross-Complaint In Intervention, a copy of which has been filed concurrently with this Motion.

INTRODUCTION

Movants are organizations and a member of the public who have accessed these documents on the Wikileaks site by using the wikileaks.org domain name and who intend to do so in the future.

1 They also want to continue to access such documents in the least burdensome manner possible.
2 They seek leave to intervene in this action so that they can move to vacate the permanent injunction,
3 which will in turn ensure that their First Amendment rights, and the rights of other members of the
4 public, to access the Wikileaks website are not injured by an overbroad prior restraint.¹

6 SUMMARY OF ARGUMENT

7 Movants meet each of the requirements for intervention as of right contained in Rule 24(a).
8 *First*, this Motion is timely. Plaintiffs Bank Julius Baer & Co., Ltd. and Julius Baer Bank & Trust
9 Co. Ltd. (“BJB”) commenced this action on February 6, 2008, and the permanent injunction
10 rendering the “Wikileaks.org” domain name totally inoperable was entered less than two weeks ago.
11 Movants brought this Motion as soon as reasonably practicable under the circumstances. *See* Part
12 I(A), *infra*.

13 *Second*, Movants have a clear interest in the subject of this action. The First Amendment
14 encompasses the “right to receive information and ideas.” *Kleindienst v. Mandel*, 408 U.S. 753,
15 762 (1972) (citation omitted). The documents and materials posted on the Wikileaks website
16 concern matters of great public interest, including the U.S. Army’s operations in Guantanamo Bay,
17 human rights abuses in China and political corruption in Kenya. Movants have accessed documents
18 such as these through the wikileaks.org domain name before, and will do so again if they can.
19 Movants’ interests in unfettered access to these materials through wikileaks.org is therefore
20 protected by the First Amendment. *See* Part I(B), *infra*.

21 *Third*, the Court’s disposition of this action has *already* impaired Movants’ rights. The Court
22 has entered a permanent injunction ordering Defendant Dynadot, LLC. (“Dynadot”), the domain

23
24 ¹Movants do not presently seek access to the documents and information that Plaintiffs claim
25 as their property and therefore do not address the significant First Amendment questions raised by
26 Plaintiffs’ motion for a preliminary injunction. We note, however, that Plaintiffs’ request for a
27 preliminary injunction requiring that the documents be removed from the Wikileaks website raises
28 serious First Amendment concerns. Plaintiffs’ Complaint does not appear to allege that Wikileaks
played any role in the alleged theft of the documents at issue. The situation here thus appears to be
analogous to that in *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001), *Florida Star v. B.J.F.*, 491 U.S.
524, 541 (1989), and *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), making it
unlikely that Plaintiffs are entitled to a preliminary injunction.

1 name registrar for the “Wikileaks.org” domain name, to disable that domain name and to block it
2 from being registered by or transferred to any other registrar. In effect, the Court has ordered the
3 domain name “wikileaks.org” to be shut down and locked up permanently, thus interfering with
4 Movants’ access to *all* the materials available through that domain name, including documents and
5 other information that are not even arguably subject to this lawsuit. *See* Part I(C), *infra*.

6 *Fourth*, Movants’ interests have *not* been represented by the existing parties. Wikileaks and
7 Wikileaks.org have not yet appeared in this case. Dynadot stipulated to the permanent injunction
8 and in return received an order requiring Plaintiffs to dismiss it from the case. No party has
9 represented Movants, or other members of the public, who wish to access information that is not
10 subject to Plaintiffs’ claim of ownership. *See* Part I(D), *infra*.

11 Alternatively, the Court should let Movants intervene under Rule 24(b). *See* Part II, *infra*.

12 BACKGROUND

13 Plaintiffs commenced this action on February 6, 2008, asserting six causes of action based
14 solely on the allegation that the Wikileaks website had improperly obtained and published certain
15 confidential documents belonging to BJB. Compl. (Docket No. 1) ¶¶1, 25-27.²

16 The principal Defendants named in the Complaint are “Wikileaks” and “Wikileaks.org,”
17 individuals or entities who are alleged to own and/or operate the “Wikileaks” website. *Id.* ¶¶7-8.
18 The Wikileaks site describes itself as an Internet website where participants can anonymously
19 disclose and comment on documents and other materials of public interest. *See* Proposed Answer
20 and Cross-Complaint in Intervention (“Cross-Complaint”) ¶14. According to the site, its “primary
21 interest” “is in exposing oppressive regimes in Asia, the former Soviet bloc, Sub-Saharan Africa and
22 the Middle East, but we also expect to be of assistance to people of all regions who wish to reveal
23 unethical behavior in their governments and corporations.” *Id.* ¶15.

24 The Wikileaks website utilizes technology designed to permit third parties to post electronic
25

26 ²The Complaint asserts the following causes of action: (1) Unlawful and Unfair Business
27 Practices in Violation of California Business & Professions Code Section 17200; (2) Declaratory
28 Relief; (3) Interference With Contract; (4) Interference With Prospective Economic Advantage; (5)
Conversion and (6) Injunctive Relief.

documents easily for public availability. Cross-Complaint ¶16. Information on the site states that it was founded “by Chinese dissidents, journalists, mathematicians and startup company technologists, from the US, Taiwan, Europe, Australia and South Africa.” *Id.* ¶17. Among other things, material posted to the website includes the U.S. Army’s operations manual for the Guantanamo Bay detention facility, documents concerning the United States’ expenditures on its military efforts in Afghanistan and Iraq, and reports exposing alleged corruption by Kenyan political leaders. *Id.*

In addition to Defendants “Wikileaks” and “Wikileaks.org,” Plaintiffs’ Complaint also named Dynadot as a Defendant to the declaratory and injunctive relief causes of action. *See* Compl. 19, 25. Dynadot is one of several Internet domain name registrars that are accredited by the Internet Corporation for Assigned Names and Numbers (“ICANN”), a non-profit corporation originally chartered by the U.S. Department of Commerce to oversee a number of Internet-related tasks, including the registration of domain names. The “wikileaks.org” domain name is registered—in essence, permitted to function—by Dynadot.³

At the same time or shortly after they filed their Complaint, Plaintiffs sought injunctive relief. The Memorandum they filed supporting their motion for a temporary restraining order and an order to show cause regarding the issuance of a preliminary injunction (“Memo”) makes only passing reference to injunctive relief against Dynadot. Indeed, its sole reference to an order compelling Dynadot to shut down the wikileaks.org domain name is contained in a single four-line footnote. *See* Memo 21 n.3. That footnote did not discuss the probability of success of Plaintiffs’ claims against Dynadot or the balance of hardships caused by granting the relief sought. Nor did the footnote discuss the impact of injunctive relief against Dynadot on third parties or the public interest. Indeed, neither the footnote nor the Memorandum as a whole mentioned the First Amendment. Finally, the injunctive relief sought by that footnote was only temporary—*i.e.*, an

³At a very simplified level, an Internet website can be accessed through a web browser either by inputting an “IP address”—a unique numerical address in a specified format (such as 88.80.13.160) that is associated with the computer that hosts the website—or by inputting a website’s domain name (such as wikileaks.org), which, if it has been properly registered, will direct traffic to the website’s IP address. Multiple domain names may be associated with a single IP address. ICANN holds a complete list of domain names in the world and asserts overall responsibility for managing the domain name system (“DNS”), a global, distributed Internet database.

1 order compelling Dynadot to shut down the wikileaks.org domain name *until the “JB property” was*
2 *returned. See id.*⁴

3 The “permanent injunction” granted by the Court was, as its name implies, decidedly not
4 temporary. This order, entered on February 15, 2008, on stipulation between Plaintiffs and
5 Dynadot, requires the latter to, among other things, immediately (1) “disable the wikileaks.org
6 domain name” (Order Granting Permanent Injunction (Docket No. 48) ¶2 (“Order”)); (2) “clear and
7 remove all DNS hosting records for the wikileaks.org domain name and prevent the domain name
8 from resolving to the wikileaks.org website or any other website or server other than a blank park
9 page” (*id.* ¶4) and (3) “lock the wikileaks.org domain name to prevent transfer of the domain name
10 to a different domain registrar” (*id.* ¶1).

11 The permanent injunction has the effect of blocking access by anyone in the United States
12 (and the world) to the Wikileaks website through the wikileaks.org domain name. As a result, it
13 impedes access to the entire Wikileaks site, not just the documents that BJB claims are at issue in
14 this litigation. Although there are foreign country domain names that apparently resolve to the same
15 IP address as wikileaks.org and are unaffected by the Court’s injunction, including wikileaks.be
16 (Belgium) and wikileaks.de (Germany), and although sophisticated users or those who have been
17 following the controversy in the press may realize that the Wikileaks website is still reachable
18 through these foreign domain names, the permanent injunction nevertheless precludes anyone who
19 enters wikileaks.org into his or her browser from obtaining access to the site that was once available
20 at that URL.

21 Movants are a group of not-for-profit organizations with an interest in receiving the
22 information provided on the Wikileaks website, either themselves or on behalf of their members,
23 and an individual user of the Wikileaks website, each of whom has a demonstrable interest in
24 continued, uninterrupted access to the site:

25
26 ⁴Indeed, the Memorandum is replete with passages indicating that Plaintiffs were seeking only
27 the return of their purported property and did not seek broader relief that would impair the public’s
28 ability to access other information on the Wikileaks site that concerned the Plaintiffs but did not
constitute “confidential” or “private” information over which Plaintiffs claimed ownership. *See*
Memo 8:20-21, 10:3-8.

- The Project on Government Oversight (“POGO”) is an independent, non-profit organization that investigates and exposes corruption and other government misconduct. POGO staff members read and followed postings on the Wikileaks website prior to the filing of Plaintiffs’ lawsuit and have strong reason to believe that future postings will be of use in the organization’s ongoing investigations. This lawsuit is also of particular interest to POGO because POGO will be unable to encourage whistleblowers who need an outlet for their documents to use the Wikileaks website if it is no longer as easily available as possible. (Cross-Complaint ¶4)
- The American Civil Liberties Union (“ACLU”) is a nationwide, non-profit, nonpartisan organization. The ACLU is frequently involved in litigation and advocacy efforts concerning the rights of whistleblowers and numerous human rights issues, many of which are the subjects of material on the Wikileaks website. Staff members of the ACLU access and rely on documents and information posted on the Wikileaks website, and intend to do so in the future because of the material’s close connections to the everyday work of the ACLU. As one example, the ACLU previously issued public statements regarding the U.S. Army’s operations manual for the Guantanamo Bay detention facility that was first disclosed on the Wikileaks website, and will likely do so again if similar documents are posted on the website. (*Id.* ¶5)
- Electronic Frontier Foundation (“EFF”) is a donor-supported membership organization working to protect fundamental rights regardless of technology; to educate the press, policymakers and the general public about civil liberties issues related to technology; and to act as a defender of those liberties. EFF has over 10,000 paying members nationwide. EFF members access information from and/or post information to the Wikileaks website and intend to do so in the future. (*Id.* ¶6)
- Jordan McCorkle is a senior at the University of Texas. He is a regular user of the Wikileaks website, which he visits at least once each week, sometimes more. He depends on Wikileaks as a source of information that is not available in the more traditional media so that he can keep abreast of recent developments and, where appropriate, make his views known to others about what he has learned from visiting the site. Mr. McCorkle wants to be able to continue to access the site so that both he and the public independently can assess questionable activities performed by corporate and governmental entities. (*Id.* ¶7)

None of the Movants are associated with, have any connections to, or have any involvement with the maintenance of the Wikileaks website. Id. ¶8.

ARGUMENT

Intervention is governed by two distinct provisions of Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a) sets forth the requirements for intervention as of right, while Rule 24(b) sets forth the requirements for permissive intervention. Movants satisfy the requirements of both and should be allowed to intervene in this action to challenge the Court's permanent injunction on First Amendment grounds.

I.

**MOVANTS ARE ENTITLED TO INTERVENE AS OF RIGHT
UNDER RULE 24(a)(2).**

Rule 24(a), governing intervention as of right, is construed by federal courts “liberally in favor of potential intervenors.” *Southwestern Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). The decision whether to allow intervention is “‘guided primarily by practical considerations,’ not technical distinctions.” *Id.* (citing *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated on other grounds sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987)). In considering a motion to intervene, the Court must accept all well-pleaded allegations in Movants’ proposed pleadings. *Southwestern Ctr.*, 268 F.3d at 820.

The Ninth Circuit has adopted a four-part test to resolve applications for intervention as of right:

(1) [T]he applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party’s ability to protect that interest; and (4) the applicant’s interest must not be adequately represented by existing parties. (*Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003))

Movants meet each of these requirements.

A. The Motion To Intervene Is Timely.

Plaintiffs commenced this action on February 6, 2008, and Defendants Wikileaks and Wikileaks.org have yet to answer the Complaint. Accordingly, this litigation is in its infancy, and the Motion is timely. *See Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993) (application timely when filed at outset of litigation). Although the Court has entered a “permanent injunction,” the Court retained jurisdiction to enforce or modify it. As a result, permitting Movants to intervene to protect their interests will not delay adjudication of the action.

B. Movants Have Substantial First Amendment Interests In Accessing The Wikileaks Website.

The “significantly protectable interest” the Ninth Circuit requires for intervention is “‘primarily a practical guide to disposing of lawsuits by involving as many apparently concerned

1 persons as is compatible with efficiency and due process.” *County of Fresno v. Andrus*, 622 F.2d
2 436, 438 (9th Cir. 1980) (citations omitted). “It is generally enough that the interest [asserted] is
3 protectable under some law, and that there is a relationship between the legally protected interest
4 and the claims at issue.” *Sierra Club*, 995 F.2d at 1484. Where “the injunctive relief sought by
5 plaintiffs will have direct, immediate, and harmful effects upon a third party’s legally protectable
6 interests, that party satisfies the ‘interest’ test.” *Forest Conservation Council v. U.S. Forest Serv.*,
7 66 F.3d 1489, 1494 (9th Cir. 1995).

8 The injunctive relief already granted by this Court more than meets this test. The permanent
9 injunction blocks the public’s access to the Wikileaks site through the domain name wikileaks.org.
10 See Compl. (Docket No. 1) ¶78(g) (requesting that the domain name wikileaks.org be locked, and
11 that its transfer be prevented); Order ¶1 (ordering same). As a result, Movants cannot use that
12 domain name to access *any* of the documents and information that were formerly available or might
13 become available in the future on the Wikileaks website, even documents and information that have
14 no connection to Plaintiffs and that are of national, if not international, interest. See p.6, *supra*.

15 Consequently, the permanent injunction has “direct, immediate, and harmful effects” on the
16 First Amendment rights of Movants and the public to access this information without judicial
17 hindrance. A long line of Supreme Court precedent holds that the First Amendment not only
18 “embraces the right to distribute literature,” it also “necessarily protects the right to *receive* it.”
19 *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (emphasis added); accord *Bd. of Educ. v. Pico*,
20 457 U.S. 853, 867 (1982) (“the right to receive ideas is a necessary predicate to the *recipient’s*
21 meaningful exercise of his own rights of speech, press, and political freedom”) (emphasis in
22 original); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (First Amendment encompasses “‘right
23 to receive information and ideas’”) (citation omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367,
24 390 (1969) (“It is the right of the public to receive suitable access to social, political, esthetic, moral,
25 and other ideas and experiences which is crucial here. That right may not constitutionally be
26 abridged . . .”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the
27 Constitution protects the right to receive information and ideas”); *Lamont v. Postmaster Gen.*, 381
28 U.S. 301, 308 (1965) (“The dissemination of ideas can accomplish nothing if otherwise willing

1 addressees are not free to receive and consider them. It would be a barren marketplace of ideas that
2 had only sellers and no buyers”) (Brennan, J., concurring).

3 This right to receive information specifically includes information disseminated over the
4 Internet. In *Clement v. California Department of Corrections*, 364 F.3d 1148 (9th Cir. 2004), an
5 inmate at Pelican Bay State Prison alleged that the prison violated his First Amendment rights by
6 prohibiting inmates from receiving material downloaded from the Internet. *Id.* at 1150. The district
7 court denied the prison’s motion for summary judgment on Clement’s claims, *sua sponte* granted
8 summary judgment in Clement’s favor and issued a permanent statewide injunction against
9 enforcement of the policy. *Id.* The Ninth Circuit affirmed, holding that the constitutional right to
10 receive information applies to “material disseminated over the internet as well as by the means of
11 communication devices used prior to the high-tech era.” *Id.* at 1151; *see also Reno v. ACLU*, 521
12 U.S. 844, 874 (1997) (invalidating law that restricted adults’ right to access information on the
13 Internet).

14 Moreover, the protection for Internet speech applies to domain names, which when used for
15 expressive, noncommercial purposes are fully protected by the First Amendment. *Taubman Co. v.*
16 *Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (“the domain name is a type of public expression, no
17 different in scope than a billboard or a pulpit”).⁵ Accordingly, the permanent injunction rendering
18 the domain name inoperable implicates Movants’ First Amendment interests in receiving documents
19 and information from the Wikileaks website, and thus satisfies Rule 24(a)’s “protectable interest”
20 requirement. *Cf. Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 472-73 (9th Cir. 1992)
21 (affirming intervention by third party to seek modification of protective order to access deposition
22 transcripts). Indeed, although the right to receive information and ideas is “fundamental to our free
23

24 ⁵There is an exception when a domain name uses a third party’s trademark for purely
25 commercial purposes, in which case the First Amendment may provide reduced protection. *See*
26 *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005). No such claim is presented
27 here. Where, as here, the domain name is expressive and describes the content of the material on the
28 website, the domain name functions much like the title or author’s name on a book and is fully
protected by the First Amendment. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348
(1995) (“the identity of the speaker is no different from other components of [a] document’s
contents that the author is free to include or exclude”).

1 society *regardless* of their social worth” (*Stanley*, 394 U.S. at 564 (emphasis added)), the right to
2 access the materials posted on the Wikileaks website is peculiarly deserving of protection under the
3 First Amendment. These documents concern issues of national and international importance, such
4 as international human rights, political corruption and other such core socio-political issues. *See* p.3,
5 *supra*. Movants have accessed such documents in the past and relied on them as part of their
6 research, policy and public advocacy efforts. *See* pp. 5-6, *supra*.

7
8 **C. The Disposition Of The Lawsuit Already Has Adversely Affected Movants’**
9 **First Amendment Rights.**

10 The Ninth Circuit has stated that “[i]f an absentee would be substantially affected in a
11 practical sense by the determination made in an action, he should, as a general rule, be entitled to
12 intervene.” *Southwestern Ctr.*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee’s
13 note). Movants’ First Amendment rights to access the important information on the Wikileaks
14 website have already been affected, “in a practical sense,” by the permanent injunction. Because the
15 injunction prevents *all use* of the wikileaks.org domain name, it has prevented both Movants and the
16 public from using that domain name to access all of the documents and other materials available
17 thereby. Indeed, it is precisely because the permanent injunction interferes with the ability of
18 members of the public to access the site that Plaintiffs sought such relief. It thus impairs not only
19 the First Amendment rights of Wikileaks, but also those belonging to Movants.

20 In this sense, the injunction is no different than a hypothetical order prohibiting Dynadot from
21 passing out leaflets telling potential viewers how to access the Wikileaks site. That plainly would
22 violate the First Amendment (*Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971)), and so does
23 the permanent injunction. Like the injunction against leafleting overturned in *Organization for a*
24 *Better Austin*, the permanent injunction rendering the domain name inoperable is a classic prior
25 restraint, “the most serious and the least tolerable infringement on First Amendment rights.” *Neb.*
26 *Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Moreover, the First Amendment does not permit
27 the issuance of injunctive relief that hinders access to documents and other information that is not
28 even arguably Plaintiffs’ property. *See Tory v. Cochran*, 544 U.S. 734, 738 (2005) (quoting *Carroll*

1 v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968), for the proposition that an
2 "order" issued in "the area of First Amendment rights" must be "precis[e]" and narrowly "tailored"
3 to achieve the "pin-pointed objective" of the "needs of the case") (internal quotation marks omitted);
4 *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765-66 (1994) (injunction may burden no more
5 speech than necessary). The permanent injunction has therefore injured Movants' First Amendment
6 rights to access these documents and information. Accordingly, they should be allowed to intervene
7 in this action so that they can move to vacate that injunction.

8 Plaintiffs may respond by asserting that, as mentioned above, some or all of the documents
9 and information available through the wikileaks.org domain name remain available to the public
10 using foreign domain names other than wikileaks.org. See p.5, *supra*. That proves only the
11 pointlessness, and thus the lack of constitutionally adequate justification, for the sweeping injunctive
12 relief entered by the Court. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S.
13 557, 564 (1980) (law that restricts speech "may not be sustained if it provides only ineffective or
14 remote support for the government's purpose").

15 Nor can the availability of alternate routes to the Wikileaks website compromise Movants'
16 First Amendment rights in obtaining access to that site through wikileaks.org. The Supreme Court
17 has repeatedly held that "one is not to have the exercise of his liberty of expression in appropriate
18 places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*,
19 308 U.S. 147, 163 (1939); accord *Reno v. ACLU*, 521 U.S. 844, 879-80 (1997) (rejecting the
20 government's contention that content-based restriction on speech in numerous Internet modalities
21 was permissible because the law allowed a "reasonable opportunity" for such speech to occur
22 elsewhere on the Internet; citing *Schneider*, the Court noted that "[t]he Government's position is
23 equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are
24 free to publish books"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,
25 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that the freedom of speech
26 may be abridged when the speaker's listeners could come by his message by some other
27 means . . ."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (holding an
28 otherwise impermissible prior restraint against performance of musical "Hair" is not saved by

1 availability of other forums for production). It is equally immaterial if the permanent injunction's
2 only effect was to delay, rather than completely frustrate, access to the Wikileaks website. *See*
3 *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even
4 minimal periods of time, unquestionably constitutes irreparable injury").

5 Nor, of course, can the permanent injunction's infringement on *Movants'* First Amendment
6 rights be justified by the fact that *Dynadot* agreed to it. Indeed, the injunction effectively grants
7 Plaintiffs relief that they could not have obtained by private agreement. The Public Interest
8 Registry, pursuant to a Registry Agreement with ICANN, operates the .org top-level domain. *See*
9 <http://www.icann.org/tlds/agreements/org/>. Dynadot, like all domain name registrars of the .org
10 domain, entered into a Registry-Registrar Agreement with PIR. The terms of the Registry-Registrar
11 Agreement requires Dynadot to adhere to the "ICANN standards, policies, procedures, and practices
12 for which PIR has monitoring responsibility," among other obligations. *See* [http://www.pir.org/](http://www.pir.org/PDFs/ORG-RRA-3-April-2007-FINAL.pdf)
13 [PDFs/ORG-RRA-3-April-2007-FINAL.pdf](http://www.pir.org/PDFs/ORG-RRA-3-April-2007-FINAL.pdf), Section 3.5. This includes the ICANN Policy on
14 Transfer of Registrations between Registrars, which states that domain name registrars (such as
15 Dynadot) "may deny a transfer request only in the following specific instances." *See*
16 <http://www.icann.org/transfers/policy-12jul04.htm>. While this list includes a "[c]ourt order by a
17 court of competent jurisdiction," it does not include a private agreement between the registrar and a
18 third party.

19
20 **D. The Existing Parties Have Not Adequately Represented Movants' Interests**
21 **In This Litigation.**

22 In determining whether a proposed intervenor's interests will be adequately represented,
23 courts consider (1) whether the interest of a present party is such that it will undoubtedly make all
24 the intervenor's arguments, (2) whether the present party is capable and willing to make such
25 arguments, and (3) whether a proposed intervenor would offer any necessary elements to the
26 proceedings that other parties would neglect. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.
27 2003). The burden to make this showing is "minimal, and would be satisfied if [a proposed
28 intervenor] could demonstrate that representation of [its] interests 'may' be inadequate." *Id.*

1 In this case, Movants' interests have not been protected by the current parties to this action.
2 Defendants Wikileaks and Wikileaks.org have yet to appear in this case, and so cannot represent
3 Movants' interests.⁶ Defendant Dynadot consented to the permanent injunction against it, and is
4 thus obviously adverse to Movants.⁷ In short, on the present record, none of the parties to this
5 litigation can or will argue that the permanent injunction violates the rights of people who want to
6 access the Wikileaks website without judicial hindrance.

7 8 II.

9 **ALTERNATIVELY, MOVANTS ARE ENTITLED TO** 10 **INTERVENE PERMISSIVELY UNDER RULE 24(b)(2).**

11 Even if Movants were not entitled to intervene as a matter of right in this proceeding under
12 Rule 24(a), the Court should nonetheless allow them to intervene permissively pursuant to Rule
13 24(b). Rule 24(b) provides, in relevant part,

14 Upon timely application anyone may be permitted to intervene in an action . . . (2) when
15 an applicant's claim or defense and the main action have a question of law or fact in
16 common. . . . In exercising its discretion the court shall consider whether the
intervention will unduly delay or prejudice the adjudication of the rights of the original
parties. (Fed. R. Civ. P. 24(b))

17 Ninth Circuit case law sets out three conditions for permissive intervention under this rule:
18 (1) the applicant has its own independent ground for subject matter jurisdiction,⁸ (2) the application

19
20 ⁶Even if they do appear, the Wikileaks Defendants would doubtless have other interests in
21 addition to, and different from, those of Movants. Accordingly, they would still be inadequate
22 surrogates to represent Movants' discrete interests in removing the harm to their First Amendment
rights caused by the permanent injunction. For example, Wikileaks could raise issues such as
whether this Court has jurisdiction over it that could prevent it from asserting Movants' First
Amendment interests in a thorough manner, if at all.

23 ⁷Dynadot's willingness to stipulate to sweeping injunctive relief is particularly troublesome
24 because, as a domain name registrar, it is immune from any liability in this action under Section 230
25 of the Communications Decency Act ("CDA"). 47 U.S.C. §230(c)(1). That statute precludes
26 Dynadot from being treated as a speaker or publisher of information provided by an information
content provider such as Wikileaks. See *Smith v. Intercosmos Media Group, Inc.*, No. Civ. A. 02-
1964, 2002 WL 31844907 (E.D. La. Dec. 17, 2002) (holding that Intercosmos, a domain name
registrar, was immune under Section 230).

27 ⁸This particular requirement applies only to Movants' request for permissive intervention.
Independent subject matter jurisdiction need not be established for intervention as of right under
28 Rule 24(a). See 28 U.S.C. §1367(a) (conferring supplemental jurisdiction over "claims that
(continued . . .)

1 is timely, and (3) the applicant's claim or defense and the main action have a question of law or a
2 question of fact in common. *United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir.
3 2002). Courts should also consider practical considerations in determining whether to exercise
4 discretion to allow permissive intervention, including whether the intervenor's interests are
5 adequately represented by other parties, whether intervention would cause delay or prejudice, and
6 judicial economy. *Venegas v. Skaggs*, 867 F.2d 527, 530-31 (9th Cir. 1989), *aff'd*, 495 U.S. 82
7 (1990). Movants meet each of these requirements.

8 *First*, there is an independent basis for subject matter jurisdiction over Movants' claims.
9 These claims rest on Movants' rights under the First and Fifth Amendments. *See* Cross-Complaint
10 ¶23. They thus invoke federal question jurisdiction. 28 U.S.C. §1331.

11 *Second*, for the reasons already set out above (*see* Part I(A), *supra*), the motion is timely.

12 *Third*, there are essential legal and factual questions common to the existing action and
13 Movants' claims and defenses in intervention. If allowed to intervene, Movants will move to vacate
14 the permanent injunction entered against Dynadot because the injunction violates Movants' and the
15 public's First Amendment rights as *recipients* of information. Because a court considering
16 injunctive relief must consider the injunction's effect on the public interest (*Southwest Voter*
17 *Registration Education Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) ("The district court
18 must also consider whether the public interest favors issuance of the injunction"); *Natural Res. Def.*
19 *Council, Inc. v. Gutierrez*, No. C-07-04771, 2008 WL 360852, at *3 (N.D. Cal. Feb. 6, 2008) ("In
20 determining whether to issue an injunction, courts must also consider the public interest")), these
21 issues were necessarily raised by Plaintiffs' request for sweeping permanent injunctive relief.

22
23
24
25
26
27 (. . . continued)
28 involve . . . intervention of additional parties"); William W. Schwarzer et al., *California Practice*
Guide: Federal Civil Procedure Before Trial ¶7:261-262 (2004).

1 **CONCLUSION**

2 For the foregoing reasons, Movants respectfully request that this Court grant their motion for
3 intervention as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, or, in the
4 alternative, their motion for permissive intervention pursuant to Rule 24(b).

5 DATED: February 26, 2008.

6 Respectfully,

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