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12  
13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA / SAN JOSE

15 **ONLINE POLICY GROUP, NELSON  
16 CHU PAVLOSKY, and LUKE  
17 THOMAS SMITH,**

18 **Plaintiffs,**

19 **v.**

20 **DIEBOLD, INCORPORATED, and  
21 DIEBOLD ELECTION SYSTEMS,  
22 INC.,**

23 **Defendants.**

**Case No. 03-4913JF**

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT**

Hearing Date: February 9, 2004  
Time: 9:00 a.m.  
Courtroom: 3

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1     **I.     PREFACE**

2             Plaintiffs attempt to color the legal issues before the Court by accusing Diebold, without  
3 any evidence, of deliberately scheming to silence critics during the election season and then  
4 backing off to avoid a court decision that would prevent it and other copyright owners from using  
5 the same supposed scheme in the future. Plaintiffs are demonstrably wrong at each turn. Far  
6 from being squelched, the issue of voting machine security “raged across the headlines and  
7 editorial sections of our nation’s leading newspapers and magazines,” as plaintiffs’ motion admits  
8 (p. 2) in another context. By one estimate, 30,000 people downloaded the collection of 1,300  
9 stolen memos from just three of the numerous websites that continued to post them. *See*  
10 “Targeting Diebold With Electronic Civil Disobedience,” Seltzer 11/3/03 Decl., Ex. J, p. 4. Plus,  
11 contrary to their litigation position, plaintiffs elsewhere have proclaimed their group’s  
12 “symposium” for discussing the stolen Diebold material was a “huge success.” *Infra*, p. 13. The  
13 record moreover indisputably demonstrates that Diebold's decision to forgo litigation was  
14 motivated by one simple reality: in light of the widespread disregard of Diebold’s DMCA  
15 notifications, rebottling the stolen-material had become impossible. Having represented  
16 unambiguously to this Court that it will not sue plaintiffs or similarly situated persons for posting  
17 or linking to the materials at issue, Diebold poses no cognizable threat to plaintiffs. And their  
18 conjecture that they or others might want to post or link in the future to different copyrighted  
19 materials stolen from Diebold or someone else does not justify an advisory opinion as to the  
20 lawfulness of that hypothetical future conduct.

21     **II.    SUMMARY**

22             Ironically, plaintiffs’ Rule 56 motion conclusively demonstrates why **Diebold** is entitled  
23 to summary judgment. Plaintiffs confirm that their case depends on the theory that (i) defendants  
24 “threatened” litigation against plaintiffs, and (ii) any litigation would have been “frivolous”  
25 because plaintiffs’ wholesale publication of or linking to stolen copyrighted materials was  
26 somehow unquestionably “fair use.” Plaintiffs are wrong on both counts.

1 As a threshold matter, Diebold did not threaten litigation. It simply sent notifications of  
2 infringement under the DMCA without threatening to sue, or suing, anyone. In doing so Diebold  
3 followed the procedure established by Congress in the DMCA to a tee.

4 Beyond that, Diebold's infringement claim was anything but frivolous. For plaintiffs to  
5 prevail, they must demonstrate the equivalent of a Rule 11 violation--namely, that Diebold's  
6 position on the law of fair use set forth in this brief and previous briefs is so unfounded that  
7 counsel should be sanctioned. Plaintiffs cannot possibly carry their burden, given both the nature  
8 of the law on fair use, which posits "a case-by-case analysis and a flexible balancing of relevant  
9 factors" as opposed to any bright-line test (*Mattel Inc. v. Walking Mountain Productions*, 353  
10 F.3d 792, 800 (9<sup>th</sup> Cir. 2003)), and their concession that the law is "far from settled" "with no  
11 clear legal demarcation of acceptable and unacceptable uses for the information." Pls.' Mot., p.  
12 15; Pavlosky 1/9/04 Decl., ¶ 7. If any argument in this action were frivolous, it would be  
13 plaintiffs.'

14 For proof that Diebold is in good company and that its legal arguments are far from  
15 frivolous (to be most charitable to plaintiffs), one need only examine the statement of Johns  
16 Hopkins University's General Counsel, attached to the Laroia declaration submitted by plaintiffs  
17 for a different purpose. Without receiving a DMCA notification, that university evidently  
18 decided on its own that wholesale publication of the stolen materials was not defensible as fair  
19 use. The General Counsel's Office observed:

20 "If a faculty member chooses to do a scholarly analysis, no matter how detrimental . . . ,  
21 we would, and do, stand by that faculty member's right to publish. This is far different. It  
22 is the publishing of the raw documents belonging to Diebold. It is the difference between  
23 publishing a thoughtful, though scathing, article about the poems of Shelly and simply  
publishing a copy of the poems themselves. The first is journalism, scholarship and  
research, the latter merely copyright violation."

24 Loroia Decl., Exh. A. Consistent with that view, no court has ever extended the fair use  
25 doctrine to worldwide, wholesale posting of gigabytes of previously unpublished, stolen internal  
26 company R&D materials. Indeed, if anything is crystal clear in the law of fair use, it is that  
27 copying large portions of written copyrighted material is impermissible even where the  
28 infringer's purpose is to criticize (*Religious Technology Center v. Netcom On-Line*

1 *Communication Servs.*, 923 F. Supp. 1231, 1249 (N.D. Cal. 1995)), and the public interest is great  
2 (*Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 555-57 (1985)).

3 Contrary to plaintiffs’ argument, the fact that Diebold has not sued, and will not sue,  
4 plaintiffs for infringement is not sinister. The DMCA was designed to provide a process for the  
5 express purpose of avoiding litigation while balancing the interests of copyright owners, ISPs and  
6 subscribers. It would pervert Congress’ intent to say that a copyright owner may use the  
7 expeditious DMCA process, which is designed to avoid lawsuits, only if it commits in advance to  
8 suing anyone who declines to comply with the notifications. Indeed, far from suggesting bad  
9 faith, Diebold’s unequivocal representation to this Court, and to the world, that it will not sue for  
10 the non-commercial use of the materials at issue, accompanied by withdrawal of its notifications,  
11 moots plaintiffs’ claim for declaratory relief.

12 For the same reasons, this action is not the appropriate place to determine the metes and  
13 bounds of ISP liability for hosting websites that link to infringing materials. As an initial matter,  
14 Diebold did not threaten to sue any ISP and is not suing any ISP for linking liability or anything  
15 else, so the issue is not presented here. In addition, Diebold’s conduct here — sending a DMCA  
16 notification—was a request for voluntary assistance, not a threat to sue. If, however, the DMCA  
17 notification were somehow considered a threat to sue, this case would still be an inappropriate  
18 vehicle for determining the ultimate liability of the ISP; the only issue would be whether a lawsuit  
19 by Diebold would have been frivolous and a sham. Plaintiffs implicitly concede this argument  
20 when they state (p. 15) that the law in this area is unclear and urge (p. 8) the Court to “clarify” it.

21 In short, adjudicating the circumstances under which an ISP can be held liable for hosting  
22 websites that contain or link to infringing materials should await a live controversy where a  
23 copyright owner is suing an ISP or where the ISP has a reasonable anticipation of being sued.  
24 Neither is true here. All the counts except for the declaratory relief request can be disposed of on  
25 the ground that Diebold’s notifications were not frivolous, without the court deciding the precise  
26 contours of ISP liability for hosting or linking. And the declaratory relief count is moot because  
27 plaintiffs are free of liability for their conduct at issue here.

1 **III. FAIR USE**

2 None of the cases plaintiffs cite supports their view of fair use, and certainly none casts  
3 doubt on the *bona fides* of Diebold’s DMCA notifications.

4 **Non-Transformative Use:** Citing *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792  
5 (9th Cir. Dec. 29, 2003), and *Nunez v. Caribbean Int’l. News Corp.*, 235 F.3d 18 (1st Cir. 2000),  
6 plaintiffs assert (p.10) that they “transformed the Diebold e-mail archive” by “shift[ing]” the  
7 “context” in which the e-mails were read—from an internal work context to a public, political  
8 one. But these cases stand for no such principle. Indeed, the conduct at issue in these cases—  
9 parodists and newspapers copying an entire photographic image of Barbie and Ms. Puerto Rico—  
10 bears no resemblance to plaintiffs’ conduct here—copying thousands of pieces of internal  
11 research and development materials and posting them in wholesale fashion on the Internet with  
12 little, if any, analysis.

13 In *Mattel*, a photographer transformed and parodied the Barbie doll’s “glamorous” image  
14 by “displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often  
15 ridiculous and apparently dangerous situations. His lighting, background, props, and camera  
16 angles all serve to create a context for Mattel’s copyrighted work that transform Barbie’s  
17 meaning.” 353 F.3d at 799. Acknowledging the general rule that wholesale copying of  
18 copyrighted material is not fair use, the *Mattel* court noted that some exception to this rule was  
19 necessary in light of the “somewhat unique nature” of Barbie dolls, as distinguished from songs,  
20 video or written works. The latter category of works, the court observed, are “naturally  
21 severable” and thus easily transformed by using excerpts rather than wholesale copying. *Id.* at  
22 800. An object like a Barbie doll, however, is difficult to “excerpt” but can be transformed and  
23 parodied by “creating a context around it and capturing that context in a photograph.” *Id.*  
24 Accordingly, the court held that in the limited circumstance where an object is not easily  
25 severable, the fair use doctrine does not require excerpting or dismembering the object to parody  
26 it. The court made clear that the outcome would be different for written works.

27 Plaintiffs’ reliance on *Nunez* is equally misplaced. In *Nunez*, the court held that the fair  
28 use doctrine permitted a newspaper to reprint a controversial photograph of Ms. Puerto Rico as



1 part of a news article discussing whether the photograph was grounds for disqualifying her. 235  
2 F.3d at 24. Again acknowledging the general rule that publishing an entire work is not fair use,  
3 the court noted that in this context wholesale republication was required because copying any less  
4 than the whole photograph “would have made the picture useless to the story.” *Id.*

5 *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), also dealt with photographs, not  
6 written works. Defendant’s Internet search engine displayed “thumbnail” images of plaintiff’s  
7 copyrighted photographs rather than displaying search results in text as most search engines do.  
8 *Id.* at 815. The Ninth Circuit held that creating thumbnail images was a sufficiently  
9 transformative use because they were much smaller images with lower-resolution and the entire  
10 photograph was necessary to the search engine’s purpose. *Id.* at 818-9. Illustrating the close  
11 questions raised by the fair use doctrine, the court remanded the case for the district court to  
12 determine whether the display of the larger image (by double-clicking the thumbnail) was outside  
13 the fair use doctrine. *Id.* at 822.

14 None of these cases supports plaintiffs’ novel argument (p. 10) that placing previously  
15 private works in the public domain is fair use. Unlike plaintiffs’ **brief** which excerpts certain  
16 emails in the context of analyzing them and criticizing Diebold, plaintiffs themselves just dumped  
17 the raw emails in their entireties into the public domain and encouraged their friends to download  
18 them. It is as if someone distributed bootleg copies of stolen, unreleased home movies and  
19 sought to justify the copyright violation by arguing that the purpose was to expose and criticize  
20 the private life of those pictured in the movies. If plaintiffs were correct, no unpublished work  
21 would ever be protected. Any republication would constitute a transformative “shift in the  
22 context”—from private to public. But that has never been the law. To the contrary, as  
23 summarized in Diebold’s summary judgment motion (p. 9), unpublished works are generally  
24 protected against unauthorized publication. Transformation of a work requires some affirmative,  
25 creative act—such as the posing of Barbie in *Mattel*, writing an article to accompany the picture  
26 in *Nunez* or, to use Johns Hopkins’ analogy, writing a “thoughtful, though scathing, article about  
27 the poems of Shelly” rather than simply publishing a copy of the poems themselves. Even the  
28

1 students' own college evidently recognized that wholesale copying was more like electronic civil  
2 disobedience than fair use. Sand 1/12/04 Decl., Ex. B.<sup>1</sup>

3 At the very least, because none of these cases offers clear support for plaintiffs'  
4 interpretation of transformative use, they do not demonstrate that Diebold's arguments are  
5 frivolous. Plaintiffs' reference (p. 12) to an inadmissible hearsay account of a statement by a  
6 Diebold representative, after publication of the stolen materials and after DMCA notifications  
7 were sent, is the ultimate bootstrap. Even if plaintiffs had admissible evidence that Diebold said  
8 certain emails quoted in the press might be out of context, it would not constitute a license for  
9 publication of any of the emails, let alone the thousands of other emails unnecessary to provide  
10 context. Moreover, the relevant issue, particularly in the context of this case, is whether the  
11 initial postings to which the notifications were addressed were fair use. That issue is determined  
12 as of the time of publication and notification, not based on subsequent comments.

13 **Lack of prior publication:** Plaintiffs acknowledge the relevancy of the fact that the  
14 materials at issue were not previously published but argue (p. 12) that this fact alone is not  
15 determinative, citing *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991), and *Norse v.*  
16 *Henry Holt & Co.*, 847 F. Supp. 142 (N.D. Cal. 1994). We have not asserted the contrary,  
17 arguing instead that the unpublished nature of the materials is an important factor that this Court  
18 should consider. More broadly, nothing in *Wright* or *Norse* suggests that the use by plaintiffs  
19 here was fair, let alone that defendants' position is frivolous. *Wright* held only that  
20 paraphrasing—not wholesale republication—of unpublished letters in a biography to establish  
21 background facts may constitute fair use. *See Wright*, 953 F.2d at 738. *Norse* held that  
22 publication of non-published work is a factor weighing against fair use, but concluded that the  
23 republication of such materials may constitute fair use where the non-published work is a  
24 minimal amount of the overall published work, and the defendant does not advertise or trade on  
25

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26  
27 <sup>1</sup> Contrary to their disclaimer (p. 13 n.4), emails posted by plaintiffs did contain employees' home  
28 telephone numbers, cell phone numbers and home addresses (Sand 1/12/04 Decl., Ex. A, pp. 10-11). But  
even the posting of only work numbers can cause considerable disruption and harassment.

1 the fact that the work contains non-published materials. *See Norse*, 847 F. Supp. at 146. Both  
2 factors are absent here.

3 **Market harm:** Plaintiffs not only fail to offer any evidence that no market exists for  
4 Diebold's R&D materials but they contradictorily argue (p. 24) that they themselves might want  
5 to sell these materials as part of their archives or sell tickets to a meeting where the materials are  
6 displayed. Beyond that, plaintiffs misconstrue the Supreme Court's observations in *Campbell v.*  
7 *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). *Campbell* did not hold, as plaintiffs suggest (p. 13),  
8 that an author never has any market interest in works that "might lead some to conclude that [its]  
9 product is inferior." It held only that the **economic harm** caused when a parody prompts others  
10 to conclude that a product is inferior is not cognizable under the Copyright Act. *Campbell*, 510  
11 U.S. at 591-92. But that reasoning does not address, let alone undermine, Diebold's argument  
12 that there is a market for its heretofore unpublished internal documents.

13 **Public interest:** Plaintiffs confuse (p. 14) the distinct issues of copyright enforcement  
14 and the scope of discovery in civil actions in arguing that unless the fair use doctrine applies here,  
15 the tobacco industry and Enron could hide their "smoking gun" memos. Copyright interests may  
16 justify a protective order under Rule 26 of the Federal Rules of Civil Procedure, but no one is  
17 arguing that a party may "hide" or refuse to produce documents in discovery on the ground that  
18 they are copyrighted. In addition, any public interest in Diebold's materials is duly protected by  
19 the fair use doctrine, as illustrated by the positions espoused by the universities noted above. As  
20 the Supreme Court explained in *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), which involved the  
21 constitutionality of the Copyright Term Extension Act, "copyright law contains built-in First  
22 Amendment accommodations" in the form of the fair use exception. It "strikes a definitional  
23 balance between the First Amendment and the Copyright Act." *Id.* Indeed, if there is a broader  
24 public interest at stake here, it is to discourage breaking and entering or its modern-day  
25 equivalent, hacking into computers, and the immediate and universal reproduction of the stolen  
26 materials over the Internet. In short, the Supreme Court has settled the argument that the public  
27 interest in the publication of copyrighted materials does not justify copyright infringement.  
28 *Harper & Row*, 471 U.S. at 560.

1 **IV. LINKING LIABILITY**

2 In their zeal to turn this action into a test case for determining the scope of an ISP's  
3 liability for hosting sites that post to infringing material or link to other sites with such posts,  
4 plaintiffs rewrite not only Diebold's DMCA notifications but also the DMCA itself. To begin  
5 with, plaintiffs represent (p. 16; emphasis added) that the notification to OPG "asserted that the  
6 **ISP might be liable** for 'hosting a web site that contains information location tools'" that link  
7 users to other sites. In fact, the notification said no such thing. Instead of threatening that the  
8 "ISP might be liable," the notification informed OPG that a "web page you are hosting" was  
9 engaged in infringing activity. Ng 10/31/03 Decl., Ex. B. Whether OPG would ultimately be  
10 liable for its user's acts was not addressed at all. More generally, in sending a DMCA  
11 notification, a copyright owner is not representing that, as a matter of law, the recipient will be  
12 found liable for infringement. *See* 17 U.S.C. § 512(d)(3) (stating that ISPs must respond when  
13 notified of "claimed infringement" or risk losing immunity); *Rossi v. Motion Picture Ass'n of*  
14 *America, Inc.*, 2003 WL 21511750 at \*3 (D. Haw. April 29, 2003) ("The Court cannot find any  
15 provision in the DMCA which requires a copyright holder to conduct an investigation to establish  
16 actual infringement prior to sending a notice to an ISP."). The owner is simply requesting the  
17 recipient's assistance in terminating suspected infringement by someone else, the subscriber.

18 Even if the letters had stated that OPG might be liable for the infringing activity of its  
19 users (which they did not), that representation would not have been frivolous. As noted,  
20 plaintiffs admit as much (1) by acknowledging that the law is unsettled in this area, (2) by seeking  
21 to distinguish on factual grounds the two cases in which courts have enjoined linking activity, and  
22 (3) by noting that the "best-developed case" in this unsettled area leaves open the question of  
23 whether an ISP could be liable for contributory or vicarious infringement. *See* Pls.' Mot., pp. 15-  
24 16.<sup>2</sup> Although the boundaries of liability for contributory or vicarious infringement with respect

25 \_\_\_\_\_  
26 <sup>2</sup> That Congress found it necessary to create a "safe harbor" for what plaintiffs repeatedly  
27 trivialize as "merely linking" is also telling. If an ISP could not be held liable for linking under any  
28 circumstances, creating a safe harbor would have been pointless. *See also* S. Rep. No. 105-190 at 55  
(1998) (stating that an ISP's possible liability should be adjudicated "based on the doctrines of direct,  
vicarious or contributory liability"); *see also Recording Industry Ass'n of America, Inc. v. Verizon Internet*  
*Services, Inc.*, \_\_\_ F.3d \_\_\_, No. 03-7015, at \*5 (D.C. Cir. Dec. 19, 2003) (confirming that the "notice and

1 to hyperlinking have not been firmly established, it simply cannot be said that hypertext links to  
2 the infringing activity can never constitute contributory or vicarious infringement, let alone that it  
3 would be frivolous for someone to assert such liability.<sup>3</sup>

4 **V. COUNT I: PLAINTIFFS HAVE NO EVIDENCE OF CONTRACT**  
5 **INTERFERENCE**

6 As to the student plaintiffs' claim of contractual interference, their motion ignores  
7 numerous dispositive facts: (1) the students did not have any contract with their ISP; (2) if there  
8 were such a contract, Swarthmore did not breach it by applying its acceptable use policy; (3) the  
9 students' website was not the subject of any DMCA notification (indeed, there is no record  
10 evidence that Diebold even knew of the student plaintiffs as of the time of the notification to  
11 Swarthmore); and (4) the student plaintiffs do not submit any evidence of damages. As to OPG,  
12 plaintiffs begrudgingly acknowledge (p. 19) that its upstream ISP had the contractual right to  
13 suspend service in compliance with its acceptable use policy but that Diebold still interfered by  
14 "impos[ing] its own version of those policies" on the ISP. This argument ignores the fact that  
15 plaintiffs must show that such a result is not actionable interference; Diebold's conduct must have  
16 resulted in a breach of contract or made it more costly or difficult for plaintiffs to comply with  
17 their contracts to constitute interference. There is simply no evidence of any such result. Quite to  
18 the contrary, Hurricane Electric represented to OPG and to this Court that OPG's service would  
19 \_\_\_\_\_  
20 take down regime" of the DMCA applies specifically to "an information locating tool hosted by the ISP"  
(i.e., a hyperlink).

21 <sup>3</sup> Stating the obvious, plaintiffs say (p. 14) that the text of the hyperlink does not infringe  
22 Diebold's copyright. It is not the text of the hyperlink that may infringe; it is the fact that the function of  
23 the hyperlink is to disseminate Diebold's copyrighted material. Once clicked, the hyperlinks on  
24 IndyMedia automatically commence the process of downloading Diebold's material or link to sites that  
25 present the user with only the choice of commencing the download. As such, these hyperlinks serve as the  
26 "functional equivalent of transferring" Diebold's materials to other users. *Universal City Studios, Inc. v.*  
27 *Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000) (discussing the transfer of anticircumvention  
28 software that violated a different section of the DMCA). This is in direct contrast to facts in *Ticketmaster*,  
cited by plaintiffs (p. 14). There, the hyperlinks did not download or otherwise disseminate the  
copyrighted works without the consent of the copyright owner. Rather, the hyperlinks merely took a user  
to the Ticketmaster web page that was owned by Ticketmaster. Because of this difference, the court found  
that the "hyperlinking [in this case] does not itself involve a violation of the Copyright Act . . . since no  
copying is involved. The customer is automatically transferred to the particular genuine web page of the  
original author." *Ticketmaster v. Tickets.com*, 2000 WL 525390, at \*2 (C.D. Cal. March 27, 2000).

1 not be terminated during this litigation—a dispositive point that plaintiffs continue to ignore. *See*  
2 Defs.' Motion for Sum. J., p. 4.

3 The lack of merit to OPG's interference claim is further reflected in its request for  
4 damages. It seeks the \$5,185.50 it paid Hurricane Electric for Internet connectivity from the time  
5 of Diebold's notification until it was withdrawn. But OPG does not claim that it lost connectivity  
6 during that period or did not get what it paid for nor can it. From all that appears in this record, it  
7 incurred no liability to subscribers and lost no business. In addition, OPG receives no payment  
8 from any of its customers. Weekly Decl., ¶ 4. Even if OPG had terminated entirely service to the  
9 four customers it claims were affected, OPG has not asserted, let alone established, that it would  
10 be liable to them.

11 If plaintiffs could establish the other elements of this state law tort, they still could not  
12 prevail because Diebold's notifications were reasonable and justified. Allegedly interfering  
13 conduct is justified and therefore not actionable in tort where the actor (1) "has a legally protected  
14 interest, (2) in good faith threatens to protect it, and (3) the threat is to protect it by appropriate  
15 means." *See Restatement (Second) of Torts* § 773; *Richardson v. La Rancherita of La Jolla*, 98  
16 Cal. App. 3d 73, 81 (1979). Diebold clearly has a legal interest in its stolen email archives; its  
17 narrowly-worded DMCA notifications were appropriate; and there was an objectively reasonable  
18 basis for Diebold's position that plaintiffs' use of the stolen materials infringed Diebold's  
19 copyright interests. *See Richardson*, 98 Cal. App. 3d at 81.<sup>4</sup>

20 Plaintiffs' principal response (p. 20) is two-fold: (i) that Diebold's position became  
21 unreasonable "after OPG put it on notice of the fair use defense and (ii) after Diebold stated that  
22 its copyright claim was influenced by the DMCA's speedy takedown procedures." The first  
23 point, however, applies only to OPG and makes no sense even as to it. Good faith is determined

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24 <sup>4</sup> This standard is analogous to the good-faith standard defined in Rule 11 of the Federal Rules of  
25 Civil Procedure. *See United States v. City and County of San Francisco*, 132 F.R.D. 533, 535 (N.D. Cal.  
26 1990). Namely, "good faith" is determined under "an objective standard of 'reasonableness under the  
27 circumstances,'" *Zimmerman v. United States*, 198 F.R.D. 535, 538 (E.D. Cal. 2000) (quoting *Golden*  
28 *Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986)), and does not take into  
account the "subjective intent of the pleader or movant to file a meritorious document." *Id.* (quoting  
*Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986)).

1 at the time the notification was sent. Plus, for the reasons summarized above, OPG could not  
2 possibly claim that its position on fair use was the only conclusion any reasonable person could  
3 reach under the present state of the law. The second point is entirely off the mark because it is  
4 based on an inadmissible newspaper article, the import of which is misstated by plaintiffs. Using  
5 the DMCA process “because it was the best resource” for removing the infringing materials does  
6 not suggest anything improper. Congress designed the DMCA procedure precisely because it  
7 wanted to implement a system that was more expeditious than filing lawsuits.

8 **VI. COUNT II: NO CAUSE OF ACTION FOR COPYRIGHT MISUSE EXISTS**

9 As plaintiffs’ summary judgment conclusively demonstrates (p. 21), their “copyright  
10 misuse” claim is a defense, not a stand-alone cause of action. Even plaintiffs’ cited support—  
11 *Practice Management*—treats misuse as a defense as Diebold illustrated in its opening brief.  
12 Finally, because plaintiffs seek only declaratory relief under this count, it is moot for the same  
13 reasons that Count IV is moot.

14 **VII. COUNT III: PLAINTIFFS PRESENT NO EVIDENCE THAT DIEBOLD MADE**  
15 **KNOWING AND MATERIAL MISREPRESENTATIONS**

16 Plaintiffs have failed to identify any admissible evidence showing that Diebold’s  
17 notifications were knowingly and materially false, that their ISP removed or disabled access as a  
18 result of relying on the false statements, or that plaintiffs were causally injured, as they must to  
19 prevail on their Section 512(f) claim.

20 First, plaintiffs do not allege, let alone identify evidence, that Diebold’s notifications were  
21 incorrect in any factual sense, e.g., that Diebold did not have a copyright interest in the posted  
22 materials, or that the materials were not posted as asserted in the notifications. Instead, plaintiffs  
23 assert that Diebold incorrectly stated a legal proposition—namely, that plaintiffs’ use was  
24 infringing and not justified by the fair use doctrine. As shown above, however, Diebold’s  
25 interpretation of the law is correct, or at least not so unsupportable that Diebold’s characterization  
26 of the law was “knowingly false.”

27 Second, there is no evidence that Swarthmore removed or disabled access to the students’  
28 website as a result of the alleged false statement. No notification was sent with respect to the

1 students' website. And it appears that Swarthmore reached its own conclusion that the students'  
2 use was not fair. *See* 11/12/03 Opp'n. to Prelim. Inj., p. 3. As to OPG, it is undisputed that its  
3 ISP, Hurricane Electric, did not remove or disable access at all.

4 Third, the student plaintiffs have presented no evidence of any causal injury or damages.  
5 Section 512(f), however, requires proof of damages even if they are "difficult to quantify" (Pls.'  
6 Mot., p. 17, fn. 9). As noted above, OPG's claim that it was damaged in the amount of Internet  
7 access fees paid to its upstream ISP is meritless on its face. OPG presents no evidence that it did  
8 not receive the Internet connectivity it paid for.

9 **VIII. COUNT IV FOR DECLARATORY RELIEF IS MOOT.**

10 We agree that the first three counts are not moot; rather summary judgment in favor of  
11 Diebold is appropriate for the reasons summarized above. The fourth count, however, is moot.  
12 Diebold unambiguously represented to this Court that it will not sue plaintiffs or similarly  
13 situated persons for the conduct at issue in this action. Implementing that representation, Diebold  
14 has withdrawn its notification letters by sending a letter to each ISP that received the original  
15 notifications. Those letters advise the ISPs that "Diebold has decided not to sue ISPs or their  
16 subscribers for copyright infringement for the non-commercial use of the materials. We are also  
17 withdrawing the DMCA notifications previously sent to you and other ISPs." Weekly Decl., Exh.  
18 A. There is no threat of litigation and no basis for claiming any chilling effect of the prior  
19 notifications and, thus, the fourth count for declaratory relief is moot.

20 Plaintiffs cite *Z Channel Limited Partnership v. Home Box Office, Inc.*, 931 F.2d 1338,  
21 1341(9th Cir. 1991), for the unremarkable proposition that even if a request for declaratory and  
22 injunctive relief is moot, a valid claim for damages may not be. As demonstrated above,  
23 however, plaintiffs lack any valid claim for damages and summary judgment is proper on counts  
24 I-III.

25 In their attempt to keep this case alive, plaintiffs make three additional mistaken  
26 arguments. First, they claim that "other ISPs continue to censor their users as a direct result of  
27 Diebold's threats." But the only evidence they cite, the Johns Hopkins statement, does not  
28 support that assertion. Indeed, the email by the Johns Hopkins University's Office of General



1 Counsel makes clear that it reached its own legal conclusion as to the lawfulness of wholesale  
2 publication of stolen materials, independent of Diebold's DMCA notifications. *Supra*, p. 2.<sup>5</sup>

3 Second, plaintiffs wrongly argue that this Court already ruled in *Yahoo!* that a statement  
4 of "no present intention of taking legal action" is insufficient to moot a claim for declaratory  
5 relief. *Yahoo! Inc. v. LA Ligue Contre Le Racisme*, 169 F. Supp. 2d 1181, 1188 (N.D. Cal. 2001).  
6 In *Yahoo!*, however, a live controversy remained despite defendants' statement of no present  
7 intention, because Yahoo! was subject to a French order that allowed for *retroactive* penalties,  
8 and defendants declined the Court's invitation to absolve Yahoo! from these potential penalties.  
9 *See id.* at 1189-1190. Thus, defendants could not carry their burden of establishing that Yahoo!  
10 did not face immediate or actual injury. That is not the case here. Rather, the present action is  
11 much closer to *Salvation Army*, a case distinguished in *Yahoo!*. *See id.* In *Salvation Army*, the  
12 Third Circuit ruled that "there was no immediate threat to the group" because among other things  
13 "the state had provided an express assurance that it would not enforce" the challenged provisions  
14 of the statute at issue. *Salvation Army v. Department of Community Affairs of the State of New*  
15 *Jersey*, 919 F. 2d 183, 192 (3<sup>rd</sup> Cir. 1990).

16 Third, plaintiffs argue that this is a "classic situation 'capable of repetition yet evading  
17 review.'" However, the "capable of repetition yet evading review" exception applies only in "the  
18 most exceptional of circumstances where the timing of a controversy is automatically such that  
19 proper judicial review cannot be made (e.g., pregnancy/abortion cases and labor disputes)." *Int'l*  
20 *Furniture Mfg. Co. v. United States Dep't of Labor*, 60 Fed. Appx. 98, 99 (9th Cir. 2003); *see*

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22 <sup>5</sup> The declaration of plaintiff Pavlosky tries to contrive some continuing harm by asserting that his  
23 parents are concerned that this case "is detracting from my studies," that some future copyright owner  
24 might sue him if he publishes other material of undisclosed nature, and that his group's December  
25 "symposium on voting transparency" suffered from his decision not to hand out CD-ROMs of the  
26 materials already widely available on the Internet. Those assertions fall of their own weight. The claims  
27 Pavlosky is asserting are bootstrapped on notifications Diebold sent to other parties about websites with  
28 which Pavlosky has no connection. Knowing this, Pavlosky initiated this lawsuit and carefully worded his  
29 declarations to hide the fact that Diebold did not send a single notice to Swarthmore College informing it  
30 that Pavlosky was posting Diebold's material on his web site. Any harm arising from the case, or the  
31 continuation thereof, is entirely self-made. The last assertion is contrary to his group's website which  
32 proclaims the symposium an "awesome success" except for the "horrendous weather." *See*  
33 <http://clarity.sccs.swarthmore.edu/news>.

1 also *GTE California, Inc. v. Federal Communications Commission*, 39 F.3d 940, 945 (9th Cir.  
2 1994). There is nothing inherent about the timing of the sequence of events under the DMCA  
3 that precludes judicial review. In an attempt to fit this case into the timing requirement, plaintiffs  
4 posit (p. 24) a hypothetical conspiracy on the part of Diebold and all other copyright owners to  
5 use the DMCA to squelch debate but never to sue for linking to copyrighted materials. Such  
6 unsupported hypotheticals, however, are far too speculative to establish a live case or controversy  
7 under Article III. See *Bugarin-Juarez v. Weiss*, 76 Fed. Appx. 773, 774 (9th Cir. 2003). In  
8 addition, the existence of cases substantively addressing the very issues described by plaintiffs as  
9 “capable of repetition yet evading review,” e.g., *Intellectual Reserve, Inc. v. Utah Lighthouse*  
10 *Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) and *Religious Technology Center*, 923 F.  
11 Supp. at 1249, demonstrate that the issue has not evaded review.

12 This is not the case to decide broad principles of copyright infringement. Contrary to  
13 plaintiffs’ argument (p. 24), whether their specific conduct infringed Diebold’s copyright will not  
14 settle whether the different use that others may make in the future of different material might  
15 infringe someone else’s copyright. Where others are capable of suing in the context of a live  
16 controversy, it does not make sense to apply the capable of repetition exception to address those  
17 same issues in the context of a moot case. See *Bernhardt v. County of Los Angeles*, 279 F.3d 862,  
18 871-72 (9th Cir. 2002); *GTE California*, 39 F.3d at 945-6 n.4.

19 **IX. CONCLUSION.**

20 For these reasons, summary judgment should be granted to defendants.  
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Dated: January 30, 2004

JONES DAY

By: \_\_\_\_\_

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