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7

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA / SAN JOSE  
10

11 **ONLINE POLICY GROUP, NELSON  
CHU PAVLOSKY, and LUKE  
12 THOMAS SMITH,**

13 **Plaintiffs,**

14 **v.**

15 **DIEBOLD, INCORPORATED, and  
16 DIEBOLD ELECTION SYSTEMS,  
INCORPORATED,**

17 **Defendants.**  
18  
19

**Case No. 03-4913 JF**

**DEFENDANTS' ANSWER TO FIRST  
AMENDED COMPLAINT FOR DAMAGES  
AND INJUNCTIVE AND DECLARATORY  
RELIEF**

20  
21 **ANSWER AND DEFENSES**

22 Defendants Diebold Incorporated and Diebold Election Systems, Inc. respond to the first  
23 amended complaint for injunctive relief for intentional interference with contract; for copyright  
24 misuse; for damages for misrepresentation of copyright claims under the Digital Millennium  
25 Copyright Act (DMCA); and for declaratory relief (Complaint) of Online Policy Group, Nelson  
26 Chu Pavlosky and Luke Thomas Smith (plaintiffs), and allege their affirmative defenses as  
27 follows:

28 1. Answering the averments of Paragraph 1 of the Complaint, defendants admit that

1 plaintiffs have attempted to allege a civil action seeking injunctive relief for intentional  
2 interference with contract; for copyrights misuse; for damages for misrepresentation of copyright  
3 claims under the DMCA; and for declaratory relief. Defendants deny any further averments in  
4 Paragraph 1 of the Complaint.

5 2. Defendants deny Paragraph 2 of the Complaint.

6 3. Defendants deny Paragraph 3 of the Complaint as they are without knowledge or  
7 information sufficient to form a belief as to the truth of those averments.

8 4. Defendants deny Paragraph 4 of the Complaint as they are without knowledge or  
9 information sufficient to form a belief as to the truth of those averments.

10 5. Defendants deny Paragraph 5 of the Complaint as they are without knowledge or  
11 information sufficient to form a belief as to the truth of those averments.

12 6. Defendants admit Paragraph 6 of the Complaint.

13 7. Defendants admit Paragraph 7 of the Complaint.

14 8. Answering the averments of Paragraph 8 of the Complaint, defendants admit that  
15 plaintiffs have attempted to allege subject matter jurisdiction over the federal claims pursuant to  
16 the Copyright Act (17 U.S.C. §§ 101 et seq.), 28 U.S.C. §§ 1331 and 1338 and the Declaratory  
17 Judgment Act (28 U.S.C. § 2201). Defendants specifically deny that this Court has jurisdiction  
18 under the Declaratory Judgment Act. If there is no jurisdiction under 17 U.S.C. §§ 101 et seq., 28  
19 U.S.C. §§ 1331 and 1338, then this Court does not have supplemental jurisdiction over the  
20 plaintiffs' state law claims. Defendants deny any further averments in Paragraph 8 of the  
21 Complaint.

22 9. Defendants admit Paragraph 9 of the Complaint.

23 10. Answering the averments of Paragraph 10 of the Complaint, Defendants deny that  
24 a substantial part of the events giving rise to the claims in the Complaint occurred in this district.  
25 Defendants admit any further averments in Paragraph 10 of the Complaint.

26 11. Defendants deny Paragraph 11 of the Complaint as they are without knowledge or  
27 information sufficient to form a belief as to the truth of those averments.

28 12. Defendants deny Paragraph 12 of the Complaint as they are without knowledge or

1 information sufficient to form a belief as to the truth of those averments.

2 13. Defendants deny Paragraph 13 of the Complaint as they are without knowledge or  
3 information sufficient to form a belief as to the truth of those averments.

4 14. Answering the averments of Paragraph 14 of the Complaint, defendants admit that  
5 on October 10, 2003 defendants' attorney on behalf of defendants sent a notification pursuant to  
6 17 U.S.C. § 512 to plaintiff Online Policy Group requesting that a link to the IndyMedia web site  
7 be removed. Defendants deny that the notification threatened copyright infringement litigation.  
8 Defendants further admit that the notification pursuant to 17 U.S.C. § 512 was attached to the  
9 Complaint as Exhibit B. Defendants deny any further averments in Paragraph 14.

10 15. Answering the averments of Paragraph 15 of the Complaint, defendants admit that  
11 their October 10, 2003 notification pursuant to 17 U.S.C. § 512 states that Diebold is the owner of  
12 copyright rights in certain Diebold property relating to its electronic voting machines and that  
13 OPG is hosting a web site that links users to that Diebold property. Defendants further admit that  
14 the notification states that the web site OPG is hosting infringes Diebold's copyright rights in that  
15 property. Defendant deny any further averments in Paragraph 15.

16 16. Defendants admit Paragraph 16 of the Complaint.

17 17. Answering the averments of Paragraph 17 of the Complaint, defendants admit that  
18 the October 10, 2003 notification expressly states that defendants "reserve their position insofar  
19 as costs and damages caused by the unauthorized provision of information locating tools with  
20 respect to online locations engaged in infringing activity with respect to the Diebold Property."  
21 Defendants further admit that the notification states that defendants "also reserve their right to  
22 seek injunctive relief to prevent further unauthorized provision of information locating tools with  
23 respect to online locations engaged in infringing activity with respect to Diebold Property,  
24 pending" OPG's response to the notification. Defendants deny that the notification included a  
25 threat of litigation against OPG. Defendants deny any further averments in Paragraph 17.

26 18. Answering the averments of Paragraph 18 of the Complaint, defendants admit that  
27 the October 10, 2003 notification states that defendants "await [OPG's] response within 24  
28 hours." Defendants deny any further averments in Paragraph 18.

1           19.     Answering the averments of Paragraph 19 of the Complaint, defendants admit that  
2 OPG sent a brief response to the October 10, 2003 notification indicating that it was consulting  
3 with counsel. Defendants deny any further averments in Paragraph 19.

4           20.     Defendants deny Paragraph 20 of the Complaint.

5           21.     Defendants deny Paragraph 21 of the Complaint as they are without knowledge or  
6 information sufficient to form a belief as to the truth of those averments.

7           22.     Answering the averments of Paragraph 22 of the Complaint, defendants admit that  
8 their attorney received a letter dated October 22, 2003 from OPG's counsel. Defendants further  
9 admit that the October 22, 2003 letter was attached as Exhibit C to the complaint. Defendants  
10 deny any further averments in Paragraph 22.

11          23.     Defendants deny Paragraph 23 of the Complaint as they are without knowledge or  
12 information sufficient to form a belief as to the truth of those averments.

13          24.     Answering the averments of Paragraph 24 of the Complaint, defendants admit that  
14 on October 21, 2003 defendants' attorney sent a notification pursuant to 17 U.S.C. § 512 to Mr.  
15 Benny Ng. Defendants further admit that the notification was attached to the Complaint as  
16 Exhibit D. Defendants deny any further averments in Paragraph 24.

17          25.     Answering the averments of Paragraph 25 of the Complaint, defendants admit that  
18 the October 21, 2003 notification sent to Mr. Ng requested that he "assist in removing the  
19 identified infringing material or act in accordance with your 17 U.S.C. 512(i)(1)(A) policy that  
20 'provides for the termination in appropriate circumstances of subscribers and account holders of  
21 the services provider's network who are repeat infringers.'" Defendants deny any further  
22 averments in Paragraph 25 as they are without knowledge or information sufficient to form a  
23 belief as to the truth of those averments.

24          26.     Defendants deny Paragraph 26 of the Complaint.

25          27.     Defendants deny Paragraph 27 of the Complaint as they are without knowledge or  
26 information sufficient to form a belief as to the truth of those averments.

27          28.     Defendants deny Paragraph 28 of the Complaint as they are without knowledge or  
28 information sufficient to form a belief as to the truth of those averments.

1           29.     Defendants deny Paragraph 29 of the Complaint as they are without knowledge or  
2 information sufficient to form a belief as to the truth of those averments.

3           30.     Defendants deny Paragraph 30 of the Complaint as they are without knowledge or  
4 information sufficient to form a belief as to the truth of those averments.

5           31.     Defendants deny Paragraph 31 of the Complaint as they are without knowledge or  
6 information sufficient to form a belief as to the truth of those averments.

7           32.     Defendants deny Paragraph 32 of the Complaint as they are without knowledge or  
8 information sufficient to form a belief as to the truth of those averments.

9           33.     Defendants deny Paragraph 33 of the Complaint as they are without knowledge or  
10 information sufficient to form a belief as to the truth of those averments.

11          34.     Defendants deny Paragraph 34 of the Complaint as they are without knowledge or  
12 information sufficient to form a belief as to the truth of those averments.

13          35.     Defendants deny Paragraph 35 of the Complaint as they are without knowledge or  
14 information sufficient to form a belief as to the truth of those averments.

15          36.     Defendants deny Paragraph 36 of the Complaint as they are without knowledge or  
16 information sufficient to form a belief as to the truth of those averments.

17          37.     Defendants deny Paragraph 37 of the Complaint as they are without knowledge or  
18 information sufficient to form a belief as to the truth of those averments.

19          38.     Defendants deny Paragraph 38 of the Complaint as they are without knowledge or  
20 information sufficient to form a belief as to the truth of those averments.

21          39.     Defendants deny Paragraph 39 of the Complaint as they are without knowledge or  
22 information sufficient to form a belief as to the truth of those averments.

23          40.     Defendants deny Paragraph 40 of the Complaint as they are without knowledge or  
24 information sufficient to form a belief as to the truth of those averments.

25          41.     Defendants deny Paragraph 41 of the Complaint as they are without knowledge or  
26 information sufficient to form a belief as to the truth of those averments.

27          42.     Defendants deny Paragraph 42 of the Complaint as they are without knowledge or  
28 information sufficient to form a belief as to the truth of those averments.

1           43. Defendants deny Paragraph 43 of the Complaint as they are without knowledge or  
2 information sufficient to form a belief as to the truth of those averments.

3           44. Defendants deny Paragraph 44 of the Complaint as they are without knowledge or  
4 information sufficient to form a belief as to the truth of those averments.

5           45. Answering the averments of Paragraph 45 of the Complaint, defendants admit that  
6 there has been public debate and media coverage about the security of Diebold electronic voting  
7 machines and that the State of Maryland commissioned a study on Diebold electronic voting  
8 machines. Defendants deny any further averments in Paragraph 45 as they are without  
9 knowledge or information sufficient to form a belief as to the truth of those averments.

10          46. Defendants deny Paragraph 46 of the Complaint as they are without knowledge or  
11 information sufficient to form a belief as to the truth of those averments.

12          47. Answering the averments of Paragraph 47 of the Complaint, defendants admit that  
13 there has been public debate and media coverage about the security of Diebold electronic voting  
14 machines. Defendants deny any further averments in Paragraph 47 as they are without  
15 knowledge or information sufficient to form a belief as to the truth of those averments.

16          48. Answering the averments of Paragraph 48 of the Complaint, defendants admit that  
17 internet web sites have posted reports and Diebold property. Defendants deny any further  
18 averments in Paragraph 48 as they are without knowledge or information sufficient to form a  
19 belief as to the truth of those averments.

20          49. Answering the averments of Paragraph 49 of the Complaint, defendants admit that  
21 media outlets have reported on electronic voting machine security, including Diebold's electronic  
22 voting machines. Defendants deny any further averments in Paragraph 49 as they are without  
23 knowledge or information sufficient to form a belief as to the truth of those averments.

24          50. Answering the averments of Paragraph 50, defendants admit that web sites have  
25 posted or linked to Diebold property. Defendants deny any further averments in Paragraph 50 as  
26 they are without knowledge or information sufficient to form a belief as to the truth of those  
27 averments.

28          51. Defendants deny Paragraph 51 of the Complaint.

1           52.     Answering the averments of Paragraph 52 of the Complaint, defendants admit that  
2 ISPs have disabled access to Diebold property. Defendants deny any further averments in  
3 Paragraph 52.

4           53.     Defendants deny Paragraph 53 of the Complaint.

5                           **COUNT I: TORTIOUS INTERFERENCE WITH CONTRACT**

6           54.     In response to Paragraph 54 of the Complaint, defendants repeat and incorporate  
7 the responses above to Paragraphs 1 to 53 of the Complaint.

8           55.     Defendants deny Paragraph 55 of the Complaint as they are without knowledge or  
9 information sufficient to form a belief as to the truth of those averments.

10          56.     Defendants deny Paragraph 56 of the Complaint.

11          57.     Defendants deny Paragraph 57 of the Complaint.

12          58.     Defendants deny Paragraph 58 of the Complaint as they are without knowledge or  
13 information sufficient to form a belief as to the truth of those averments.

14          59.     Defendants deny Paragraph 59 of the Complaint.

15          60.     Defendants deny Paragraph 60 of the Complaint as they are without knowledge or  
16 information sufficient to form a belief as to the truth of those averments.

17          61.     Defendants deny Paragraph 61 of the Complaint as they are without knowledge or  
18 information sufficient to form a belief as to the truth of those averments.

19          62.     Defendants deny Paragraph 62 of the Complaint.

20          63.     Defendants deny Paragraph 63 of the Complaint.

21          64.     Defendants deny Paragraph 64 of the Complaint as they are without knowledge or  
22 information sufficient to form a belief as to the truth of those averments.

23          65.     Defendants deny Paragraph 65 of the Complaint.

24                           **COUNT II: MISUSE OF COPYRIGHT**

25          66.     In response to Paragraph 66 of the Complaint, defendants repeat and incorporate  
26 the responses above to Paragraphs 1 to 65 of the Complaint.

27          67.     Answering the averments of Paragraph 67 of the Complaint, plaintiffs' statement  
28 that "publication of the e-mail archive is fair use" is a legal conclusion not subject to denial or

1 admission and, alternatively, defendants deny that it was fair use. Defendants deny the averment  
2 in subparagraph 67a that the character of the use is to inform public discussion and political  
3 debate. Defendants deny the averment in subparagraph 67a regarding the purpose of the use as  
4 they are without knowledge or information sufficient to form a belief as to the truth of that  
5 averment. Defendants deny subparagraphs 67b through 67d.

6 68. Defendants deny Paragraph 68 of the Complaint.

7 69. Answering the averments of Paragraph 69 of the Complaint, defendants admit they  
8 used the DMCA, 17 U.S.C. § 512, because it provides copyright owners, like Diebold, with an  
9 expeditious method of taking down infringing materials. Defendants deny any further averments  
10 in Paragraph 69.

11 70. Defendants deny Paragraph 70 of the Complaint.

12 71. Defendants deny Paragraph 71 of the Complaint.

13 72. Defendants deny Paragraph 72 of the Complaint.

14 73. Defendants deny Paragraph 73 of the Complaint.

15 **COUNT III: 17 U.S.C. 512(f) MISREPRESENTATION**

16 74. In response to Paragraph 74 of the Complaint, defendants repeat and incorporate  
17 the responses above to Paragraphs 1 to 73 of the Complaint.

18 75. Defendants deny Paragraph 75 of the Complaint.

19 76. Defendants deny Paragraph 76 of the Complaint.

20 77. Defendants deny Paragraph 77 of the Complaint.

21 78. Defendants deny Paragraph 78 of the Complaint.

22 79. Defendants deny Paragraph 79 of the Complaint.

23 80. Defendants deny Paragraph 80 of the Complaint.

24 81. Defendants deny Paragraph 81 of the Complaint.

25 **COUNT IV: DECLARATORY RELIEF**

26 82. In response to Paragraph 82 of the Complaint, defendants repeat and incorporate  
27 the responses above to Paragraphs 1 to 81 of the Complaint.

28 83. Answering the averments of Paragraph 83 of the Complaint and without waiving



1 defendants' position that the notifications sent pursuant to the DMCA were appropriate,  
2 defendants deny that there is an ongoing case or controversy sufficient to support the alleged  
3 claim for declaratory relief. Defendants deny any further averments in Paragraph 83.

4 84. Answering the averments of Paragraph 84 of the Complaint and without waiving  
5 defendants' position that the notifications sent pursuant to the DMCA were appropriate,  
6 defendants deny that there is an ongoing case or controversy sufficient to support the alleged  
7 claim for declaratory relief. Defendants deny any further averments in Paragraph 84.

8 85. Answering the averments of Paragraph 85 of the Complaint and without waiving  
9 defendants' position that the notifications sent pursuant to the DMCA were appropriate,  
10 defendants deny that there is an ongoing case or controversy sufficient to support the alleged  
11 claim for declaratory relief. Defendants deny any further averments in Paragraph 85.

12 86. Answering the averments of Paragraph 86 of the Complaint, defendants admit that  
13 plaintiffs have attempted to invoke this Court's jurisdiction under the Declaratory Judgment Act,  
14 28 U.S.C. § 2201, and Federal Rule of Civil Procedure 57. Defendants deny that this Court has  
15 jurisdiction under the Declaratory Judgment Act as there is no ongoing case or controversy  
16 sufficient to support the alleged claim for declaratory relief.

17 87. Answering the averments of Paragraph 87 of the Complaint, defendants admit that  
18 Paragraph 87 is a statement of plaintiffs' legal contentions, but defendants deny that there is an  
19 ongoing case or controversy sufficient to support the alleged claim for declaratory relief.

20 88. Answering the averments of Paragraph 88 of the Complaint and without waiving  
21 defendants' position that the notifications sent pursuant to the DMCA were appropriate,  
22 defendants deny Paragraph 88 as there is no ongoing case or controversy giving rise to the alleged  
23 claim for declaratory relief.

24 89. Answering the averments of Paragraph 89 of the Complaint, defendants admit that  
25 plaintiffs have requested this Court to determine and adjudge their propositions in the Complaint  
26 as stating the law applicable to the facts involved in this action. Defendants deny that this Court  
27 should do so. Defendants deny any further averments in Paragraph 89.

28 90. Answering the Prayer for Relief, defendants deny that plaintiffs or all others

1 similarly situated are entitled to any of the relief sought in the Complaint or to any relief  
2 whatsoever.

3 **AFFIRMATIVE DEFENSES**

4 **FIRST DEFENSE**

5 **(Failure to State a Claim)**

6 91. The Complaint and each cause of action stated therein fail to state facts sufficient  
7 to state a cause of action against defendants, and further fail to allege any facts sufficient to entitle  
8 plaintiffs to the relief and other remedies sought in the Complaint.

9 **SECOND DEFENSE**

10 **(Case or Controversy)**

11 92. The Complaint fails to raise a justiciable case or controversy as required by Article  
12 III, Section 2 of the United States Constitution and the Declaratory Judgment Act, 28 U.S.C. §  
13 2201.

14 **THIRD DEFENSE**

15 **(Mootness)**

16 93. The issues raised in the Complaint are moot.

17 **FOURTH DEFENSE**

18 **(First Amendment)**

19 94. The Complaint is barred by the First Amendment of the United States  
20 Constitution.

21 **FIFTH DEFENSE**

22 **(Justification)**

23 95. The notifications pursuant to 17 U.S.C. § 512 were justified.

24 **SIXTH DEFENSE**

25 **(Mitigation of Damages)**

26 96. Plaintiffs have failed to mitigate their damages by timely pursuing their remedies  
27 under the DMCA.

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**SEVENTH DEFENSE**

**(Federal Preemption)**

97. The alleged state law claims in the Complaint are preempted by federal law.

**EIGHTH DEFENSE**

**(Right to Assert Additional Defenses)**

98. Defendants reserve the right to assert additional affirmative defenses at such time and to such extent as warranted by discovery and the factual developments in this case.

Dated: December 5, 2003

JONES DAY

By: /s/ Tharan Gregory Lanier  
Tharan Gregory Lanier

Attorney for Defendant  
DIEBOLD, INCORPORATED, AND  
DIEBOLD ELECTION SYSTEMS, INC.