

1 Robert A. Mittelstaedt (State Bar No. 060359)
Tharan Gregory Lanier (State Bar No. 138783)
2 Adam R. Sand (State Bar No. 217712)
JONES DAY
3 555 California Street, 26th Floor
San Francisco, CA 94104
4 Telephone: (415) 626-3939
Facsimile: (415) 875-5700

5 Attorneys for Defendants
6 DIEBOLD, INCORPORATED, AND DIEBOLD
ELECTION SYSTEMS, INC.
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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA / SAN JOSE
11

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

14 **Plaintiffs,**

15 **v.**

16 **DIEBOLD, INCORPORATED, and**
17 **DIEBOLD ELECTION SYSTEMS,**
INC.,

18 **Defendants.**
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20
21

Case No. 03-4913JF

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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

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28

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. BACKGROUND.....	1
A. The DMCA.....	1
B. The Copyrighted Materials at Issue Were Stolen From Diebold.....	2
1. The Swarthmore students.....	2
2. Online Policy Group	4
III. ARGUMENT	4
A. This Case Is Moot	6
B. Diebold’s DMCA Letters Are Privileged	7
C. Plaintiffs Were Not Engaged In Fair Use	8
D. ISPs may be liable for hosting sites that contain or link to infringing materials	12
E. Plaintiffs' Contractual Interference Claim Fails.....	13
F. There is no cause of action for "Copyright Misuse."	15
G. Plaintiffs' Claim For Misrepresentation Under Section 512(f) Fails	16
1. As A Matter Of Law, Diebold Could Not Have “Knowingly” Misrepresented Infringement.	16
2. Diebold's DMCA Letters Contained No Material Misrepresentations Regarding Infringement.....	16
3. Neither the Students nor OPG Was Injured.....	17
H. There Is No Basis For Awarding Declaratory Relief.....	18
IV. CONCLUSION.....	18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

FEDERAL CASES

A&M Records, Inc. v. Napster, Inc.,
239 F.3d 1004, (9th Cir. 2001)..... 9, 10,
..... 12, 15

American Geophysical Union v. Texaco Inc.,
60 F.3d 913 10

Arista Records, Inc. v. MP3Board, Inc.,
2002 WL 1997918..... 13

Batzel v. Smith,
333 F.3d 1018 2, 3

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508..... 7

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569..... 9, 11

Celotex Corp. v. Catrett,
477 U.S. 317..... 4

Coastal States Marketing, Inc. v. Hunt,
694 F.2d 1358 8

Coverdell v. Department of Social and Health Services,
834 F.2d 758 5

Devereaux v. Abbey,
263 F.3d 1070 4

Elvis Presley Enters, Inc. v. Passport Video,
2003 WL 22510352..... 9

First National Bank of Ariz. v. Cities Serv. Co.,
391 U.S. 253..... 5

Fonovisa, Inc. v. Cherry Auction, Inc.,
76 F.3d 259 12

Garter- Bare Co. v. Munsingwear Inc.,
723 F.2d 707 14

Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.,
443 F.2d 1159 12

TABLE OF CONTENTS
(continued)

		Page
1		
2		
3	<i>Golden v. Zwicker,</i>	
4	394 U.S. 103.....	6
5	<i>Harper & Row Publishers, Inc. v. Nation Enterprise,</i>	
6	471 U.S. 539.....	1, 9, 10, 11
7	<i>Hills v. Eisenhart,</i>	
8	156 F.Supp. 902.....	5, 18
9	<i>Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.,</i>	
10	75 F.Supp.2d 1290.....	12
11	<i>Kentmaster Manufacturing Co. v. Jarvis Products, Corp.,</i>	
12	146 F.3d 691.....	13
13	<i>Keystone Retaining Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.,</i>	
14	2001 WL 951582, at 11.....	7
15	<i>LucasArts Entertainment Co. v. Humongous Entertainment Co.,</i>	
16	870 F.Supp. 285.....	13
17	<i>McGuire Oil Co. v. Mapco, Inc.,</i>	
18	958 F.2d 1552.....	8
19	<i>Mallinckrodt, Inc. v. Medipart, Inc.,</i>	
20	976 F.2d 700.....	13
21	<i>Mann Design Ltd. v. Bounce, Inc.,</i>	
22	138 F.Supp.2d 1174.....	6
23	<i>Marcus v. Rowley,</i>	
24	695 F.2d 1171.....	1, 9, 11
25	<i>Marobie-Fl v. National Association of Fire Equipment Distributing,</i>	
26	983 F.Supp. 1167.....	12
27	<i>Matsushita Electric Corp. v. Loral Corp.,</i>	
28	974 F.Supp. 345.....	8
	<i>Nissan Fire & Marine Insurance Co. v. Fritz Cos.,</i>	
	210 F.3d 1099.....	5
	<i>Perfect 10, Inc. v. Cybernet Ventures, Inc.,</i>	
	213 F.Supp.2d 1146.....	12
	<i>Playboy Enterprise, Inc. v. Frena,</i>	
	839 F.Supp. 1552.....	12

TABLE OF CONTENTS
(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

<i>Practice Management Information Corporation v. American Medical Association</i> , 121 F.3d 516	15
<i>Professional Real Estate Investors, Inc. v. Columbia Pictures Industrial Inc.</i> , 508 U.S. 49.....	7
<i>Religious Technology Center v. Netcom On-Line Communication Services Inc.</i> , 923 F.Supp. 1231	10, 11
<i>Rickards v. Canine Eye Registration Foundation, Inc.</i> , 704 F.2d 1449	14
<i>Sicor Ltd v. Cetus Corp.</i> , 51 F.3d 848	13
<i>Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.</i> , 655 F.2d 938	6
<i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417	11
<i>Steik v. Garcia</i> , 2003 WL 22992223, at 4.....	5
<i>Texas v. West Public Co.</i> , 681 F.Supp. 1228	6
<i>Thermos Co. v. Igloo Products Corp.</i> , 1995 WL 842002, at 4-5	8
<i>Universal City Studios, Inc. v. Reimerdes</i> , 111 F.Supp.2d 294	12
<i>Versatile Plastics, Inc. v. Snowbest, Inc.</i> , 247 F.Supp.2d 1098	8
<i>Virginia Panel Corp. v. MAC Panel Co.</i> , 133 F.3d 860	15
<i>Wainwright Securities, Inc. v. Wall Street Transcript Corp.</i> , 558 F.2d 91	10, 11
<i>Warns v. Vermazen</i> , 2003 WL 23025441, at 4.....	5

1
2
3
4
5
6
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8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS
(continued)

Page

STATE CASES

Pac. Gas & Electric Co. v. Bear Stearns & Co., 50 Cal.3d 1118..... 14
Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal.4th 26, 960 P.2d 513 14

FEDERAL STATUTES

Declaratory Judgment Act, 28 U.S.C. § 2201 18
Digital Millennium Copyright Act, 17 U.S.C. § 107 9
Digital Millennium Copyright Act, 17 U.S.C. § 512 passim
H.R. Rep. 105-551 at 27 17
S. Rep. No. 105-190, at 1-2..... 1, 11,
..... 12, 16
U.S. Const. art. III, § 2 6, 18

OTHER CITATIONS

3 Nimmer on Copyright § 13-05 1, 11
3 Nimmer on Copyright § 5.04 9
Wright, Miller & Kane, Federal Practice and Procedure:
Civil 3d § 2727 at 474..... 5
Wright, Miller & Kane, Federal Practice and Procedure:
Civil 3d 3d § 2757 at 495 6
Wright, Miller & Kane, Federal Practice and Procedure:
Jurisdiction 2d § 3530 at 308 7

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 This lawsuit was unnecessary and meritless from the outset. And it is now moot.

- 3 • Unnecessary, because plaintiffs' rights would have been protected if they had
4 followed the procedures set forth in the Digital Millennium Copyright Act, 17 U.S.C.
5 § 512.
- 6 • Meritless, because Diebold did nothing more than exercise its rights under the
7 DMCA without interfering with any contract and without suing anybody.
- 8 • Moot, because Diebold committed on the record not to sue plaintiffs for copyright
9 infringement for the materials they have published.

10 As to the claim for damages for copyright misuse and for knowing misrepresentation
11 under section 512(f), plaintiffs cannot show (1) that their wholesale publishing or linking to stolen
12 copyrighted materials constituted “fair use” **and** (2) that the law in this area was so clearly in their
13 favor that Diebold's position was frivolous as a matter of law. As the Ninth Circuit and other
14 courts have held, wholesale publication of copyrighted material weighs heavily against a finding
15 of fair use. *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983); *see also* 3 Nimmer on
16 Copyright § 13-05. Moreover, unpublished material is not normally subject to fair use, because
17 “the author’s right to control the first public appearance of his undisseminated expression will
18 outweigh a claim of fair use.” *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539,
19 555 (1985).

20 **II. BACKGROUND**

21 **A. The DMCA.**

22 The advent of the Internet inexorably accelerated the speed at which copyrighted material
23 can be illegally distributed. Internet Service Providers (“ISPs”) that connect web sites to the
24 Internet cannot constantly monitor whether their vast numbers of subscribers are posting material
25 that infringes copyrights held by others. Nor can copyright owners locate and sue every person
26 posting infringing material on a web site. Recognizing this reality and the sometimes conflicting
27 interests of copyright owners, ISPs and users, Congress passed the DMCA and created a new
28 approach to intellectual property in the Internet age. *See* S. Rep. No. 105-190, at 1-2 (1998).

1 The first step under the DMCA is for copyright owners to notify ISPs of potential
2 infringement. After receiving a notification, the ISP is permitted, free from any fear of liability,
3 to take down the infringing material, subject to putting it back within 10-14 days (again without
4 liability) if the subscriber provides a counter-notification of non-infringement and the copyright
5 owner does not sue the subscriber for infringement. 17 U.S.C. § 512(g). As the Ninth Circuit has
6 observed, these “specific notice, take-down, and put-back procedures” are the mechanisms by
7 which Congress “carefully balanced the First Amendment rights of users with the rights of a
8 potentially injured copyright” owner. *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003).
9 Taken together, the procedures provide a streamlined, practical approach to copyright
10 enforcement on the Internet.

11 **B. The Copyrighted Materials at Issue Were Stolen From Diebold.**

12 **1. The Swarthmore students.**

13 Plaintiffs have not contested that the materials at issue were stolen from Diebold by a
14 hacker who broke into its computer system in March 2003. *See* Examples of Stolen Material,
15 Declaration of Adam Sand in Support of Defendants' Motion for Summary Judgment, Ex. A
16 ("Sand Decl."). Beginning in early October 2003, Diebold's stolen copyrighted material was
17 published on a Swarthmore web site unrelated to the two student plaintiffs. Compl. ¶ 39.
18 Diebold promptly issued a notice to Swarthmore College, the web site's ISP, explaining that it
19 “appear[e]d to be hosting a web site that contains Diebold Property” and requesting removal of
20 the Diebold Property on a specific, identified web site other than the students'. Compl. Ex. F.
21 Swarthmore disabled that web site. Compl. ¶ 38.

22 The student plaintiffs then posted the same Diebold material on a different web site.
23 Compl. ¶ 39. The students did not provide any analysis of the stolen materials or excerpt them in
24 a critique. Instead, they posted the entire email archive and called on others to host the
25 copyrighted materials for wider distribution. *See* Student Plaintiffs' Web Site, Sand Decl., Ex. F.
26 **Diebold did not issue any DMCA notice for that web site.** Instead, on October 22, 2003,
27 Swarthmore, on its own accord, instructed the students to remove the material from their web site.
28 *Id.* ¶ 40. Swarthmore advised the students that, in apparent contrast to their wholesale publication

1 of the email archive without analysis or commentary, the fair use doctrine would permit them to
2 “use their web sites to describe the content of the memos they have seen and their implications for
3 American democracy, and to use their sites to inform interested members of the public that the
4 memos are available at sites not associated with Swarthmore.” Swarthmore Administration
5 Taking Steps, Sand Decl., Ex. B. Swarthmore added that its legal counsel had advised that
6 providing hyperlinks to the material “may be construed as contributory copyright infringement
7 under *Intellectual Reserve v. Utah Lighthouse Ministry*.” *Id.* The next day, Swarthmore disabled
8 the students’ web site. Compl. ¶ 41. The students then sued Diebold and sought a TRO to enjoin
9 defendants from issuing DMCA notifications.

10 On November 4, 2003, this Court denied the TRO application. The student plaintiffs
11 issued a counter-notification to Swarthmore under the DMCA, claiming that their web site did not
12 contain infringing material. *See Counter-Notification*, Sand Decl., Ex. C. Swarthmore informed
13 Diebold that, following the DMCA procedure, it would put back the infringing materials unless
14 Diebold sued the students for infringement within 10 days. *See id.* On November 24, 2003,
15 Diebold notified the Court that “having issued notifications in good faith compliance with the
16 DMCA, [it] ha[d] decided not to take the additional step of suing for copyright infringement for
17 the materials at issue.” Diebold Resp. To Plts.’ Post-Hr’g Letter at 1. Diebold added that
18 “[g]iven the widespread availability of the stolen materials, [it] ha[d] further decided to withdraw
19 its existing DMCA notifications and not to issue any further ones for those materials.” *Id.* On
20 December 3, 2003, Diebold sent these withdrawal notices to the recipients of the DMCA letters
21 regarding the stolen copyrighted material. *See Withdrawal Letter Sent to OPG*, Sand Decl., Ex.
22 D.

23 On November 25, 2003, the students’ web site was reactivated and now contains a link to
24 Diebold’s copyrighted materials, including the emails that contain employee personal
25 information. *See Coalition Web Site*, Sand Decl., Ex. E. Leaving no doubt that the students
26 understand Diebold’s position, their web site advises:

27 Diebold has withdrawn all of its DMCA notices, and has promised
28 not to send out any more. . . . This means that you can mirror the
memos freely! Nobody will do anything to you! We can now use
these vital documents in public discussion without fear.

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2. **Online Policy Group.**

Plaintiff OPG provides *pro bono* Internet hosting services and collocation services “to nonprofit organizations and individuals who are under-represented, underserved, or facing unfair bias, discrimination or defamation.” Compl. ¶ 11. Its users include Indybay.org which is a member of a news media “collective” called Indy Media. Compl. ¶ 12. OPG receives its upstream Internet connection from the ISP Hurricane Electric. *Id.* ¶ 13.

On October 10, 2003, Diebold notified OPG that it appeared to be hosting web sites containing or linking to the stolen Diebold material and that “[t]he material and activities at the online location infringe Diebold’s copyrights in [this property] because the Diebold Property was copied and posted to the online location and [was] being distributed from the online location, without Diebold’s consent.” Compl. Ex. B. The letter identified several hypertext links contained on the Indybay.org web site which were designed to link users to separate web pages containing the stolen Diebold material. *Id.* Diebold requested some agreement with OPG about disabling access to the stolen material. **Diebold did not state that OPG itself was infringing any copyright**—only that it was hosting web sites that contained or linked to infringing materials.

On October 22, 2003, OPG notified Diebold that it would not disable the web site containing links to the stolen material. Compl. ¶ 21. Diebold sent a similar notification to Hurricane Electric. *Id.* ¶ 24. Hurricane Electric did not disable OPG’s service. Compl. ¶ 27. Indeed, Hurricane Electric assured OPG that it would not terminate its service pending resolution of this lawsuit. Decl. of Benny Ng in Support of TRO, ¶ 18.

On December 1, 2003, this Court denied the motion for preliminary injunction on the ground that the motion was moot following Diebold's withdrawal of its DMCA notifications. Order After Case Management Conference, Dec. 1, 2003, at 2.

1 **III. ARGUMENT**

2 Summary judgment is appropriate "against a party who fails to make a showing sufficient
3 to establish the existence of an element essential to that party's case, and on which that party will
4 bear the burden of proof at trial . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

5 When the nonmoving party has the burden of proof at trial, the moving party need only point out
6 "that there is an absence of evidence to support the nonmoving party's case." *Devereaux v.*
7 *Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting *Celotex*). "It is not necessary for the movant
8 to introduce any evidence in order to prevail on summary judgment." Wright, A. Miller & M.
9 Kane, *Federal Practice and Procedure*, Civil 3d § 2727, p. 474 (1998); *Coverdell v. Dept. of Soc.*
10 *and Health Servs.*, 834 F.2d 758, 769 (9th Cir. 1987) (under *Celotex*, "the moving party is not
11 required to produce evidence showing the absence of a genuine issue of material fact").

12 Once the moving party carries its burden, "the nonmoving party must produce evidence to
13 support its claim or defense. If the nonmoving party fails to produce enough evidence to create a
14 genuine issue of material fact, the moving party wins the motion for summary judgment." *Nissan*
15 *Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1103 (9th Cir. 2000); *Warns v. Vermazen*,
16 2003 WL 23025441, at *4 (N.D. Cal. Dec. 22, 2003). Plaintiffs cannot "get to a jury on the basis
17 of the allegations in their complaints, coupled with the hope that something can be developed at
18 trial." *First Nat'l. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968). Instead, the
19 nonmoving party must produce significant probative evidence supporting its claim that a genuine
20 issue of material fact exists. *See Steik v. Garcia*, 2003 WL 22992223, at *4 (N.D. Cal Dec. 9,
21 2003).

22 Each of plaintiffs' claims is premised on Diebold's issuance of DMCA infringement
23 notices and the threat of litigation allegedly contained therein. Plaintiffs' argument is that their
24 wholesale posting or linking to the stolen materials was permissible "fair use" and that there was
25 no basis for Diebold to threaten to sue them. On that purported foundation, plaintiffs attempt to
26 build claims for contract interference, "copyright abuse" and violation of section 512(f). As we
27 show, those claims suffer from the same three fatal defects. First, the DMCA notifications did
28 not threaten litigation. Second, they were privileged communications protected by the First

1 Amendment. Third, the wholesale publication of copyrighted material is not fair use and, in any
2 event, it certainly was not frivolous for Diebold to take that position. Plus, the individual causes
3 of action suffer from their own defects, including the failure to show that Diebold caused any
4 contract to be breached and the absence of any legally cognizable claim for “copyright abuse.”
5 Above all, the claims are moot.

6 **A. This Case Is Moot.**

7 To start with the last point, there is no longer a case or controversy as required by the U.S.
8 Constitution. *See* U.S. Const. art. III, § 2; *Hills v. Eisenhart*, 156 F. Supp. 902 (N.D. Cal. 1957).
9 "The presence of a controversy must be measured at the time the court acts. It is not enough that
10 there may have been a controversy when the action was commenced if subsequent events have
11 put an end to the controversy, or if the opposing party disclaims the assertion of countervailing
12 rights." Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 3d § 2757 at 495); *see*
13 *also Golden v. Zwicker*, 394 U.S. 103, 108 (1969). In the realm of patents, copyrights and
14 trademarks, a live controversy does not exist absent a “real and reasonable apprehension that
15 [plaintiff] will be subject to liability” if plaintiff continues its activity. *See Societe de*
16 *Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 944 (9th Cir.
17 1981). When events after filing a request for declaratory relief remove any reasonable
18 apprehension of an infringement suit, the claim is no longer a live controversy over which a
19 federal court has subject matter jurisdiction. For example, in *Texas v. West Pub. Co.*, 681 F.
20 Supp. 1228, 1229-31 (D.C. Tex. 1988), the district court dismissed the state's declaratory
21 judgment action on the issue of fair use because it failed to show that it faced any threat of
22 infringement by the publisher. *See also Mann Design Ltd. v. Bounce, Inc.*, 138 F. Supp. 2d 1174,
23 1177-78 (D.C. Minn. 2001).

24 Plaintiffs have no reasonable apprehension of an infringement action, because Diebold has
25 stated unequivocally to plaintiffs and this Court that it has no intention of suing for copyright
26 infringement. Demonstrating their absence of fear, the student plaintiffs have proclaimed:
27 "Diebold has withdrawn all of its DMCA notices, and has promised not to send out any
28 more. . . . This means that you can mirror the memos freely! Nobody will do anything to you!

1 We can now use these vital documents in public discussion without fear." *See* Student Plaintiffs'
2 Web Site, Sand Decl., Ex. E.

3 Nor do plaintiffs have any cognizable legal injury for the period before Diebold withdrew
4 the DMCA notification letters. Nothing adverse happened to OPG during that period; its
5 upstream provider Hurricane did not terminate service. And if the student plaintiffs could show
6 any harm, it would be attributable to the determination by their ISP, Swarthmore College, that the
7 students were not engaged in fair use—without having received a DMCA notification for the
8 students' web site. Thus, there is no controversy between Diebold and plaintiffs.

9 To be sure, plaintiffs and their counsel desire to use their case as some sort of "test case"
10 to challenge the DMCA. Their self-proclaimed goal is to engage in electronic civil disobedience,
11 to resist repressive legislation like the DMCA, and to get rid of bad laws like the DMCA. But
12 federal courts do not assert "hypothetical question" jurisdiction over "test cases" that fail to satisfy
13 constitutional and prudential requirements. Wright, Miller & Cooper, *Federal Practice and*
14 *Procedure*, Jurisdiction 2d § 3530 at 308.

15 **B. Diebold's DMCA Letters Are Privileged.**

16 In any event, plaintiffs' claims fail in their entirety because Diebold's issuance of DMCA
17 notices was privileged under the First Amendment absent evidence that they were sent in bad
18 faith.

19 As a practical matter, DMCA infringement notices are often a prerequisite to suing ISPs
20 for contributory infringement. That is because ISPs generally maintain a safe harbor protection
21 against liability unless they are notified of the infringement using the DMCA's notice provision.
22 *See* 17 U.S.C. § 512(c). The First Amendment's Petition Clause protects such notifications to
23 guarantee parties their ultimate access to court. *See California Motor Transport Co. v. Trucking*
24 *Unlimited*, 404 U.S. 508, 513 (1972) (Parties "have the right of access to the agencies and courts.
25 . . . That right, as indicated, is part of the right of petition protected by the First Amendment.").
26 As a result, a party who sends a notification or other document as part of a first step in litigation
27 cannot be held liable for the consequences of its issuance unless the notification is sent in bad
28 faith and objectively baseless. *See Professional Real Estate Investors, Inc. v. Columbia Pictures*

1 *Indus. Inc.*, 508 U.S. 49, 60 (1993) (holding that petitioning activity is privileged unless it is a
2 "sham," *i.e.*, objectively baseless in the sense that the attorney could not realistically expect
3 success on the merits). As numerous courts have recognized, where a "case involves cease-and-
4 desist letters that are required under the statute in order for a patentee to recover damages for
5 infringement," the good faith issuance of these letters is protected petitioning activity under the
6 First Amendment. *See Keystone Retaining Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.*,
7 2001 WL 951582, at *11 (D. Minn. Aug. 22, 2001); *Versatile Plastics, Inc. v. Snowbest, Inc.*, 247
8 F. Supp. 2d 1098, 1104 (E.D. Wis. 2003).¹

9 To avoid this precedent, plaintiffs argue that the notifications were "bad faith threats of
10 baseless litigation." Supp. Mem. in Sup. of Prelim. Inj., at 1, 4. As shown on the face of the
11 letters, however, they did not threaten litigation. They simply notified ISPs that they "appear to
12 be hosting a web site" that infringes Diebold's copyright, identified the copyrighted material and
13 the site containing it, stated that the transmission of that material was unauthorized and reserved
14 Diebold's legal rights. *See Compl., Exs. B, D and F.* Apart from the last, these statements are all
15 required by the DMCA's notice provision. *See* 17 U.S.C. § 512(c)(3)(A). The last statement
16 prevents the letter from being construed as a waiver. Rather than threatening litigation, the letters
17 expressly state that their purpose is "to seek [the recipient's] agreement," not to commence
18 litigation.

19 If, however, the notifications were interpreted as threats of litigation, there would be no
20 basis to conclude that litigation would be a sham. As shown below, there certainly was a good
21 faith basis to conclude that Internet users who host or link to copyrighted materials as plaintiffs
22 did can be liable for infringement.

23 **C. Plaintiffs Were Not Engaged In Fair Use.**

24 It is undisputed that Diebold owns the copyright to the materials at issue, and that the
25 student plaintiffs chose to post the copyrighted materials on their web site in wholesale fashion
26

27 ¹ *In Accord McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1558-60 (11th Cir. 1992); *Coastal States*
28 *Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983); *Matsushita Elec. Corp. v. Loral Corp.*, 974 F. Supp.
345, 359 (S.D.N.Y. 1997); *Thermos Co. v. Igloo Products Corp.*, 1995 WL 842002, at *4-5 (N.D. Ill. Sept. 27,
1995).

1 with no transformation, analysis or creativity. *See* Sand Decl., Ex. F. No analysis or other
2 commentary was provided beyond stating that the material "reveal[s] security flaws in the
3 electronic voting software." *Id.* The material included archived emails written by Diebold
4 employees that discuss the development of Diebold's proprietary computerized election systems,
5 as well as Diebold trade secret information, and even employees' personal information such as
6 home addresses and cell phone numbers. *See* Sand Decl., Ex. A.

7 The issue is not whether there was **some** lawful use to which plaintiffs could have put the
8 stolen materials, for example, using excerpts from some of the emails to analyze or critique
9 electronic voting systems. It is instead whether plaintiffs' actual use of the materials--including
10 publication of employees' personal information that had no bearing on plaintiffs' ostensible,
11 public-minded purpose--was fair. More precisely, the issue is whether it was frivolous to contend
12 that plaintiffs' actual use of the materials did not meet the legal standard for fair use.

13 The threshold and insurmountable obstacle faced by plaintiffs in this regard is that the fair
14 use analysis is "not to be simplified with bright-line rules," but instead requires a "case-by-case
15 analysis." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994); *see also Elvis*
16 *Presley Enters, Inc. v. Passport Video*, 2003 WL 22510352 (9th Cir. Nov. 6, 2003). Each of the
17 four factors of the fair use test "are to be explored, and the results weighed together, in light of the
18 purposes of copyright." *Id.* at *4. If any definitive standards can be discerned from fair use
19 jurisprudence, however, the standards are directly contrary to plaintiffs' position. First,
20 previously unpublished material is not normally subject to fair use, because "the author's right to
21 control the first public appearance of his undisseminated expression will outweigh a claim of fair
22 use." *Harper & Row Publishers*, 471 U.S. at 555; *see also* 3 Nimmer on Copyright § 5.04.
23 Second, as the Supreme Court and Ninth Circuit have explained, wholesale copying of
24 copyrighted material weighs heavily against a finding of fair use. *See Harper & Row*, 471 U.S. at
25 557; *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983). Plaintiffs' conduct violates both of
26 these standards--they copied and posted previously unpublished materials in a wholesale fashion.
27 Thus, if any party's position is frivolous here, it is plaintiffs' effort to expand the fair use doctrine
28 to fit their facts.

1 A closer examination of the four traditional factors under 17 U.S.C. § 107 leads to the
2 same conclusion.

3 *Factor 1: Purpose and Character of the Use.* This factor asks "whether and to what
4 extent the new work is 'transformative.'" *Campbell*, 510 U.S. at 578-79; *A&M Records, Inc. v.*
5 *Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001). Unless the new work is transformative, it is
6 not entitled to protection as "fair use" because it does serve the underlying purpose of the
7 copyright law, namely, to promote creativity. "Courts have been reluctant to find fair use when
8 an original work is merely retransmitted in a different medium." *A&M Records*, 239 F.3d at
9 1015. This principle applies equally to other technologies such as the Internet. "Mechanical
10 'copying' of an entire document, made readily feasible and economical by the advent of
11 xerography, . . . is obviously an activity entirely different from creating a work of authorship.
12 Whatever social utility copying of this sort achieves, it is not concerned with creative authorship."
13 *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 917 (2d Cir. 1994); *see also id.*

14 By the same token, whatever social value plaintiffs may claim here, there is nothing
15 transformative or creative about publishing stolen internal company documents in a wholesale
16 fashion. The student plaintiffs are not using excerpts of an email in a critical analysis, nor are
17 they following Swarthmore's advice of simply describing some of the documents and
18 commenting on "their implications for American democracy." Swarthmore Administration
19 Taking Steps, dated 10/31/03, Sand Decl., Ex. B. As explained in *Religious Technology Center v.*
20 *Netcom On-Line Communication Services Inc.*, 923 F. Supp. 1231, 1249 (N.D. Cal. 1995), the
21 fair use doctrine does not protect "criticism" that consists of copying large portions of copyright
22 material even though the infringer's purpose was different from that of the copyright owner. *See*
23 *also Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96-97 (2d Cir.
24 1977) (finding no fair use when the publication of copyrighted works "did not provide
25 independent analysis or research" and "did not include any criticism, praise, or other reactions by
26 industry officials or investors").

27 *Factor 2: Nature of the Work.* The material at issue includes Diebold employees'
28 expressions and interpretations of factual events that are protected by copyright law. "What is

1 protected is the manner of expression, the author’s analysis or interpretation of events, the way he
2 structures his material and marshals facts, his choice of words and the emphasis he gives to
3 particular developments.” *Wainwright Securities*, 558 F.2d at 95-96; *see also Harper & Row*,
4 471 U.S. at 564-565 (holding that the unauthorized use of the factual and creative sequences
5 exceeded “that necessary to disseminate the facts”). Here the students do not simply use the
6 factual portions of the material, but they publish Diebold’s employees’ manner of expression,
7 analysis, interpretation, structure, choice of words and even private information, such as home
8 addresses and cell phone numbers.

9 *Factor 3: Amount used.* Plaintiffs’ republication of the materials unedited and largely
10 without comment weighs heavily against a finding of fair use. *See* 3 Nimmer on Copyright § 13-
11 05; *see also Harper & Row*, 471 U.S. at 556; *Campbell*, 510 U.S. at 579; *Religious Technology*
12 *Center*, 923 F. Supp. at 1249; *Marcus*, 695 F.2d at 1176. This is precisely what plaintiffs have
13 done. As Nimmer points out, “whatever the use, generally, it may not constitute a fair use if the
14 entire work is reproduced.” *Id.*²

15 *Factor 4: Effect on Market Value of Work.* This factor “poses the issue of whether
16 unrestricted and widespread conduct of the sort engaged in by the [plaintiffs] (whether in fact
17 engaged in by the [plaintiffs] or by others) would result in a substantially adverse impact on the
18 potential market.” 3 Nimmer on Copyright § 13-05. The potential market can mean either an
19 immediate or a delayed market and can include any harm to potential derivative works. *See*
20 *Campbell*, 510 U.S. at 593 n.23. Plaintiffs cannot carry their burden of establishing that no such
21 market exists or will exist. Indeed, it is inconsistent for plaintiffs to claim that the stolen
22 materials have immense public importance but no market value. If a company decides to
23 supplement its revenues by publishing its research and development materials as a book, there is
24 every reason to believe it would be marketable. Competitors would surely pay a high price for
25 their competitor’s R&D materials.

26 ² In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court created an exception to that rule,
27 holding that “timeshifting” devices, such as home video recorders, that allow individuals to view copyrighted work
28 privately at a later point in time and are not used to republish the material externally, do not infringe on a copyright.
464 U.S. 417, 450 (1984). Plaintiffs, however, have not simply saved Diebold’s proprietary materials to their home
computers to read them later.

1 **D. ISPs may be liable for hosting sites that contain or link to infringing**
2 **materials.**

3 While this Court need not, and indeed should not, determine the boundaries of ISP
4 liability in this action, Congress itself and numerous courts have observed that ISPs may be liable
5 for hosting sites that contain infringing material based on doctrines of “contributory and vicarious
6 liability,” and no court has held otherwise. *See* S. Rep. 105-190, at 19 (citing *Religious Tech.*
7 *Center*, 907 F. Supp. 1361; *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993);
8 *Marobie-Fl v. Nat’l Ass’n of Fire Equip. Distrib.*, 983 F. Supp. 1167 (N.D. Ill. 1997)); *see also*
9 *A&M Records*, 239 F.3d at 1021 (“We agree that if a computer system operator learns of specific
10 infringing material available on his system and fails to purge such material from the system, the
11 operator knows of and contributes to direct infringement.”); *Gershwin Publ’g Corp. v. Columbia*
12 *Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (recognizing this theory of contributory
13 infringement liability); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996)
14 (adopting vicarious liability theory of infringement). The DMCA itself is premised on the notion
15 that an ISP with knowledge that hyperlinks on its site directs users to potentially infringing
16 material is not immunized from liability. *See* 17 U.S.C. § 512. “The important intended
17 objective of this standard is to exclude sophisticated ‘pirate’ directories—which refer Internet
18 users to other selected Internet sites where pirate software, books, movies, and music can be
19 downloaded or transmitted—from the safe harbor.” S. Rep. 105-190, at 48-49.

20 Against that background, it cannot be said that Diebold’s notification to OPG was
21 objectively baseless as a matter of law. Swarthmore understood this when it advised the student
22 plaintiffs that contributory infringement could flow from simply posting a hyperlink to another
23 web site. *See* Swarthmore Administration Taking Steps, Sand Decl., Ex. B. Case law clearly
24 establishes that hyperlinks directing users to web sites containing infringing material themselves
25 infringe the underlying copyright. *See, e.g., Intellectual Reserve, Inc. v. Utah Lighthouse*
26 *Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) (finding that plaintiff was likely to prevail on
27 claim that site linking to other sites hosting infringing copies of Mormon Church handbook was
28 liable for contributory infringement); *Perfect 10, Inc., v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d

1 1146, 1174 (C.D. Cal. 2002) (issuing a preliminary injunction to copyright owner against link-
2 provider); *see also Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y.
3 2000) (linking to sites that distributed circumventing software code held to violate DMCA anti-
4 circumvention provision).

5 **E. Plaintiffs' Contractual Interference Claim Fails.**

6 The claim for contractual interference (Count I) fails for two additional reasons. First,
7 under California law, “seeking to protect a copyright by alerting a third party that the copyright is
8 being infringed” is not actionable as contract interference. *Arista Records, Inc. v. MP3Board,*
9 *Inc.*, 2002 WL 1997918 (S.D.N.Y. 2002) (applying California law). Indeed, even issuing a notice
10 of litigation cannot be considered actionable interference. *See Pac. Gas & Elec. Co.*, 50 Cal.3d
11 1127; *LucasArts Entertainment Co. v. Humongous Entertainment Co.*, 870 F. Supp. 285, 291
12 (N.D. Cal. 1993). It is simply not “an actionable wrong for one in good faith to make plain to
13 whomsoever that it is his purpose to insist upon what he believes to be his legal rights, even
14 though he may misconceive what those rights are.” *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d
15 700, 710 (Fed. Cir. 1992) (internal quotations and citations omitted).

16 Second, the student plaintiffs do not establish the existence of a contract with their college
17 for the provision of Internet service or the terms of any such contract, let alone that it was
18 breached or disrupted. Instead, they assert that Diebold’s cease-and-desist letter to Swarthmore
19 “admits knowledge” (Compl., Ex. F) of a contract. The letter, however, says no such thing; it
20 states only that the college is hosting a web site that infringes Diebold’s copyrights. Moreover,
21 the letter Diebold sent to Swarthmore did not relate to the student plaintiffs’ web site at all.
22 Having failed to demonstrate any underlying contractual relationship affected here, the students’
23 claim must be dismissed. *See e.g., Kentmaster Mfg. Co. v. Jarvis Products, Corp.*, 146 F.3d 691,
24 695 (9th Cir. 1998) (dismissing claim for tortious interference with contract where plaintiff failed to
25 allege a valid and existing contract); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 861 (9th Cir. 1995)
26 (holding that plaintiff who only provided “conclusory allegations concerning the existence of a
27 contract” failed to allege that there was a valid and existing contract for a tortious interference claim).
28

1 In addition, neither the student plaintiffs nor OPG has established any cognizable breach
2 or disruption of a contract. The student plaintiffs do not claim that Swarthmore's insistence that
3 they comply with its policy against posting or linking to infringing materials is outside
4 Swarthmore's rights or constitutes a breach of any contract. To the extent the student plaintiffs
5 intend to argue that the disabling of their web site constituted disruption of their economic
6 relationship with Swarthmore and prospective economic relationships with others, their
7 interference claims must fail because they have failed to establish any economic injury from the
8 interruption of their Internet service. *See, e.g., Garter- Bare Co. v. Munsingwear Inc.*, 723 F.2d
9 707, 716 (9th Cir. 1984) (quoting *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d
10 1449, 1456 (9th Cir. 1983)) (Essential element of tort of interference with prospective economic
11 advantage is "some identifiable pecuniary or economic benefit [that] must accrue to [defendant]
12 that formerly accrued to [plaintiff]"). Instead, they allege "fear for the continuity of their Internet
13 service from Swarthmore." Compl. ¶ 64.

14 Similarly, OPG admits that both itself and Hurricane Electric have refused to breach or
15 disrupt any alleged contract; its only identifiable injury is "apprehension, concern," Compl. ¶¶ 19,
16 22, 28. But "fear" is not the kind of "disruption" that the tort of contractual interference
17 encompasses. *See Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1129 (1990)
18 (Disruption of contract means performance has been made more "costly or more burdensome.").
19 Moreover, although OPG has alleged that it has now required a subscriber to remove the stolen
20 material from a web site, OPG does not assert that it was breaching any contract in doing so or
21 that its contractual performance was more costly or burdensome as a result.

22 Nor is there any evidence that Diebold intended to induce any breach or expected a
23 breach. To state a claim for contractual interference, a plaintiff must demonstrate that the
24 defendant specifically intended to induce a breach or that interference was "incidental to the
25 [defendant's] independent purpose and desire but known to him to be a necessary consequence of
26 his action." *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 56 (1998). Far from
27 intending any breach, Diebold did not even send a notification for the student plaintiffs' web site.
28 As to OPG, Diebold could not have intended or anticipated any breach, because OPG's contract

1 **authorized** its ISP to “modify or suspend Customer’s Service in the event of illegal use of the
2 Network or **as necessary to comply with any law or regulation, including the Digital**
3 **Millennium Copyright Act** of 1998, 17 U.S.C. 512.” Compl., Ex. A, ¶ 2.10) (emphasis added).
4 OPG’s ISP would have been within its rights in suspending service in response to Diebold’s
5 notification; thus no breach could have resulted from Diebold’s notification letters. However, as
6 noted above, no disruption ever occurred.

7 **F. There is no cause of action for "Copyright Misuse."**

8 The asserted claim for “copyright misuse” (Count II) fares no better. Indeed, there
9 appears to be no statutory or common law basis for this cause of action. Plaintiffs have identified
10 none, and we are aware of none. Traditionally, misuse has been asserted as an affirmative
11 defense to an infringement claim. *See A&M Records*, 239 F.3d at 1026 (referring to the “defense
12 of copyright misuse”); *cf. Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 868 (Fed. Cir.
13 1997) (stating “[p]atent misuse is an affirmative defense to an accusation of patent
14 infringement”). *Practice Management Information Corporation v. American Medical*
15 *Association*, 121 F.3d 516 (9th Cir. 1997), the only case cited by plaintiffs in prior briefing,
16 recognizes “misuse” only as a defense to infringement. In that case, the plaintiff sought to have a
17 copyright declared invalid because it concerned uncopyrightable material and had been misused.
18 The lower court concluded that the copyright was valid and enforceable and enjoined the plaintiff
19 from using the material without permission. The Ninth Circuit affirmed the lower court’s
20 conclusion that the copyright should be enforced but declared that the plaintiff had “established
21 its misuse defense as a matter of law” such that the injunction was improper. *Id.* at 521. The
22 Court repeatedly characterized copyright misuse as “a defense to copyright infringement” and
23 discussed it not as a stand-alone claim for declaratory relief or a monetary remedy, but as a reason
24 to vacate the lower court’s injunction. *Id.* at 520.

25 Even assuming that some affirmative cause of action called “misuse” exists, plaintiffs
26 cannot prevail. Under their own formulation of the claim (and in light of the First Amendment
27 Petition Clause), they would be required to prove that Diebold acted in bad faith. As shown
28 above, they cannot do so.

1 **G. Plaintiffs' Claim For Misrepresentation Under Section 512(f) Fails.**

2 Plaintiffs' final substantive claim, their claim for misrepresentation under 17 U.S.C.
3 § 512(f) is equally meritless. Section 512(f) authorizes a cause of action only when several
4 specific elements are satisfied, including that: (i) the defendant acted "knowingly"; (ii) the
5 defendant made a "material[]" misrepresentation; (iii) the misrepresentation concerns whether
6 something is "infringing"; (iv) the plaintiff must be "injured" by such misrepresentation; (v) and
7 the injury must have been caused by an ISP "removing or disabling access" to the material
8 claimed to be infringing. See 17 U.S.C. § 512(f). Plaintiffs cannot satisfy these elements because
9 they have failed to demonstrate that Diebold acted "knowingly," that its DMCA letters contained
10 misrepresentations or that anybody was injured.

11 **1. As A Matter Of Law, Diebold Could Not Have "Knowingly"**
12 **Misrepresented Infringement.**

13 This claim fails because plaintiffs cannot establish facts to support their conclusory
14 allegations (Compl. ¶¶ 76, 80) that Diebold "knowingly" made misrepresentations. To the
15 contrary, Diebold could not, as a matter of law, have "knowingly" made misrepresentations of
16 infringement given the precedent discussed above on the issues of fair use and linking liability. It
17 would be one thing for a plaintiff to attempt to prove that a copyright owner knowingly
18 misrepresented certain factual matters such as whether it owned the published materials or had
19 consented to publication. It is far different for a plaintiff to attempt to prove that the copyright
20 owner knowingly misrepresented the law especially in an area where the legal outcome turns on
21 balancing numerous factors. As shown above, plaintiffs cannot possibly show that the law is so
22 clear in this area—and so favorable to them—that Diebold must have known that its claim of
23 infringement was legally erroneous. This is true not only of the fair use issue but also the linking
24 issue.

25 **2. Diebold's DMCA Letters Contained No Material Misrepresentations**
26 **Regarding Infringement.**

27 Plaintiffs cannot establish that Diebold made any material misrepresentation as to
28 infringement in its DMCA letters. As an initial matter, the DMCA does not provide a cause of
action for knowingly materially misrepresenting that a service provider may be liable for hosting

1 certain material. Rather, this subsection "establishes a right of action against any person who
2 knowingly misrepresents that material or activity online is infringing." S. Rep. 105-190 at 44. To
3 the extent plaintiffs seek damages for misrepresenting **who** might be liable for infringement, they
4 seek relief outside of the scope of § 512(f). Diebold's claims of infringement contained in its
5 notification letters are accurate in that Diebold owns a copyright interest in the email archive and
6 the wholesale publication of these archives is not a fair use. Moreover, Diebold was correct in
7 stating that publication of the stolen material constitutes infringement, not fair use. As to the
8 hyperlinks, although this area of law is unsettled, Diebold had at a bare minimum a colorable
9 claim of infringement against those who linked to the copyrighted materials.

10 **3. Neither the Students nor OPG Was Injured.**

11 The plaintiffs were not injured by Diebold's DMCA letters. The student plaintiffs could
12 not have been injured because Diebold never sent a letter that referenced their web site. OPG has
13 no cause of action under the terms of § 512(f) because it has never been denied Internet access.
14 The terms of § 512(f) make clear that a cause of action will lie only when the plaintiff was injured
15 "as the result of the service provider relying upon such misrepresentation in removing or
16 disabling access to the material or activity claimed to be infringing." 17 U.S.C. § 512(f). The
17 legislative history demonstrates that Congress intended to provide a remedy only to "protec[t]
18 against losses caused by reliance on false information" by "allowing the recovery of damages
19 incurred by a person who relies on such misrepresentations in removing, disabling or blocking
20 access to such material." H.R. Rep. 105-551 at 27 (May 22, 1998).

21 The complaint unambiguously provides that OPG did not take down or disable any web
22 site in reliance on the notification letters. Compl. ¶¶ 21-23. Although OPG later alleged that it
23 informed other unidentified users not to host the stolen material (Compl. ¶ 31), section 512(f)
24 does not, by its terms, permit an action based on alleged injuries from "advising" others not to
25 post material. Congress presumably chose not to expand liability to this instance because unlike
26 "removing or disabling access to the material," advisory action is a costless endeavor that is not
27 binding on individuals wishing to post infringing material.

1 Plaintiffs cannot establish the necessary elements of misrepresentation under § 512 and
2 thus this claim should be dismissed.

3 **H. There Is No Basis For Awarding Declaratory Relief.**

4 As explained above, each of plaintiffs' claims fails. Thus, no declaratory relief is
5 warranted in this case. In addition, because the Declaratory Judgment Act, 28 U.S.C. § 2201,
6 does not expand the jurisdiction of federal courts, there must be a live case or controversy
7 between the parties before a federal court can grant relief. *See* U.S. Const. art. III, § 2; *Hills v.*
8 *Eisenhart*, 156 F. Supp. 902 (N.D. Cal. 1957). Because Diebold withdrew its DMCA letters and
9 promised not to sue for infringement, this case is moot and should be dismissed.

10 **IV. CONCLUSION**

11 For these reasons, summary judgment should be granted in favor of defendants.

12
13 Dated: January 12, 2004

JONES DAY

14
15 By: _____
16 Robert A. Mittelstaedt

17 Attorneys for Defendant
18 DIEBOLD, INCORPORATED, AND
19 DIEBOLD ELECTION SYSTEMS,
20 INCORPORATED
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