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12

13 **UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 ONLINE POLICY GROUP, NELSON CHU )  
PAVLOSKY, and LUKE THOMAS SMITH, )

16 )  
17 Plaintiffs, )

18 v. )

19 DIEBOLD, INCORPORATED, and DIEBOLD )  
ELECTION SYSTEMS, INCORPORATED, )

20 )  
21 Defendants. )

No. \_\_\_\_\_

22 ) **COMPLAINT FOR INJUNCTIVE**  
23 ) **RELIEF FOR INTENTIONAL**  
24 ) **INTERFERENCE WITH CONTRACT;**  
25 ) **FOR COPYRIGHT MISUSE; FOR**  
26 ) **DAMAGES FOR**  
27 ) **MISREPRESENTATION OF**  
28 ) **COPYRIGHT CLAIMS UNDER THE**  
29 ) **DIGITAL MILLENNIUM COPYRIGHT**  
30 ) **ACT; AND FOR DECLARATORY**  
31 ) **RELIEF**

(Jury Trial Demanded)

32  
33  
34 1. This is a civil action seeking injunctive relief for intentional interference with  
35 contract; for copyright misuse; for damages for misrepresentation of copyright claims under the  
36 Digital Millennium Copyright Act; and for declaratory relief.

37 2. This case arises out of legal threats issued by the Defendants, namely threats of  
38 copyright litigation made in an attempt to stifle public discussion and criticism of the Defendant

1 companies' products, electronic voting machines. The threats have successfully induced the  
2 removal of the information from the websites run by Plaintiffs Pavlosky and Smith, due to actions  
3 taken by their ISP, Swarthmore College. The threats have also interfered with the contractual  
4 relationship between Plaintiff Online Policy Group and its upstream Internet service provider,  
5 Hurricane Electric and that between Plaintiffs Pavlosky and Smith and Swarthmore College.

6 **PARTIES**

7 3. Plaintiff Online Policy Group ("OPG") is a California public benefit corporation  
8 with its principal place of business in the State of California, county of San Francisco.

9 4. Nelson Chu Pavlosky ("Pavlosky") is an individual residing at 500 College Avenue  
10 at Swarthmore College, Swarthmore, Pennsylvania. Pavlosky is a sophomore at Swarthmore  
11 College and one of the co-founders of the Swarthmore Coalition for the Digital Commons  
12 ("SCDC").

13 5. Luke Thomas Smith ("Smith") is an individual residing at 500 College Avenue at  
14 Swarthmore College, Swarthmore, Pennsylvania. Smith is a sophomore at Swarthmore College  
15 and the other co-founder of the SCDC.

16 6. On information and belief, Diebold, Inc. is an Ohio corporation with its principal  
17 place of business in the State of Ohio. On information and belief, Defendant Diebold Election  
18 Systems, Inc. is a wholly owned subsidiary of Diebold, Inc. Both Defendants will be collectively  
19 referred to as "Diebold."

20 7. On information and belief, Diebold manufactures and sells electronic voting  
21 systems and software, including voting systems used in Alameda, Fresno, Humboldt, Lassen,  
22 Marin, Modoc, Placer, San Luis Obispo, Santa Barbara, Siskiyou, Trinity, and Tulare counties in  
23 California. Diebold systems have also been sold for use in Georgia, Maryland, Massachusetts,  
24 Ohio, and Texas.

25 **JURISDICTION AND VENUE**

26 8. This court has subject matter jurisdiction over the federal claims pursuant to the  
27 Copyright Act (17 U.S.C. §§ 101 et seq.), 28 U.S.C. §§ 1331 and 1338 and the Declaratory  
28 Judgment Act (28 U.S.C. § 2201). This court has supplemental subject matter jurisdiction over

1 state law claims pursuant to 28 U.S.C. § 1367(a) in that the state law claims form part of the same  
2 case or controversy as the federal claims.

3 9. Plaintiffs are informed, believe and thereon allege that Defendants, and each of  
4 them, have sufficient contacts with this district generally and, in particular, with the events herein  
5 alleged, that each such Defendant is subject to the exercise of jurisdiction of this court over the  
6 person of such defendant and that venue is proper in this judicial district pursuant to 28 U.S.C.  
7 § 1391.

8 10. Plaintiffs are informed, believe and thereon allege that, based on the places of  
9 businesses of the Defendants identified above and/or on the national reach of Defendants, and each  
10 of them, a substantial part of the events giving rise to the claims herein alleged occurred in this  
11 district and that Defendants, and each of them, and/or an agent of each such Defendant, may be  
12 found in this district.

13 **FACTUAL ALLEGATIONS RELATED TO ALL COUNTS**

14 **ONLINE POLICY GROUP**

15 11. OPG is a San Francisco-based volunteer organization providing pro bono Internet  
16 hosting services and colocation services to nonprofit organizations and individuals who are under-  
17 represented, underserved, or facing unfair bias, discrimination, or defamation. Founded in July  
18 2000, OPG now serves approximately 1000 websites; it provides collocation facilities to more than  
19 100 users who themselves host more than 110 websites. Overall, OPG serves more than 77,700  
20 individuals.

21 12. OPG's users include San Francisco IndyMedia, a branch of the international  
22 Independent Media Center news media collective. San Francisco IndyMedia hosts a website  
23 available at both <<http://www.indybay.org>> and <<http://www.sf.indymedia.org>>. The San  
24 Francisco IndyMedia website resides on a webserver co-located with OPG. "Colocation" means  
25 that the San Francisco IndyMedia server is not owned or controlled by OPG; it simply resides in  
26 physical premises leased from OPG alongside OPG's own servers and utilizes OPG's Internet  
27 connection.

28 13. OPG receives its "upstream" Internet connection from Hurricane Electric, an

1 upstream ISP (also known as a Business Technical Service Provider) based in Fremont, California.  
2 Attached hereto as Exhibit A is a true and correct copy of the written contract between OPG and  
3 Hurricane Electric.

4 14. On October 10, 2003, Diebold sent OPG a cease-and-desist letter under 17 U.S.C.  
5 § 512 through its attorney, Ralph E. Jocke, threatening copyright infringement litigation if OPG  
6 failed to remove links and other information from the IndyMedia website. A true and correct copy  
7 of the cease-and-desist letter is attached as Exhibit B hereto and incorporated herein by reference.

8 15. The October 10, 2003 letter asserts that an IndyMedia web page hosted by OPG  
9 links to online locations at which Diebold correspondence was posted, specifically an e-mail  
10 archive of communications among Diebold employees about the company's electronic voting  
11 machine product ("e-mail archive"). The letter asserts that Diebold holds copyright to the  
12 correspondence, and further asserts that the IndyMedia webpages that link to the locations where  
13 the e-mail archive is "infringe[s] Diebold's copyrights."

14 16. Further, the October 10, 2003, letter purports to "advise [OPG] of our clients' rights  
15 and to seek [OPG's] agreement to the following: To disable or remove the information location  
16 tool(s) identified in the attached chart. In addition to disabling or removing any hyperlink, the  
17 disabling or removal should include destroying the usefulness as an information location tool of  
18 any textual directory or pointer information contained therein."

19 17. The October 10, 2003 letter expressly asserts that Diebold "reserve[s] their position  
20 insofar as costs and damages caused by" OPG's hosting of the IndyMedia website with links to the  
21 e-mail archive and further asserts that it "reserve[s] their right to seek injunctive relief to prevent  
22 further" hosting of the IndyMedia website with links to the e-mail archive by OPG. In other  
23 words, the letter included a threat of litigation against OPG if it did not comply with the demands  
24 in the letter.

25 18. The October 10, 2003 letter states that Diebold "looks forward to a response within  
26 24 hours."

27 19. The October 10, 2003 letter to OPG caused great apprehension, concern and  
28 disruption to OPG. OPG sent a brief response indicating that it was consulting with counsel.

1           20.     Because OPG does not control the San Francisco IndyMedia computer hosting the  
2 website, instead only providing Internet connectivity to that computer through colocation, OPG  
3 could not comply by merely disabling or removing the hyperlink and related information  
4 demanded by Diebold. OPG's only option to comply with the demand was to cut off IndyMedia's  
5 Internet connectivity entirely. This would disable the entire website and any other information  
6 stored on that computer from connection to the Internet.

7           21.     While fearful of the potential of ruinous litigation, OPG board decided not to  
8 comply, because the demand would require OPG to restrict speech by its users that OPG believed  
9 was lawful, in ways antithetical to the OPG mission of promoting free speech.

10          22.     On October 22, 2003, OPG's counsel wrote a response to Diebold's counsel stating  
11 that OPG would not comply with the demand and explaining why it had come to that decision.  
12 Attached hereto as Exhibit "C" is a true and correct copy of the letter sent by OPG counsel to  
13 Diebold counsel.

14          23.     At about the same time, another user of OPG's web hosting services indicated that it  
15 wished to publish the e-mail archive.

16          24.     Also on October 22, 2003, OPG received notice that its upstream Internet provider,  
17 Hurricane Electric, had received a cease-and-desist letter from Diebold. Attached hereto as Exhibit  
18 "D" is a true and correct copy of the letter sent by Diebold Counsel to Hurricane Electric.

19          25.     Diebold's October 21, 2003, cease-and-desist letter to Hurricane Electric, which  
20 Hurricane forwarded to OPG, demanded that Hurricane Electric "assist in removing the identified  
21 infringing material or act in accordance with your 17 U.S.C. 512(i)(1)(A) policy that 'provides for  
22 the termination in appropriate circumstances of subscribers and account holders of the service  
23 provider's network who are repeat infringers.'"

24          26.     Again, Diebold's actions caused tremendous apprehension, concern and disruption  
25 to OPG. This time, however, the threat carried much more severe consequences. As with the  
26 technical structure between OPG and IndyMedia, the technical structure between Hurricane and  
27 OPG meant that Hurricane Electric could not simply remove the link from the IndyMedia website  
28 hosted by OPG. Instead, Diebold's demands, if complied with by Hurricane Electric, would result

1 in the disconnection of all of OPG's users from the Internet and the disabling of all of the  
2 approximately 1000 websites and other Internet services provided by OPG to the more than 77,700  
3 individuals served by OPG. Such disconnection by Hurricane Electric in response to Diebold's  
4 demand would threaten the continued existence of OPG. The volunteer board held an emergency  
5 board meeting to discuss the Diebold letter to Hurricane Electric.

6 27. In a discussion with OPG on October 22, Hurricane Electric informed OPG that it  
7 took Diebold's copyright demands seriously.

8 28. After OPG indicated that it intended to seek relief from this Court against further  
9 threats from Diebold, Hurricane Electric informed OPG that it would not take action to terminate  
10 OPG's contract based on this single complaint regarding IndyMedia's links.

11 29. However, Hurricane Electric has stated that it might be forced to terminate OPG's  
12 contract in the future, if it received further demands from Diebold.

13 30. In particular, Hurricane Electric has stated that it might be forced to terminate OPG  
14 if it received complaints alleging that OPG's clients were hosting Diebold material directly, rather  
15 than just linking to it.

16 31. Based upon the conversation with Hurricane Electric, OPG told other users that they  
17 may not host the e-mail archive pending clarification from this Court.

18 MR. PAVLOSKY AND MR. SMITH

19 32. Plaintiffs Pavlosky and Smith co-founded SCDC, an unincorporated student  
20 association, in September of 2003 to advocate a bottom-up participatory structure for society and  
21 culture, characterized by the free and open exchange of information. The group is dedicated to the  
22 promotion of free and open-source technological standards to enable such participation.

23 33. SCDC operates an Internet website on the Swarthmore College network at  
24 <<http://scdc.sccs.swarthmore.edu>>. Internet connectivity and the right to set up websites for  
25 student organization use are among the services provided as part of Swarthmore College tuition.

26 34. The SCDC website describes the organization's goals and mission, alerts members  
27 and interested students of meetings, and provides updates on organizational activities and projects.  
28 The website also provides links to resources, including newspaper articles and other websites,

1 relevant to SCDC's goals and mission.

2 35. SCDC members discussed the effect of technology on government, and particularly  
3 the issue of voting transparency, as early as their first meeting in September 2003. Plaintiff  
4 Pavlosky considered studying non-proprietary, open-source alternatives to voting technologies  
5 developed by private companies with proprietary interests.

6 36. Plaintiffs Pavlosky and Smith first heard about the Diebold email archive from  
7 friends active in another Swarthmore student group, Why-War? The www.Why-War.com website  
8 hosted the e-mail archive between October 8 and 10, 2003. After hearing that the e-mail archive  
9 contained information on, among other topics, the (lack of) accuracy, security and accountability of  
10 Diebold's electronic voting machines widely used in the United States, Plaintiffs Pavlosky and  
11 Smith viewed and downloaded the archive.

12 37. Plaintiffs Pavlosky and Smith determined that the e-mail archive was directly  
13 relevant to the SCDC's study project.

14 38. Plaintiffs Pavlosky and Smith learned at some time in early October that Diebold  
15 had asked Why-War?'s off-campus Internet service provider to disable access to the e-mail  
16 archive, at which point student members of Why-War? and other Swarthmore students began to  
17 host the archive on personal websites. This arrangement was impracticable due to the size of the  
18 archive and bandwidth issues.

19 39. Thereafter, Plaintiffs Pavlosky and Smith decided to post the e-mail archive on the  
20 SCDC website to preserve public access to the documents. On October 21, 2003, SCDC posted the  
21 e-mail archive on its website to show the public the serious and deep-seated problems with the  
22 Diebold machines, and to educate the public about the need for a transparent voting system. A true  
23 and correct copy of the e-mail archive is attached hereto as Exhibit "E".

24 40. On October 22, 2003, Swarthmore College administration told SCDC that the  
25 school had received a letter from Diebold claiming that SCDC was infringing Diebold's copyright  
26 by posting the e-mail archive. A true and correct copy of the cease-and-desist letter, which  
27 Plaintiff Pavlosky later obtained, is attached hereto as Exhibit "F".

28 41. On October 23, 2003, Swarthmore disabled Internet access to the e-mail archive on

1 the SCDC website.

2 42. Plaintiff Smith subsequently added a link from the SCDC website to the e-mail  
3 archive posted on a remote site. Plaintiff Pavlosky removed this link after being informed that even  
4 linking from a Swarthmore website to an outside website hosting the e-mail archive contravened  
5 Swarthmore policy.

6 43. Neither Plaintiff Pavlosky nor Plaintiff Smith is currently hosting or linking to the e-  
7 mail archives on the SCDC website or any other site.

8 44. Plaintiffs Pavlosky and Smith are concerned for their ability to learn more about the  
9 e-voting debate, including their ability to plan a symposium, "Choosing Clarity: Symposium on  
10 Voting Transparency," that SCDC had set for the week of December 1, 2003.

11 THE PUBLIC DEBATE ABOUT THE SECURITY OF ELECTRONIC VOTING MACHINES

12 45. The security and independent verifiability of the accuracy of electronic voting  
13 systems, including those manufactured by Diebold, are subjects of intense national debate. Diebold  
14 electronic voting machines have been criticized for overall lax security, both in the machines  
15 themselves and in the processes used by Diebold to test, update and develop the product. Plaintiffs  
16 are informed and believe, and based upon such information and belief allege that as a result of  
17 independent research done on certain Diebold computer code that revealed serious security  
18 problems, the State of Maryland commissioned a study of the Diebold code that confirmed "high-  
19 risk vulnerabilities in the implementation of the managerial, operational and technical controls for"  
20 Diebold's electronic voting system.

21 46. Moreover, some members of the public have raised concerns because the Diebold e-  
22 voting machines, like many others, produce no paper records of votes cast that can be reviewed and  
23 verified by individual voters for accuracy and then used as a separate audit trail in the case of a  
24 question about the accuracy of the machines or other circumstances. Members of the public and  
25 some election officials have raised concern that such systems, including Diebold's system, by  
26 relying entirely on the security of the voting systems themselves for verification of election results,  
27 create a tremendous risk of erroneous or fraudulent election results.

28 47. These concerns, among others, have resulted in significant public debate and media



1 coverage about the security of Diebold's voting machines.

2 48. Numerous Internet websites have posted news, reports, and internal Diebold  
3 documents assessing the security of Diebold electronic voting systems, including the e-mail  
4 archive.

5 49. Numerous traditional print, radio and television media have reported on the  
6 controversy surrounding electronic voting machine security, including the security of Diebold's  
7 electronic voting machines.

8 50. Numerous websites have linked to the Diebold e-mail archive as source material for  
9 their commentary and criticism.

10 51. A Diebold spokesperson says the company has been issuing cease-and-desist  
11 demands to everyone who has posted Diebold documents, asserting copyright in the documents.  
12 Attached hereto as Exhibit E is a true and correct copy of a Delaware County Times article, dated  
13 Friday Oct. 24, 2003, quoting Mike Jacobsen.

14 52. Many ISPs have taken down websites in response to Diebold's litigation threats.

15 53. Plaintiffs are informed and believe and based upon such information and belief  
16 allege that Diebold will continue to send out these cease-and-desist letters unless restrained by this  
17 court.

18 **COUNT I: TORTIOUS INTERFERENCE WITH CONTRACT**  
19 **(All Parties)**

20 54. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding  
21 paragraphs of this complaint.

22 **Online Policy Group**

23 55. OPG contracts with Hurricane Electric for Internet connectivity. Exhibit A.

24 56. Defendants' cease-and-desist letter of October 21, 2003, admits knowledge of the  
25 contractual relationship between OPG and Hurricane Electric, specifically referring to OPG as one  
26 of Hurricane Electric's "subscribers and account holders." Exhibit D.

27 57. Defendants' October 21, 2003, cease-and-desist letter to Hurricane Electric was  
28 designed to cause Hurricane Electric to terminate, interrupt, or otherwise limit OPG's Internet

1 service by misrepresenting that the actions of OPG in hosting IndyMedia's website with links to  
2 the e-mail archive violated Diebold's copyrights.

3 58. Diebold's threat did disrupt OPG's relations with Hurricane Electric, causing  
4 Hurricane to make immediate demands to OPG, and to threaten interruption of OPG's Internet  
5 service in the future if Diebold documents or links are hosted on machines OPG co-locates with  
6 Hurricane. Because of the threats from Diebold, OPG has been made to fear for the continuity of  
7 its Internet service from Hurricane.

8 59. As a result of these disruptions, and in order to assure that it is not disconnected  
9 from the Internet, OPG may be forced to take down the links to the e-mail archive, and with them  
10 IndyMedia's entire website, if it receives a further threat from Diebold.

11 60. As a result of these disruptions, and in order to assure that it is not disconnected  
12 from the Internet, OPG has been forced to limit its clients' activities in ways that are contrary to the  
13 OPG mission to support free speech, specifically by refusing to allow its users to host the e-mail  
14 archive.

#### 15 Pavlosky and Smith

16 61. Pavlosky and Smith obtain Internet connectivity and the ability to operate the SCDC  
17 website on the Swarthmore network through Swarthmore College. They pay for that connectivity  
18 as part of their student fees.

19 62. Defendants' letter of October 9, 2003, to Swarthmore College admits knowledge of  
20 the contractual relationship between Pavlosky and Smith and Swarthmore. Exhibit F.

21 63. Defendants' cease-and-desist letter to Swarthmore was designed to cause  
22 Swarthmore to terminate, interrupt, or otherwise limit the Internet service provided by Swarthmore  
23 to Pavlosky and Smith – service to which they were contractually entitled – by misrepresenting that  
24 the actions of students in publishing the e-mail archive violated Diebold's copyrights.

25 64. Diebold's threat did disrupt Pavlosky and Smith's relations with Swarthmore,  
26 causing Swarthmore to make immediate demands to Pavlosky and Smith that they cease posting  
27 and linking to the e-mail archive and to threaten interruption of Pavlosky and Smith's Internet  
28 service in the future, if Diebold documents or links to such documents are hosted on machines that

1 SCDC or Pavlosky or Smith individually connects to the Swarthmore College network. Because of  
2 the threats from Diebold, Pavlosky and Smith have been made to fear for the continuity of their  
3 Internet service from Swarthmore.

4 65. As a result of these disruptions, and in order to assure that their Internet services are  
5 not disconnected – in which case SCDC members would lose a critical avenue of expression –  
6 Pavlosky and Smith have been forced to limit their and other SCDC members’ expression, in ways  
7 that are contrary to the SCDC mission to support free and open exchange of information.

8 **COUNT II: MISUSE OF COPYRIGHT**  
9 **(All Parties)**

10 66. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding  
11 paragraphs of this complaint.

12 67. The publication of the e-mail archive is fair use, not infringement. Plaintiffs are  
13 informed and believe and based upon information and belief allege that the facts that underlie this  
14 conclusion include, but are not limited to:

- 15 a. The purpose and character of the use is to inform public discussion and political  
16 debate on a matter core to American democracy, the functioning of our electoral  
17 system;
- 18 b. The nature of the work is factual;
- 19 c. The archive does not embody any substantial expressive work and is necessary in  
20 the aggregate for purposes of commentary and criticism;
- 21 d. The publication of the e-mail archive does not compete with Diebold in any current  
22 or potential market. If the publication cuts into sales of Diebold’s e-voting  
23 equipment it does so only because Diebold’s own statements have raised concerns  
24 about the security of their electronic voting machines.

25 68. Plaintiffs are informed and believe and based upon such information and belief  
26 allege that Diebold’s motivation in demanding the documents’ removal was not to protect any  
27 market for distribution of its e-mail archive or other interest protected by copyright law, but instead  
28 to stifle free speech in the form of criticisms of its electronic voting systems.



1 the authority of 17 U.S.C. § 512, Diebold knowingly materially misrepresented that publication of  
2 and links to the e-mail archive to be infringing.

3 77. In its cease-and-desist letters of October 10 and 21, 2003, purportedly issued under  
4 the authority of 17 U.S.C. § 512, Diebold knowingly materially misrepresented that OPG could be  
5 liable under copyright law for hosting a website that merely contained a link to the e-mail archive  
6 that it claimed was infringing.

7 78. In its letter of October 21, 2003, purportedly issued under the authority of 17 U.S.C.  
8 § 512, Diebold knowingly materially misrepresented that Hurricane Electric could be liable under  
9 copyright law for providing upstream services to an ISP whose users had a website that merely  
10 contained a link to the e-mail archive that Diebold claimed was infringing.

11 79. OPG has been injured by the misrepresentation in that Hurricane Electric, its service  
12 provider, relied upon the misrepresentation to forbid OPG from allowing its clients to post copies  
13 of the e-mail archive.

14 Pavlosky and Smith

15 80. In its letter of October 9, 2003, issued under the authority of 17 U.S.C. § 512,  
16 Diebold knowingly materially misrepresented that publication of the e-mail archive was infringing.

17 81. Plaintiffs Pavlosky and Smith have been injured by the misrepresentation in that  
18 Swarthmore College, their service provider, relied upon the misrepresentation to terminate their  
19 hosting of the e-mail archive and to forbid them from linking to the e-mail archive.

20 **COUNT IV: DECLARATORY RELIEF**  
21 (All Parties)

22 82. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding  
23 paragraphs of this complaint.

24 83. There is a real and actual controversy between Plaintiffs and Defendants regarding  
25 whether the publication of or linking to the e-mail archive constitutes copyright infringement.

26 84. There is a real and actual controversy between Plaintiffs and Defendants regarding  
27 whether an Internet Service Provider can be held liable for hosting a website that links to allegedly  
28 infringing material.



1 c) Providing Internet services to others who host websites that link to allegedly  
2 infringing material is lawful.

- 3 2. Injunctive relief restraining the Defendants, their agents, servants, employees,  
4 successors and assigns, and all others in concert and privity with them, from  
5 bringing any lawsuit or threat against Plaintiffs or any other person or entity for  
6 copyright infringement of the e-mail archive in connection with the publication,  
7 linking to or hosting services described above.
- 8 3. Damages for copyright misuse and intentional interference with contractual  
9 relations according to proof;
- 10 4. Judgment barring Defendants from enforcing any copyright in the e-mail archive  
11 unless and until their misuse has ceased;
- 12 5. Attorneys fees pursuant to 17 U.S.C. § 512(f), other portions of the Copyright Act,  
13 on a Private Attorney General basis, or otherwise as allowed by law;
- 14 6. Plaintiffs' costs and disbursements within; and
- 15 7. Such other and further relief as the Court shall find just and proper.

16 Plaintiffs hereby request a jury trial for all issues triable by jury including, but not limited  
17 to, those issues and claims set forth in any amended complaint or consolidated action.

18 DATED: November 3, 2003

19 By 

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28



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## Internet Services and Colocation Agreement

This Internet Services and Colocation Agreement (the "Agreement") is between Hurricane Electric, Inc. ("Hurricane") and the Customer shown at the end of this document and consists of (i) this document and (ii) the Customer's Quotation of Services (see below). This Agreement may be executed by facsimile and/or in multiple counterparts. Once executed by both parties, this Agreement is effective as of the Effective Date shown below.

**Definitions.** As used in this Agreement, "Service" means the provision of bandwidth for the transmission of data to and from the Internet through the Network together with Colocation services including 24x7 connectivity to the Internet and Colocation Space, as further defined in this Agreement and in the Quotation of Services ("Quote(s)"). "Network" means the network of routers, switches and communication channels that are owned or controlled by Hurricane. The Quote is attached and marked as Exhibit A. Customer and Hurricane may enter into subsequent Quote(s), which will automatically become part of this Agreement. "Colocation Space" means the physical area within Hurricane's Colocation facility identified in a Quote. "Customer Equipment" means the computer equipment, software, networking hardware or other materials placed by or for Customer in the Colocation Space, other than Hurricane Equipment. "Hurricane Equipment" means all computer equipment, software, networking hardware or other materials belonging to or furnished by Hurricane. Additional terms are defined in the Hurricane Terms and Conditions, below. Hurricane will begin installation and Service only after it receives and accepts: (i) the Quote; (ii) this Agreement signed by a Customer authorized representative; and (iii) the Initial Payment due under Section 1.1 of this Agreement. "Personnel" refers to employees, representatives, agents, contractors, or subcontractors.

**1. Service Fees And Billing.** Customer agrees to pay the monthly charges for Service, the activation and other charges indicated on the Quote or otherwise due hereunder (collectively, "Service Charges"). Service Charges do not include applicable taxes, shipping charges (if any), or telephone company charges, all of which shall be billed in addition to the Service Charges (or billed by third party providers) and shall be the responsibility of the Customer.

**1.1 Initial Payment.** Upon Hurricane's acceptance of the Quote and full execution of this Agreement, Customer shall be invoiced for all Service Activation Charges and the first month's Service Charges which shall be due upon installation, but in no event later than 30 days after the execution of this Agreement.

**1.2 Recurring Charges.** Hurricane will bill Customer monthly in advance for the Colocation Space ("Colocation Space Fees") and committed bandwidth and monthly in arrears for any additional bandwidth used above the committed bandwidth billed in the prior month. Additional bandwidth will be billed in 0.1(tenth) Mbps increments. "Bandwidth Fees" is defined as charges for usage of bandwidth provided under this Agreement as set forth in the Quote. Billing for monthly Service Charges will begin on the earlier of: (a) the Installation Date, which shall be thirty (30) business days after the Effective Date set forth above or (b) the date that Customer places Customer Equipment in Hurricane's premises. If, however, Customer is unable to use the Services commencing on the Installation Date due solely to delays caused by and within the reasonable control of Hurricane, then the date on which monthly Service Charges billing begins will be extended by one day for each such day of delay.

**1.3 Payment.** All Service Charges and other fees will be due in U.S. dollars within thirty (30) days of the date of invoice. Late payments will accrue interest at a rate of one and one-half percent (1 ½%) per month or the highest rate allowed by applicable law, whichever is lower. If payment is returned to Hurricane with insufficient funds, Customer is considered to not have paid and subject to a returned check charge of \$25 and may be terminated for Nonpayment as described in 13.1.



**1.4 Bandwidth Measurement.** Bandwidth usage will be calculated by Hurricane using the 95<sup>th</sup> percentile of samplings taken at 5 minute intervals on a monthly basis. Samples are taken by Hurricane via SNMP from the Hurricane switch or router port Customer is directly connected to and are the greater of input or output bits per second. 95th percentile is determined by sorting the sample data from smallest to largest and discarding the top 5 percent, with the remaining largest sample designated as the 95<sup>th</sup> percentile.

## **2. Colocation**

**2.1 Use of Space.** Hurricane grants Customer the right to operate Customer Equipment at the Colocation Space, as specified on Customer's Quote. Except as specifically provided herein, Customer expressly assumes all risk of loss to Customer Equipment in the Colocation Space. Customer shall be liable to Hurricane for any damage to the Colocation facility, Hurricane Equipment or equipment of other Hurricane customers caused by Customer, Customer Equipment or Customer's personnel.

**2.2 Customer Equipment Installation and Removal.** Customer is responsible for all aspects of installation and removal of Customer Equipment, including bringing appropriate equipment, tools and packaging materials. Customer will install Customer Equipment in the Colocation Space after obtaining the appropriate authorization from Hurricane to access Hurricane premises. Customer will remove all packaging for Customer Equipment promptly after installation. Should Customer use an agent or other third party to deliver, install or remove Customer Equipment, Customer will be solely responsible for the acts of such party. At Customer's option, Hurricane will remove and package Customer Equipment and place Customer Equipment in a designated area for pick-up, on the condition that Customer either provide or pay for all needed packaging plus pay Hurricane's packaging fees and charges. Within five (5) days after authorization from Hurricane Customer will remove Customer Equipment from the designated area or arrange on a pre-paid basis for a carrier to pick-up and ship such equipment to Customer. Customer may request Remote Hands Service for the purpose of installation of equipment that has been shipped preconfigured by customer to Hurricane Electric.

**2.3 Designated Space.** Hurricane will designate space for Customer. All of Customer's equipment and property must be stored in Customer's designated space or removed from the premises by Customer. Equipment and other property left by Customer in an area other than the Customer's designated space may be considered abandoned by Hurricane. In that event, Hurricane may, at its option either (a) retain such items as its property or dispose of them without accountability in such a manner as Hurricane shall determine, at Customer's expense, or (b) remove and store such items for Customer, at Customer's expense.

**2.4 Electrical Power.** Unless otherwise specified on Customer's Quote, each cabinet or rack shall be supplied with one 110 VAC 15A electrical circuit connected to its own circuit breaker. Any power strips provided by Hurricane are subject to the Limitations of Liability contained within this Agreement. Hurricane does not keep track of the power requirements of customer equipment and will not be held liable by Customer if Customer, by action of Customer's personnel or by Hurricane's personnel at the request of Customer, exceeds the rating of an electrical circuit, power strip, and/or circuit breaker.

**2.5 Cross Connects.** Customer may run cross connects between Customer's adjacent cabinets at no charge. In addition to any cross connects between Customer's adjacent cabinets, Customer may request up to ten category 5 cross connects, within Hurricane Electric's facility at no additional charge. After ten category 5 cross connects, or for cross connects using media other than category 5 cabling, Customer may request cross connects for a one time installation fee not to exceed the reasonable cost of labor and materials for the cross connect. At Hurricane's discretion, Customer may provide cross connect labor or materials. All cross connect cabling and installation methods must meet Hurricane's data center standards.

**2.5 Remote Hands Service.** Customer may request Hurricane to perform "remote hands" service on Customer's equipment within Hurricane's facilities. There is no charge for Hurricane's remote hands service. Remote hands service involves Hurricane personnel physically touching Customer's equipment. Remote hands tasks are limited to simple tasks such as pressing a button, flipping a switch, or hooking up a monitor and reporting what is on the screen, that take no longer than 15 minutes to perform. Remote hands

tasks do not include configuration of customer equipment. Remote hands service does not include daily scheduled tasks such as tape changing. Customer may request a maximum of 8 hours of remote hands service per month. Hurricane offers consulting separate from this agreement at additional charge. Customer is not required to use the remote hands service. Customer may choose to use its own personnel to perform any task on its equipment at any time. Customer understands that computers and telecommunications equipment (hardware) are electromechanical devices and may fail. Customer is solely responsible for the maintenance and replacement of its hardware. Hurricane does not warrant either the results to be obtained from the remote hands service or that the remote hands service will be error free. Customer agrees to indemnify and hold harmless Hurricane against any loss, damage, cost and expense due to claims from Customer or third parties arising out of Customer's remote hands requests.

**2.6 Access and Security.** Customer personnel may access the Colocation Space as allowed by the access list provided by Customer to Hurricane. Hurricane reserves the right to deny access to specific Customer personnel for billing or security reasons. Customer shall be responsible for any authorized or unauthorized access to Customer Equipment through the Internet and any resulting use of Service.

**2.7 Acceptable Use Guidelines.** Customer will at all times comply with and conform its use of the Service to the Hurricane Acceptable Use Guidelines (set forth at Hurricane's website), as updated from time to time. In the event Customer violates Hurricane's Acceptable Use Guidelines, Hurricane shall have the right to immediately suspend Service. Hurricane will provide notice and opportunity to cure, if and to the extent Hurricane deems practicable, depending on the nature of the violation and availability of the Customer. Hurricane, in its reasonable discretion, may re-enable the Service upon satisfaction that all violations have ceased and with adequate assurance that such violations will not occur in the future.

**2.8 Updates.** Hurricane may update the Hurricane Acceptable Use Guidelines from time to time by posting such updates on Hurricane's website. References herein to the Hurricane Acceptable Use Guidelines shall mean the most updated version of such policies or procedures posted on Hurricane's web site. Hurricane shall notify Customer of any material changes to its policies and procedures.

**2.9 Prohibited Uses.** Customer shall not do or allow any use which in the opinion of Hurricane (a) causes or is likely to cause damage or constitutes a nuisance or annoyance to the facility, equipment, personnel, or other customers (b) would violate a condition of standard fire insurance policy for data processing centers in California (c) would violate any certificate of occupancy for the building.

**2.10 Illegal Use.** Customer will cooperate in any investigation of Customer's alleged illegal use of Hurricane's facilities or other networks accessed through Hurricane. If Customer fails to cooperate with any such investigation, Hurricane may suspend Customer's Service. Additionally, Hurricane may modify or suspend Customer's Service in the event of illegal use of the Network or as necessary to comply with any law or regulation, including the Digital Millennium Copyright Act of 1998, 17 U.S.C. 512, as reasonably determined by Hurricane.

**2.11 Address Space.** Hurricane will assign IP addresses to Customer based upon ARIN guidelines. Addresses assigned to Customer by Hurricane may only be used while a Hurricane customer. If Customer has a valid address allocation from ARIN, RIPE, or APNIC, Customer may request Hurricane to announce it via BGP at no additional charge.

**3. Local and Long Distance Carriers.** Customer is responsible for ordering, maintaining, terminating and paying for any data and telecommunications circuits provided to Customer by local and long-distance carriers including cross-connects from Hurricane.

**4. Other Networks.** Customer is responsible for paying any fees, obtaining any required approvals and complying with any laws or usage policies applicable to transmitting data beyond the Network and/or through other public and private networks. Hurricane is not responsible or liable for performance or non-performance of such networks or their inter-connection points.

**5. Resale.** In the event Customer resells connectivity to the Internet (a) Customer remains responsible to Hurricane for all of its obligations hereunder including but not limited to all Service Charges and liabilities arising out of or related to such third party usage, sites, communications, and the acts and omissions of such third party, (b) Customer shall indemnify Hurricane for any third party claims arising out of the acts and omissions of such third party and (c) Customer and the party(s) to whom Customer resells any portion of the Services enter into written agreement(s) pursuant to which such party(s) agree to be bound by all terms and conditions in this Agreement as applicable to them and their use of the Services and the Network. Any such resale agreement shall terminate automatically upon expiration or termination of this Agreement. Notwithstanding the foregoing, Hurricane is not liable to any third party resale customer for any claims, losses or damages, (including consequential damages) resulting from that customer's use of the Service.

6. Paragraph Retained as Placeholder

**7. NO WARRANTY.** EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE SERVICES ARE PROVIDED ON AN "AS IS" BASIS, AND CUSTOMER'S USE OF THE SERVICES AND THE COLOCATION SPACE ARE AT CUSTOMER'S OWN RISK. HURRICANE DOES NOT MAKE, AND HEREBY DISCLAIMS, ANY AND ALL OTHER EXPRESS AND IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT AND TITLE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. HURRICANE DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE, OR COMPLETELY SECURE.

**8. Disclaimer of Third Party Actions and Control.** Hurricane does not and cannot control the flow of data to or from the Network and other portions of the Internet. Such flow depends in large part on the performance of Internet services provided or controlled by third parties. At times, actions or inactions caused by these third parties can produce situations in which Customer connections to the Internet (or portions thereof) may be impaired or disrupted. Hurricane cannot guarantee that such situations will not occur and, accordingly, Hurricane disclaims any and all liability resulting from or related to such events. In the event that Customer's use of the Service or interaction with the Internet or such third parties is causing harm to or threatens to cause harm to the Network or its operations, Hurricane shall have the right to suspend the Service. Hurricane shall restore Service at such time as it reasonably deems that there is no further harm or threat of harm to the Network or its operations.

**9. Insurance.** Customer will keep in full force and effect during the term of this Agreement: (i) commercial general liability insurance; (ii) workers' compensation insurance in an amount not less than that required by applicable law; and (iii) business property insurance covering Customer's equipment in the amount of its replacement value.

**10. Limitations of Liability**

**10.1 Personal Injury.** Hurricane will not be liable for any harm or personal injury to Customer personnel or customers resulting from any cause, other than Hurricane's gross negligence or willful misconduct.

**10.2 Damage to Customer Equipment.** Hurricane is not liable for damage to, or loss of any of Customer Equipment resulting from any cause, other than Hurricane's gross negligence or willful misconduct and then only in an amount not to exceed the replacement value of the damaged Customer Equipment, or the total amount paid by Customer to Hurricane for one month's service, whichever is lower.

**10.3 Damage to Customer Business.** In no event will Hurricane be liable for any incidental, punitive, indirect, or consequential damages (including without limitation any lost revenue or lost profits) or for any loss of technology, loss of data, or interruption or loss of use of Service (except as set forth in Section 6) or any other similar claims by Customer or related to Customer's business, even if Hurricane is advised of the possibility of such damages. Hurricane will not be liable for any damages or expenses incurred by Customer as a result of any deficiency, error, or defect in Hurricane's service whether due to equipment, hardware, software, or Hurricane's failure to correct the same.

**10.4 Maximum Liability.** Notwithstanding anything to the contrary in this Agreement, Hurricane's maximum aggregate liability to Customer related to or in connection with this Agreement whether under theory of contract, tort (including negligence), strict liability or otherwise will be limited to the total amount paid by Customer to Hurricane for one month's service.

#### Indemnification

**11.1 By Customer.** Customer will indemnify, defend and hold harmless Hurricane, its directors, officers, employees, affiliates and customers (collectively, the "Hurricane Covered Entities") from and against any and all claims, actions or demands brought against any of the Hurricane Covered Entities alleging: (a) with respect to the Customer's business: (i) infringement or misappropriation of any intellectual property rights; (ii) defamation, libel, slander, obscenity, pornography, or violation of the rights of privacy or publicity; or (iii) spamming or any other offensive, harassing or illegal conduct or violation of the Acceptable Use Guidelines; (b) any loss suffered by, damage to or injury of any other Hurricane customer, any other customer's equipment or any other customer's representatives, employees or agents, which loss, damage or injury is caused by or otherwise results from acts or omissions by Customer, Customer representative(s) or Customer's designees; (c) any personal injury suffered by any Customer personnel arising out of such individual's activities related to the Services, unless such injury is caused by Hurricane's negligence or willful misconduct; or (d) any other damage arising from the Customer Equipment or Customer's business, (collectively, the "Customer Covered Claims"). Customer agrees to reimburse Hurricane for the expense and cost of handling such claims including, without limitation, legal fees.

**11.2 Notice Procedure.** Hurricane will provide Customer with prompt written notice of each Customer Covered Claim of which Hurricane becomes aware, and, at Hurricane's sole option, Hurricane may elect to participate in the defense and settlement of any Customer Covered Claim, provided that such participation shall not relieve Customer of any of its obligations under this Section 11. Customer shall have the right to control the defense of any Customer Covered Claim. Customer will provide Hurricane with prompt written notice of each Hurricane Covered Claim of which Customer becomes aware, and at Customer's sole option, Customer may elect to participate in the defense and settlement of Hurricane Covered Claim, provided that such participation shall not relieve Hurricane of any of its obligations under this Section 11. Hurricane shall control the defense of any Hurricane Covered Claim.

**12. Term.** This Agreement will commence on the Effective Date and shall expire at the end of the last "Term" specified in any Quote, unless sooner terminated as provided in Section 13 below, provided, however, that each Quote shall automatically renew for additional periods of the same length as the initial Term upon the end of its Term unless one party provides the other written notice that it is terminating such Quote not more than 90 days and not less than 30 days prior to the end of the Term specified in the Quote.

#### Termination

**13.1 Nonpayment.** Hurricane may suspend Service to Customer if any amount due hereunder is not paid in full within fifteen (15) days after Customer is sent an overdue notice. To reinstate Service, Hurricane will require a reconnection fee of \$500.00. Hurricane may terminate this Agreement (or at its option, only the relevant Quote) if any amount due hereunder is not paid in full within thirty (30) days after Customer is sent an overdue notice.

**13.2 Bankruptcy.** Hurricane may terminate this Agreement upon written notice to Customer if Customer becomes the subject of a petition in bankruptcy or any proceeding relating to insolvency, receivership, or liquidation for the benefit of creditors, if such petition or proceeding is not dismissed within 60 days of filing.

**13.3 Unacceptable Use.** Hurricane may immediately terminate this Agreement if Customer violates any provision of the Hurricane Acceptable Use Guidelines that results or could result in suspension by Hurricane.

13.4 For Other Cause. Except as otherwise stated, either party may terminate this Agreement if the other party breaches any material term or condition of this Agreement and fails to cure such breach within ten (10) days after receipt of written notice of the same.

13.5 Effect of Termination. Upon expiration or termination of this Agreement: (a) Hurricane will cease providing the Services; (b) except in the case of termination by Customer pursuant to Section 13.4, all of Customer payment obligations under this Agreement, including but not limited to monthly Service Fees through the end of the Term indicated on the Quote(s) will become due in full immediately; and (c) within ten (10) days, Customer will remove all of Customer Equipment and any other property from Hurricane's premises and return the Colocation Space to Hurricane in the same condition as it was prior to Customer installation. If Customer does not remove such property within the ten (10) day period, Hurricane, at its option and at Customer expense, may remove and store any and all such property, return such Equipment to the Customer, or dispose of such equipment without liability for any related damages. In addition, Hurricane reserves the right to hold any Customer Equipment until it has received payment in full.

14. Survival. The Parties' respective representations, warranties, and covenants, together with obligations of indemnification, confidentiality and limitations on liability will survive the expiration, termination or rescission of this Agreement and continue in full force and effect.

#### 15. Miscellaneous Provisions

15.1 Force Majeure. Other than with respect to failure to make payments due hereunder, neither party shall be liable under this Agreement for delays, failures to perform, damages, losses or destruction, or malfunction of any equipment, or any consequence thereof, caused or occasioned by, or due to fire, earthquake, flood, water, the elements, labor disputes or shortages, utility curtailments, power failures, explosions, civil disturbances, governmental actions, shortages of equipment or supplies, unavailability of transportation, acts or omissions of third parties, or any other cause beyond its reasonable control.

15.2 No Lease. This Agreement is a services agreement and is not intended to and will not constitute a lease of or tenancy or other interest in the Colocation Space or other Hurricane premises, the Hurricane Equipment or any other real or personal property.

15.3 Government Regulations. Customer will not export, re-export, transfer, or make available, whether directly or indirectly, any regulated item or information to anyone outside the U.S. in connection with this Agreement without first complying with all export control laws and regulations which may be imposed by the U.S. Government and any country or organization of nations within whose jurisdiction Customer operates or does business.

15.4 Assignment. Neither party may assign its rights or delegate its duties under this Agreement either in whole or in part without the prior written consent of the other party, except to an affiliate or a party that acquires substantially all of the assigning party's assets or a majority of its stock as part of a corporate merger or acquisition. Any attempted assignment or delegation without such consent will be void. This Agreement will bind and inure to the benefit of each party's successors and permitted assigns.

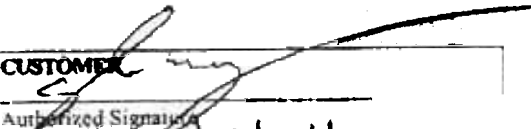
15.5 Notices. Any required notice hereunder may be delivered personally or by courier; sent by confirmed facsimile; or mailed by registered or certified mail, return receipt requested, postage prepaid, to either party at the name and address on the signature page of this Agreement, or at such other address as such party may provide to the other by written notice. Such notice will be deemed to have been given as of the date it is delivered personally or by courier, or five (5) days after it is sent by confirmed facsimile or mailed.

15.6 Relationship of Parties. This Agreement will not establish any relationship of partnership, joint venture, employment, franchise or agency between the parties.

15.7 Changes Prior to Execution. Customer represents and warrants that any changes to this Agreement made by it were properly marked as changes and that Customer made no changes to the Agreement that were not properly identified as changes.

15.8 Choice of Law. This Agreement will be governed by and construed in accordance with the laws of the State of California, excluding its conflict of laws principles.

16. General. This Agreement, together with the Quote(s) and Hurricane policies referred to in this Agreement is the complete agreement and understanding of the parties with respect to the subject matter hereof, and supersedes any other agreement or understanding, written or oral. This Agreement may be modified only through a written instrument signed by both parties. Should any provision of this Agreement be declared void or unenforceable, such provision will be deemed amended to achieve as nearly as possible the same economic effect as the original terms and the remainder of this Agreement will remain in full force and effect. In the case of international, federal, state or local government orders, Customer purchase order must contain the following language: "This purchase order is being used for administrative purposes only and is subject to the terms and conditions of the Hurricane Internet Service and Colocation Agreement executed between Customer and Hurricane."

CUSTOMER

Authorized Signature
David Weekly
(print name)
CCCP Project Director
Title
Online Policy Group, Inc
Company Name
304 Winfield St
Address
San Francisco, CA 94110
Telephone
+1 415 826 3532
Fax
+1 928 244 2347

End of Hurricane Internet Services Agreement



**HURRICANE ELECTRIC  
INTERNET SERVICES**

## **Hurricane Electric Internet Service Level Agreement**

### **Network Availability Addendum- July 2000**

#### **100 Percent Network Availability**

##### **Network Availability**

Hurricane Electric guarantees access to Hurricane Electric's Internet Internet Backbone will be available 100% of the time. If availability falls below 100% within a thirty (30) calendar day period, customer may request a credit in writing via fax or postal mail equal to the prorated amount of the downtime. At customer's request, Hurricane Electric will calculate customer's network unavailability during a calendar month. Network unavailability is determined by the number of minutes the Hurricane Electric Internet Backbone was not available to the customer, but will not include unavailability resulting in whole or in part from any one or more of the following causes:

- (a) Any act or omission by customer, its officers, directors, employees, subcontractors, agents, or any other entity under customer's control, including non-Hurricane Electric equipment;
- (b) Any unavailability which customer fails to report within one calendar week;
- (c) Scheduled maintenance performed with prior notification; and
- (d) Denial of service attacks perpetrated by individuals outside the control of Hurricane Electric;
- (e) Force majeure events as described in the General Terms and Conditions.

Hurricane Electric provides quality colocation internet services. Due to the quality of our network and engineering staff, we are able to maintain very reliable connectivity. Network availability guarantee does not constitute a latency or throughput guarantee.



Ralph E. Jocke  
Patent  
&  
Trademark Law

October 10, 2003

William Doherty  
Online Policy Group, Inc.  
304 Winfield Street  
San Francisco, CA 94110-5512

doherty@onlinepolicy.org

**Re: Copyright Infringement**

Dear Mr. Doherty:

We represent Diebold, Incorporated and its wholly owned subsidiary Diebold Election Systems, Inc. (collectively "Diebold").

Diebold is the owner of copyrights in certain correspondence relating to its electronic voting machines that was stolen from a Diebold computer ("Diebold Property").

It has recently come to our clients' attention that you appear to be hosting a web site that contains information location tools that refer or link users to one or more online location containing Diebold Property. The material and activities at the online location infringe Diebold's copyrights in the Diebold Property because the Diebold Property was copied and posted to the online location and is being distributed from the online location, without Diebold's consent. The web page you are hosting clearly infringes Diebold's copyrights by providing information location tools that refer or link users of the web page to an online location containing infringing material or activity. See 17 U.S.C. 512(d).

The web page, information location tool, and online location are identified in a chart attached to this letter.

The purpose of this letter is to advise you of our clients' rights and to seek your agreement to

330 • 721 • 0000  
MEDINA

330 • 225 • 1669  
CLEVELAND

330 • 722 • 6446  
FACSIMILE

rej@walkerandjocke.com  
E-MAIL

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231 South Broadway, Medina, Ohio U.S.A. 44256-2601



the following: To disable or remove the information location tool(s) identified in the attached chart. In addition to disabling or removing any hyperlink, the disabling or removal should include destroying the usefulness as an information location tool of any textual directory or pointer information contained therein.

In addition, please note that the page actively encourages infringing activity. It initially pointed to one infringing web site. When that web site was removed two additional links were added pointing to a new web site hosting the same infringing material. Between the first draft of this letter and the time of its transmission, links to a third infringing site were added. Please take action to ensure that the thread itself is removed or locked so that additional links are not added, and to prevent the user who has repeatedly posted infringing material at the web site from continuing to use a site hosted by Online Policy Group to engage in infringing activity.

Please confirm, in writing, that you have complied with the above request.

The information contained in this notification is accurate as of the time of compilation and, under penalty of perjury, I certify that I am authorized to act on behalf of Diebold.

Our clients reserve their position insofar as costs and damages caused by the unauthorized provision of information locating tools with respect to online locations engaged in infringing activity with respect to the Diebold Property. Our clients also reserve their right to seek injunctive relief to prevent further unauthorized provision of information locating tools with respect to online locations engaged in infringing activity with respect to Diebold Property, pending your response to this letter. We suggest you contact your legal advisors to obtain legal advice as to your position.

We await your response within 24 hours.

Very truly yours,



Ralph E. Jocke

330 • 721 • 0000  
MEDINA

330 • 225 • 1669  
CLEVELAND

330 • 722 • 6446  
FACSIMILE

rej@walkerandjocke.com  
E-MAIL

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231 South Broadway, Medina, Ohio U.S.A. 44256-2601

Links to online locations containing infringing information or activity posted at  
<http://www.indybay.org>

Web Page/Site	Link	Guidance as to location	Online location containing infringing information or activity
<a href="http://www.indybay.org/news/2003/09/1649419.php">http://www.indybay.org/news/2003/09/1649419.php</a>	New location	In box at bottom left of page captioned "LATEST COMMENTS ABOUT THIS ARTICLE"	<a href="http://www.indybay.org/news/2003/09/1649419_comment.php">http://www.indybay.org/news/2003/09/1649419_comment.php</a> (Link to comment which links to online location containing Diebold Property without Diebold's consent.)
<a href="http://www.indybay.org/news/2003/09/1649419_comment.php">http://www.indybay.org/news/2003/09/1649419_comment.php</a>	<a href="http://d176.whartonab.swarthmore.edu/">http://d176.whartonab.swarthmore.edu/</a>	Following comment: "Diebold keeps knocking these servers down, here's a link - download and mirror!"	<a href="http://d176.whartonab.swarthmore.edu/">http://d176.whartonab.swarthmore.edu/</a>  Contains Diebold Property on public display and distributed without Diebold's permission.
<a href="http://www.indybay.org/news/2003/09/1649419_comment.php">http://www.indybay.org/news/2003/09/1649419_comment.php</a>	<a href="http://d176.whartonab.swarthmore.edu/dieboldinternalmemos.pdf">http://d176.whartonab.swarthmore.edu/dieboldinternalmemos.pdf</a>	Following comment: "Diebold keeps knocking these servers down, here's a link - download and mirror!"	<a href="http://d176.whartonab.swarthmore.edu/dieboldinternalmemos.pdf">http://d176.whartonab.swarthmore.edu/dieboldinternalmemos.pdf</a>  Contains Diebold Property on public display and distributed without Diebold's permission.
<a href="http://www.indybay.org/news/2003/09/1649419_comment.php">http://www.indybay.org/news/2003/09/1649419_comment.php</a>	<a href="http://www.sentry.nu/s/lists/">http://www.sentry.nu/s/lists/</a>	Following comment: "The following is a link to the incriminating stash of Diebold Election Systems memos... please take copies of this data and redistribute..."	<a href="http://www.sentry.nu/s/lists/">http://www.sentry.nu/s/lists/</a>  Contains Diebold Property on public display and distributed without Diebold's permission.  (Currently down; this link was included here to encourage you to take action to prevent the continuation

<a href="http://www.indybay.org/news/2003/09/1649419.php">http://www.indybay.org/news/2003/09/1649419.php</a>	Another Mirror	In box at bottom left of page captioned "LATEST COMMENTS ABOUT THIS ARTICLE"	of this thread) <a href="http://sf.indymedia.org/news/2003/09/1649419_comment.php#1652214">http://sf.indymedia.org/news/2003/09/1649419_comment.php#1652214</a> (Link to comment which links to online location containing Diebold Property without Diebold's consent.)
<a href="http://sf.indymedia.org/news/2003/09/1649419_comment.php#1652214">http://sf.indymedia.org/news/2003/09/1649419_comment.php#1652214</a>	<a href="http://noisebox.cypherpunks.to/~visible/vote/vote.html">http://noisebox.cypherpunks.to/~visible/vote/vote.html</a>		<a href="http://noisebox.cypherpunks.to/~visible/vote/vote.html">http://noisebox.cypherpunks.to/~visible/vote/vote.html</a> (Online location containing Diebold Property, posted without Diebold's consent.)





**Electronic Frontier Foundation**  
Protecting Rights and Promoting Freedom on the Electronic Frontier

October 22, 2003

Ralph E. Jocke, Esq.  
Walker & Jocke  
231 South Broadway  
Medina, Ohio 44256

**VIA EMAIL ([rej@walkerandjocke.com](mailto:rej@walkerandjocke.com)) AND U.S. MAIL**

**RE: Diebold's Copyright Infringement Claim**

Dear Mr. Jocke.

The Electronic Frontier Foundation represents the Online Policy Group (OPG), a non-profit Internet service provider. Please provide all future correspondence on this issue to us. After review of your letter of October 10, 2003, to William Doherty, OPG respectfully declines to remove the IndyMedia pages you reference therein.

First, OPG is merely providing co-location to IndyMedia, which in turn is only providing hyperlinks to materials you claim infringe Diebold copyrights. In other words, OPG does not host the Diebold materials and neither does IndyMedia. There is merely an address for the information on the IndyMedia website as source material for a news story. Linking is not among the exclusive rights granted by the Copyright Act, 17 U.S.C. §106, and so cannot infringe any copyright Diebold might hold. Your allegations amount to a claim of tertiary liability; copyright law does not reach parties so far removed from a claimed infringement.

Second, the postings themselves are plainly fair use, not infringement. As the Copyright Act provides, "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, ... or research, is not an infringement of copyright." 17 U.S.C. § 107. IndyMedia is a news organization whose use of these links gives background to its discussion of the controversy surrounding e-voting. We understand that the linked-to material contains internal memoranda concerning Diebold's electronic voting machines, including admissions by Diebold staff of errors, difficulties, bugs and other problems with the machines and software. We further understand that IndyMedia linked to these memoranda as part of news reportage about the risks of election fraud or erroneous election results that might arise from use of Diebold's voting machines.

The First Amendment plainly protects speech about this very essence of our democracy -- the right to a free and fair election. Thus, even if Diebold has an enforceable copyright in the documents, their reposting by others serves the public interest and would be deemed fair and non-infringing on all four factors of the fair use analysis: 1) The purpose and character of the use is to inform public discussion and political debate on a matter core to American democracy, the functioning of our electoral system. As a news agency, IndyMedia should be able to link to its primary sources. 2) The nature of the work is (presumably) factual and thus less protected. 3) The documents do not appear to embody any substantial expressive work. 4) Most importantly, the posting does not compete with Diebold in any current or potential market -- if it

October 22, 2003

Page 2

cuts into sales of e-voting equipment, it does so only because Diebold's own statements have raised concerns about the machines' security.

Finally, it appears you are harassing numerous ISPs with these frivolous demand letters, misusing claimed copyright to interfere with numerous subscribers' contracts for Internet service. You may wish to consider the risk of countersuit at which this puts you and your client.

Please contact me directly if you wish to discuss the matter further

Sincerely,

A handwritten signature in black ink, appearing to read "Wendy Seltzer", with a long horizontal flourish extending to the right.

Wendy Seltzer

Subject: [Fwd: Copyright Infringement Notification]  
Date: Tue, 21 Oct 2003 22:22:39 -0400  
From: Walker & Jocke LPA <iplaw@walkerandjocke.com>  
To: copyright@he.net

October 21, 2003

Benny Ng  
copyright@he.net

Re Copyright Infringement Notification

Mr Ng,

The attached copyright infringement notification was sent to William Doherty, the individual identified in the Interim Designation of Agent to Receive Notification of Claimed Infringement filed by the Online Policy Group with the Copyright Office..

Mr Doherty initially responded on October 10 as follows

>>Dear Mr Jocke

>>I have received your letter of October 10, 2003.  
>>I will respond further after I have had the opportunity  
>>to consult with counsel.

>>Very truly yours

>Will Doherty

It has been more than a week, and I have had no further direct response from Mr. Doherty, but he has since then publicly announced that he has no intention of complying with Diebold's request. In addition, since that announcement, numerous additional infringing links have been posted at the site, as well as infringing material.

You apparently act as a 17 U.S.C. 512(a) provider to the Online Policy Group, Inc, and thus to indybay.org, as well. Diebold has attempted to protect Diebold's rights in the Diebold Property in the manner which is least disruptive to indybay.org's operation, by making a request to remove specifically identified links which point to Diebold Property posted at one or more online locations without Diebold's consent. Apparently indybay.org, with the cooperation of the Online Policy Group has decided to encourage, rather than discourage, infringing activity.

Please consider this a first notice of infringing activity by indybay.org through its 17 U.S.C 512(c) service provider, the Online Policy Group, and assist in removing the identified infringing material or act in accordance with your 17 U.S.C. 512(i)(1)(A) policy that "provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's network who are repeat infringers."

Very truly yours

Ralph E Jocke

----- Original Message -----  
Subject: Copyright Infringement Notification  
Date: Fri, 10 Oct 2003 10:02:06 -0400  
From: Walker & Jocke <iplaw@walkerandjocke.com>  
Organization: Walker & Jocke  
To: doherty@onlinepolicy.org

October 10, 2003

William Doherty, Designated Agent for Online Policy Group, Inc

Re: Copyright Infringement

Mr. Doherty

Please see the attached copyright infringement notification regarding indybay.org, a page of which contains infringing information location tools (17 U.S.C. 512(d)).

Very truly yours,

Ralph E Jocke

--

Walker & Jocke  
<http://www.walkerandjocke.com>

The information contained in this e-mail message is confidential and intended for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited and will be considered as a tortious interference in our confidential business relationships. If you have received this communication in error, please immediately notify us by telephone at (330) 721-0000 and destroy all copies of the e-mail. Thank you.

[Attachment]



Dolph E.  
Patent  
&  
Trademark Law

October 10, 2003

William Doherty  
Online Policy Group, Inc.  
304 Winfield Street  
San Francisco, CA 94110-5512

doherty@onlinepolicy.org

**Re: Copyright Infringement**

Dear Mr. Doherty:

We represent Diebold, Incorporated and its wholly owned subsidiary Diebold Election Systems, Inc. (collectively "Diebold").

Diebold is the owner of copyrights in certain correspondence relating to its electronic voting machines that was stolen from a Diebold computer ("Diebold Property").

It has recently come to our clients' attention that you appear to be hosting a web site that contains information location tools that refer or link users to one or more online location containing Diebold Property. The material and activities at the online location infringe Diebold's copyrights in the Diebold Property because the Diebold Property was copied and posted to the online location and is being distributed from the online location, without Diebold's consent. The web page you are hosting clearly infringes Diebold's copyrights by providing information location tools that refer or link users of the web page to an online location containing infringing material or activity. See 17 U.S.C. 512(d).

The web page, information location tool, and online location are identified in a chart attached to this letter.

720 • 6000  
MEDINA

216 • 227 • 7000  
CLEVELAND

440 • 720 • 6446  
FACSIMILE

sej@walkerandjocke.com  
E-MAIL

WWW • WALKERANDJOCKE.COM • 44256-260



The purpose of this letter is to advise you of our clients' rights and to seek your agreement to the following: To disable or remove the information location tool(s) identified in the attached chart. In addition to disabling or removing any hyperlink, the disabling or removal should include destroying the usefulness as an information location tool of any textual directory or pointer information contained therein.

In addition, please note that the page actively encourages infringing activity. It initially pointed to one infringing web site. When that web site was removed two additional links were added pointing to a new web site hosting the same infringing material. Between the first draft of this letter and the time of its transmission, links to a third infringing site were added. Please take action to ensure that the thread itself is removed or locked so that additional links are not added, and to prevent the user who has repeatedly posted infringing material at the web site from continuing to use a site hosted by Online Policy Group to engage in infringing activity.

Please confirm, in writing, that you have complied with the above request.

The information contained in this notification is accurate as of the time of compilation and, under penalty of perjury, I certify that I am authorized to act on behalf of Diebold.

Our clients reserve their position insofar as costs and damages caused by the unauthorized provision of information locating tools with respect to online locations engaged in infringing activity with respect to the Diebold Property. Our clients also reserve their right to seek injunctive relief to prevent further unauthorized provision of information locating tools with respect to online locations engaged in infringing activity with respect to Diebold Property, pending your response to this letter. We suggest you contact your legal advisors to obtain legal advice as to your position.

We await your response within 24 hours

Very truly yours,



Ralph E. Jocke

Links to online locations containing infringing information or activity posted at  
<http://www.indybay.org>

Web Page/Site	Link	Guidance as to location	Online location containing infringing information or activity
<a href="http://www.indybay.org/news/2003/09/1649419.php">http://www.indybay.org/news/2003/09/1649419.php</a>	New location	In box at bottom left of page captioned "LATEST COMMENTS ABOUT THIS ARTICLE"	<a href="http://www.indybay.org/news/2003/09/1649419_comment.php">http://www.indybay.org/news/2003/09/1649419_comment.php</a> (Link to comment which links to online location containing Diebold Property without Diebold's consent.)
<a href="http://www.indybay.org/news/2003/09/1649419_comment.php">http://www.indybay.org/news/2003/09/1649419_comment.php</a>	<a href="http://d176.whartonab.swarthmore.edu/">http://d176.whartonab.swarthmore.edu/</a>	Following comment: "Diebold keeps knocking these servers down, here's a link - download and mirror!"	<a href="http://d176.whartonab.swarthmore.edu/">http://d176.whartonab.swarthmore.edu/</a>  Contains Diebold Property on public display and distributed without Diebold's permission.
<a href="http://www.indybay.org/news/2003/09/1649419_comment.php">http://www.indybay.org/news/2003/09/1649419_comment.php</a>	<a href="http://d176.whartonab.swarthmore.edu/diebold_internalmemos.pdf">http://d176.whartonab.swarthmore.edu/diebold_internalmemos.pdf</a>	Following comment: "Diebold keeps knocking these servers down, here's a link - download and mirror!"	<a href="http://d176.whartonab.swarthmore.edu/diebold_internalmemos.pdf">http://d176.whartonab.swarthmore.edu/diebold_internalmemos.pdf</a>  Contains Diebold Property on public display and distributed without Diebold's permission.
<a href="http://www.indybay.org/news/2003/09/1649419_comment.php">http://www.indybay.org/news/2003/09/1649419_comment.php</a>	<a href="http://www.sentry.nu/s/lists/">http://www.sentry.nu/s/lists/</a>	Following comment: "The following is a link to the incriminating stash of Diebold Election Systems memos... please take copies of	<a href="http://www.sentry.nu/s/lists/">http://www.sentry.nu/s/lists/</a>  Contains Diebold Property on public display and distributed without Diebold's permission.  (Currently down; this link

		this data and redistribute..."	was included here to encourage you to take action to prevent the continuation of this thread)
<a href="http://www.indybay.org/news/2003/09/1649419.php">http://www.indybay.org/news/2003/09/1649419.php</a>	Another Mirror	In box at bottom left of page captioned "LATEST COMMENTS ABOUT THIS ARTICLE"	<a href="http://sf.indymedia.org/news/2003/09/1649419_comment.php#1652214">http://sf.indymedia.org/news/2003/09/1649419_comment.php#1652214</a> (Link to comment which links to online location containing Diebold Property without Diebold's consent.)
<a href="http://sf.indymedia.org/news/2003/09/1649419_comment.php#1652214">http://sf.indymedia.org/news/2003/09/1649419_comment.php#1652214</a>	<a href="http://noisebox.cypherpunks.to/~visible/vote/vote.html">http://noisebox.cypherpunks.to/~visible/vote/vote.html</a>		<a href="http://noisebox.cypherpunks.to/~visible/vote/vote.html">http://noisebox.cypherpunks.to/~visible/vote/vote.html</a> (Online location containing Diebold Property, posted without Diebold's consent.)

Ralph E. Jocke  
Patent  
&  
Trademark Law

October 9, 2003

Judy Downing  
Director of Information Technology Services  
Swarthmore College  
Beardsley Hall  
500 College Avenue  
Swarthmore, PA 19081

[downing@swarthmore.edu](mailto:downing@swarthmore.edu)

**Re: Copyright Infringement**

Dear Ms. Downing:

We represent Diebold, Incorporated and its wholly owned subsidiaries Diebold Election Systems, Inc., and Diebold Election Systems ULC (collectively "Diebold").

Diebold is the owner of copyrights in certain correspondence and other material relating to its electronic voting machines that were stolen from a Diebold computer ("Diebold Property").

It has recently come to our clients' attention that you appear to be hosting a web site that contains Diebold Property. The web site you are hosting infringes Diebold's copyrights because the Diebold Property was placed on this web site without Diebold's consent.

The web site and Diebold Property are identified in a chart attached to this letter.

The purpose of this letter is to advise you of our clients' rights and to seek your agreement to the following: (1) to remove and destroy the Diebold Property contained at the web site identified in the attached chart and (2) to destroy any backup copies of the Diebold Property in your possession or under your control.

Please confirm, in writing, that you have complied with the above requests.

To the best of my knowledge and belief the information contained in this notification is accurate as of the time of compilation and, under penalty of perjury, I certify that I am authorized to act on behalf of Diebold.

Our clients reserve their position insofar as costs and damages caused by infringing activity with respect to the Diebold Property. Our clients also reserve their right to seek injunctive relief to prevent further unauthorized use of Diebold Property, including reproduction, distribution, public display, or the creation of derivative works, pending your response to this letter. We suggest you contact your legal advisors to obtain legal advice as to your position.

We await your response within 24 hours.

Very truly yours,



Ralph E. Jocke

330 • 721 • 0000  
MEDINA

330 • 225 • 1669  
CLEVELAND

330 • 722 • 6446  
FACSIMILE

rej@walkerandjocke.com  
E-MAIL

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231 South Broadway, Medina, Ohio U.S.A. 44256-2601

**INFRINGING MATERIALS POSTED ON <http://d176.whartonab.swarthmore.edu/>**

<p><a href="http://why-war.com/resources/files/diebold_internalmemos.pdf">http://why-war.com/resources/files/diebold_internalmemos.pdf</a> <a href="http://d176.whartonab.swarthmore.edu/diebold_internalmemos.pdf">http://d176.whartonab.swarthmore.edu/diebold_internalmemos.pdf</a></p>	<p>This site consists of Diebold Property, stolen from Diebold and posted at this web site without the consent of Diebold.</p>
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330 • 721 • 0000  
MEDINA

330 • 225 • 1669  
CLEVELAND

330 • 722 • 6446  
FACSIMILE

rej@walkerandjocke.com  
E-MAIL

**231 &c**

**Broadway Medina**

**U.S.A**



## Local

# Swarthmore students refuse to comply with Diebold Co.

■ College faction claims public has right to know about memos illegally hacked from voting machine company.

By KRISTIN SMITH  
ksmith@delcoonline.com

A group of Swarthmore College students are refusing to remove from their Web site a series of stolen internal company memos they say prove the company knowingly sold faulty voting machines to several states.

Taking a page out of Henry David Thoreau's book, the students say they are launching a system of "electronic civil disobedience."

The students allege the documents show the company, Diebold Election Systems of Ohio, knew there were security problems with many of their electronic voting machines.

The internal memos were hacked from Diebold's Web site in March by an unknown person and also contain information pertaining to some of the voting machines in Florida that were at the center of the 2000 presidential election controversy.

Those machines, however, were manufactured by Global Election Systems, a company Diebold purchased in January 2002.

The student group Why War?, a non-violent political organization, says it is their right and democratic duty to make the memos available for public inspection.

"It's so important to the public debate about these new election systems, we have to be truly confident our votes will be counted, especially after the Florida fiasco," said Andrew Main, 21, a junior at the college and Web master of Why War? "Anything that adds to this debate needs to be in the public arena."

The Why War? Web site, which operated by the students, was hosted by Swarthmore College. After receiving the cease-and-desist notice from the company, the college told the students they must take down the documents, although later indicated

they would work with the students if the proper legal procedures were followed.

Tom Crattenmaker, spokesperson for the liberal-arts college, said although no official position is being expressed, many of the faculty admire the students for their actions.

"I think I speak for most of us in the administration when I say we applaud their initiative and idealism," said Crattenmaker. "I respect them for acting on their consciences and I think most people would agree that fair elections and democracy are worthy causes."

A spokesperson for Diebold Inc., the parent company of Diebold Election Systems, said the company has been issuing the cease-and-desist orders to every person who puts up the stolen documents because they are copyrighted material.

When asked if there was any validity to the students' claims, Mike Jacobson said, "No, absolutely not — our systems are accurate and secure."

Additionally, "the vote counts have all been verified by state officials in every election in which the machines have been used, including the Florida 2000 presidential count," he said.

Jacobson went on to say that the internal documents being made public were probably deliberately corrupted or changed by anyone who had access to them.

The memos are incomplete," said Jacobson. "They (people) see a memo or two and I think a lot of folks are making claims based on one or two memos and it's probably one piece of a long conversation e-mailed back and forth between Diebold folks."

“Anything that adds to this debate needs to be in the public arena.”

ANDREW MAIN, Swarthmore student

Main doesn't buy the company's assertion that the documents are taken out of context, but said he would welcome the opportunity to open a dialogue with Diebold.

"I'd be thrilled if Diebold would come in and enter the debate on these important issues, but at this point all they've had an interest in is suppressing discussion on the vulnerabilities revealed," he said.

The students, who are vowing to fight the issue until the finish, have been receiving legal advice from the Electronic Frontier Foundation, a group of lawyers in Calif. committed to preserving digital liberties.

The Swarthmore Coalition for the Digital Commons (SCDC), a group dedicated to preserving electronic free speech, bowed to the cease-and-desist order, but is investigating legal action against

the company.

"Diebold is essentially bluffing, they're trying to intimidate people into rolling over just like Swarthmore (College) did," said Luke Smith, a 19-year-old sophomore at the school and co-founder of SCDC. "We expect that if they force the issue, basically no matter what, if this case goes to court they lose. And we're confident that we're in the right legally."

Jacobson said it hasn't been decided yet if the company would take further action if the students continue to ignore the order. As for what Swarthmore College would do if the students become embroiled in a legal battle, Crattenmaker said it was a bridge they would cross when they came to it.

To view copies of the memos, visit [www.whywar.com](http://www.whywar.com).

NEWS AND INFORMATION OFFICE

OCT 24 2003