



October 22, 2003

[Private]
Walker & Jocke
[Private]
Medina, Ohio 44256

VIA EMAIL ([private]) AND U.S. MAIL

RE: Diebold's Copyright Infringement Claim

Dear [Private]:

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

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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,

/s/

Wendy Seltzer