



November 17, 2003

Hon. Jeremy Fogel
U.S. District Court for the Northern District of California
280 South First Street
San Jose, CA 95113

Re: Online Policy Group v. Diebold, No. C-03-4913 JF

Dear Judge Fogel:

We apologize for presenting another document in this case, but unfortunately, and unbeknownst to us, even as we were before you arguing for a preliminary injunction today, Diebold had just issued a "second notice" cease and desist letter to Hurricane Electric.

The second cease and desist notice repeats Diebold's assertions that Hurricane Electric has potential copyright liability for co-locating and providing Internet access to OPG because OPG co-locates and provides internet access to San Francisco Indymedia and the Indymedia website contains a link to the e-mail archive.

Additionally, and even more disturbing in light of today's hearing, Diebold claims that Indymedia's hosting of *excerpts* from the e-mail archives, as part of a story discussing the "gems" available in the archive, also violates its copyrights. Mr. Ng's Declaration includes a print out of the website containing the excerpts from the e-mail archive, highlighting the excerpts that Diebold alleges infringe its copyrights.

This second notice increases the pressure on OPG to terminate the Internet access it provides to San Francisco Indymedia because of increasing concern about this matter from its host Hurricane Electric. It also increases the pressure on OPG to prevent any reference to the e-mail archive on any of the 1,000 websites it hosts or face termination. We provide the Supplemental Declaration of Benny Ng in support the motion for preliminary injunction including this second notice and stating that it has led Hurricane to conclude that it may terminate OPG's internet connectivity entirely (thus "unplugging" over 1,000 websites and 77,000 users) unless preliminary relief is granted by this court.

We believe this second cease and desist notice confirms our assertions that, unless immediately restrained by this Court, Diebold will continue to use cease and desist notices to try to remove the e-mail archive, and even excerpts from it, from public discussion.

Again, we apologize, but we believe the court would want to be aware of this new development, especially in light of Diebold's counsel's presentation today.

Sincerely,

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