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12 **UNITED STATES DISTRICT COURT**  
3 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

16 Plaintiffs,

17 v.

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

20 Defendants.

No.

**DECLARATION OF BENNY NG IN  
SUPPORT OF PLAINTIFFS'  
APPLICATION FOR TEMPORARY  
RESTRAINING ORDER AND FOR  
PRELIMINARY INJUNCTION**

21 I, Benny Ng, hereby declare as follows.

22 I am Director of Marketing of Hurricane Electric Internet Services. I make this  
23 Declaration in support of plaintiff's application for a temporary restraining order and for a  
24 preliminary injunction.

25 2. Hurricane Electric is a commercial Internet service provider, offering colocation,  
26 dedicated servers, web hosting, and other professional services to business clients.

27 3. Hurricane Electric provides colocation services to Online Policy Group pursuant to  
28 a paid contract.

1           4.       More specifically, this means that Hurricane provides Internet connectivity and  
2 other services to OPG machines hosted at Hurricane's Fremont, California facility.

3           5.       I am aware that OPG provides hosting, through these colocation facilities, to  
4 numerous websites and email lists.

5           6.       I am the designated agent to receive notification of claimed infringement under the  
6 Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(2). The email address copyright@he.net is  
7 on file with the Copyright Office as the email address of the designated agent.

8           7.       Diebold Notification of Claimed Infringement and Hurricane Electric's Response

9           8.       On October 21, 2003, I received an emailed "Copyright Infringement Notification"  
10 at copyright@he.net from Ralph E. Jocke on behalf of Diebold regarding material hosted on OPG's  
11 connection. That email is attached as Exhibit A.

12          9.       I forwarded the email to David Weekly of the Online Policy Group.

13          10.       On October 22, I had a conversation about this takedown demand with David  
14 Weekly and Will Doherty of the Online Policy Group, and Wendy Seltzer and Cindy Cohn,  
15 lawyers from the Electronic Frontier Foundation, representing OPG.

16          11.       During that conversation, I noted that Diebold's letter alleged that one of OPG's  
17 clients was hosting Diebold documents as well as linking to them.

18          12.       OPG assured me that their clients were only linking, not hosting, but had plans to  
19 host the Diebold material directly as well.

20          13.       OPG told me further that they had decided not to take down IndyMedia's links  
21 pursuant to the DMCA. OPG said they would support their client and permit them to continue  
22 linking to the Diebold documents.

23          14.       I said that because this letter was characterized as a "first notice," Hurricane would  
24 not take action against OPG for linking, at this time.

25          15.       I said further that if I received additional notifications from Diebold, I would  
26 forward them to OPG and we might then need to discuss further whether Hurricane felt compelled  
27 to terminate OPG's contract or its hosting of particular material.

28          16.       Specifically, if we receive follow-up notices from Diebold, Hurricane may be

compelled to terminate OPG's Internet service entirely, cutting off all OPG-hosted websites, email lists, and other services.

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17. OPG informed me they intended to take legal action to clarify the rights of their clients to link to and post Diebold material

18 I agreed that Hurricane would not take any action against OPG for its clients' links, pending this legal action.

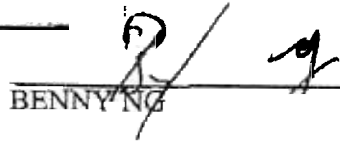
19. I said I could not make a similar commitment to take no action if OPG's clients started hosting Diebold material instead of just linking to it

20. While Hurricane supports its customers' free speech, we must take Diebold's legal threats seriously and evaluate them as a business risk.

21 If this court does not promptly determine that the posting of the Diebold material is non-infringing or does not subject us to secondary liability, Hurricane may be forced to terminate OPG's Internet service contract and with them the services OPG provides to all its clients.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed in Fremont, California.

Dated: October 31, 2003 \_\_\_\_\_

  
\_\_\_\_\_ **BENNY NG**

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 on October 10, 2003.  
>>I will respond further if 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]

Ralph E. Jocke  
Patent  
&  
Trademark Law

Walker  
&  
Jocke  
a legal professional association

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.

\* 721 • 35000  
MEDINA

330 • 225 • 1669  
CLEVELAND

330 • 725 • 6446  
FAOAMBLE

raj@walkerandjocke.com  
E-MAIL

M

Ohio U.S.A.

44298 2601

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.

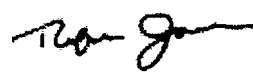
Please confirm, in writing, that you have complied with the above request.

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><br><br>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><br><br>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><br><br>Contains Diebold Property on public display and distributed without Diebold's permission.<br><br>(Currently down; this link                                 |



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|   |   | 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.)  |