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1 THOMAS SMITH

12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

17 v

18 DIEBOLD, INCORPORATED, and DIEBOLD }
ELECTION SYSTEMS, INCORPORATED, }

19
20 Defendants.

No

DECLARATION OF DAVID E. WEEKLY
IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND FOR
PRELIMINARY INJUNCTION

21
22 I, David E. Weekly, hereby declare as follows

23 I serve as Colocation Director for the Online Policy Group ("OPG") and am a
24 member of the OPG board make this Declaration in support of OPG's application for a
25 temporary restraining order and for a preliminary injunction

26 2 OPG is a nonprofit organization with tax-exempt status under federal law. OPG is
27 dedicated to serving as the Internet Service Provider ("ISP") for groups and organizations that
28 cannot afford commercial ISP services. Our motto is "One Internet With Equal Access For All."

3 OPG is funded through individual donations and has a completely volunteer staff
2 and board of directors. OPG was founded in July 2000.

3 4 OPG provides a variety of Internet services, all for no charge, to other nonprofit
4 organizations and individuals in the United States and abroad. This includes website hosting and
5 colocation, a service where we provide connectivity to the Internet for a user. Unlike website
6 hosting services, a colocated website itself resides on a computer owned or controlled by the user
but which is stored with other computers OPG owns for ease of connection to the Internet

8 5 OPG also provides e-mail hosting, domain registration, computer refurbishing
9 technical consulting and educational training for organizations and individuals. Its focus is on
10 providing services to those who would not otherwise be able to afford Internet services. The
constituencies it serves include the youth, elderly, disabled or ill individuals and those facing issues
12 arising from their ethnic, cultural, religious, or sexual orientation. Among our clients are the
3 Special Olympics of Northern California, the California Coalition for Civil Rights, and the AIDS
4 Info BBS Database. OPG also engages in political and research activity in support of freedom of
5 speech online and related issues

16 6. OPG does not have a precise number of the websites it hosts or provides
7 connectivity for, but believe it is approximately ,000. OPG hosts 29 clients through virtual
18 hosting, providing server space by which the clients themselves host over 100 websites OPG hosts
19 more than 10 colocated physical servers for more than 100 unique clients. Further, OPG hosts 865
20 e-mail mailing lists, and over 302 domain names. Overall, OPG serves over 77,700 individuals
2 directly and many more visit the websites published by OPG users believe that around a million
22 web pages per day are downloaded from OPG-hosted sites and that every month OPG-hosted
23 websites receive well over a million unique visitors in aggregate

24 OPG receives its connection to the Internet from another ISP, called Hurricane
25 Electric. In Internet parlance, Hurricane Electric is an "upstream" provider. Attached hereto as
26 Exhibit "A" and incorporated herein by this reference is a true and correct copy of OPG's contract
27 with Hurricane Electric Under this contract we pay approximately \$3,100 per month for the
28 internet connections for OPG users, both direct and colocated

8 One of OPG's users is San Francisco Indymedia, a news collective that is a branch
2 of a larger, international news collective. Indymedia has a colocated computer that receives Internet
3 connectivity through OPG and that computer hosts a website available at both
4 <http://www.indybay.org> and <http://www.sf.indymedia.org>.

5 9 On October 10, 2003, OPG received a letter via e-mail from an attorney for
6 Diebold, Mr. Ralph Jocke of the law firm of Walker & Jocke. The letter stated that OPG user
7 Indymedia was publishing links to sites not hosted by OPG; these sites published information that
8 allegedly infringed Diebold's copyrights. It then threatened OPG with legal action under the
9 copyright laws if it did not disable or remove the links and "destroy[] the usefulness as an
10 information location tool of any textual directory or pointer information contained therein." The
letter further stated, "[W]e await your response within 24 hours. A true and correct copy of the
2 letter from Mr. Jocke is attached hereto as Exhibit "B" and incorporated herein by this reference

13 10 OPG has no ability to simply remove the link (or any material) hosted on the San
4 Francisco IndyMedia server. As an entity that merely provides colocation services to San Francisco
IndyMedia, the only way that OPG could comply with Diebold's demand would be to terminate the
colocation services offered to IndyMedia, in effect pulling the plug on their entire website and
related services hosted on that computer

18 OPG takes all threats of legal action seriously. We immediately sent a quick reply to
19 Diebold stating that we were discussing their letter with counsel. The Diebold letter was circulated
20 to the OPG Board and we discussed it right away. The letter was also sent to San Francisco
2 Indymedia and we discussed it with their representatives as well

22 12 Because we believed that OPG should not be held liable under copyright law for
23 merely providing colocation services to a website that published a link to claimed infringing
24 material, and because we believed that the underlying works should be protected as fair use under
25 copyright law, and because we believed that it would be unfair to terminate all of IndyMedia's
26 connectivity due to a claim of copyright infringement based upon a handful of links, we decided
27 not to comply with the demands contained in the letter. We decided the free speech principles at
28 stake merited defense of our user's right to publish links and OPG's right to host them.

3 On October 22, 2003, at our request, our attorneys issued a letter to Mr. Jocke
2 responding to his letter and explaining why we had decided not to remove the links and related
3 material. Attached hereto as Exhibit C is a true and correct copy of our attorneys' letter back to Mr.
4 Jocke

5 4 On the same day, October 22, 2003, we were informed by our upstream ISP,
6 Hurricane Electric, that it had received a cease and desist notice from the same attorney for
7 Diebold. As understood it, the implication of the letter to Hurricane Electric was to threaten
8 Hurricane Electric with copyright liability if it did not remove the links and related material
9 referred to in the letter to OPC. Just as OPG did not have the ability to take down mere links on the
10 IndyMedia website, Hurricane Electric did not have the ability to remove specific material from
11 websites hosted by OPG. Thus, as with OPG, Hurricane Electric's only option to comply with the
12 letter was to terminate OPG's internet access entirely. A copy of that letter is attached to the
13 Declaration of Benny Ng, filed herewith, as Exhibit

14 5 If Hurricane Electric had decided to terminate OPG's connectivity, all of OPG's
15 services as an ISP would cease. This would threaten the continued existence of OPG. It also means
16 that all of the websites would be disconnected, hurting all 77,700 individuals who use our services,
as well as preventing millions of readers from accessing the information published by OPG users
18 Obviously, this caused great alarm and apprehension at OPG

19 16. At approximately the same time, we learned that at least one other OPG user wished
20 to host the e-mail archives that were the subject of the Diebold letters. They asked OPG whether
2 we would object if they hosted the material directly

22 7 We called an emergency board meeting upon receipt of the letter from Hurricane
23 Electric and consulted with our attorneys. Within an hour, we held an emergency telephone call
24 with several board members, OPG counsel and Hurricane Electric representative Benny Ng
25 During the call, we informed Mr. Ng that we intended to file this action in order to seek protection
26 from the court against litigation by Diebold arising from the link that was hosted on the Indymedia
27 websites. We also discussed the relative strength of the legal threat made against Hurricane
28 Electric. We also discussed the desire of other OPG clients to host the e-mail archive directly. Mr.


1 Ng agreed that Hurricane Electric would not terminate OPG as a result of the single letter, but
2 indicated that he would have to reconsider if circumstances changed, and especially if any OPG
3 users directly hosted the matcrial rather than merely linking to it.

4 18. Based upon the direct threats in the letters that Diebold sent to OPG and to
5 Hurricane Electric, OPG is deeply concerned that Diebold will file suit against it for copyright
6 infringement and related claims.

7 19. Based upon the direct threats in the letter that Diebold sent to Hurricane Electric,
8 OPG is deeply concerned that Hurricane Electric will terminate its contract with OPG, and thus
9 terminate OPG's Internet connectivity, should an OPG user choose to host the e-mail archive
10 directly or should Diebold issue additional threat letters to Hurricane Electric.

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

14 Date: Nov 1, 2003



DAVID WEEKLY

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Hurricane Electric
760 Mission Court
Fremont, CA 94539
Telephone 510 580 4100

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 95th 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 95th 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.

11. 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.

13. 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	
(print name)	David Weekly
Title	CCCP Project Director
Company Name	Online Policy Group, Inc
Address	304 Winfield St 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 Ba 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 customers 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 customers 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

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MEDINA

330 • 225 • 1669
CLEVELAND

330 • 722 • 6446
FACSIMILE

rej@walkerandjocke.com
E-MAIL

251 South Broadway Medina U.S.A

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

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

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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) 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

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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,

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

Wendy Seltzer