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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 CLOSED CORPORATION, a California
Corporation

13
14 Plaintiff,

15 v.

16
17 OPEN SESAME USERS' GROUP, DOES 1-
1000, and SCAPE GOAT,

18 Defendants.
19

CASE NO. CT-0001-DFO

**CLOSED CORPORATION'S AMENDED
RESPONSE IN OPPOSITION TO OPEN
SESAME'S MOTION TO DISMISS**

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QUESTIONS PRESENTED

May a California Court exercise personal jurisdiction in a patent infringement lawsuit over an Internet Usenet group, all of whose members are anonymous but some of which are known to be software developers located in California, where each member of the Usenet group contributes to developing the infringing software?

Under the circumstances of this case, is the Open Sesame Users' Group an unincorporated association, given that it is created for, and dedicated to, the goal of jointly and voluntarily creating an alternative to Closed Corporation's software?

Does the Open Sesame Users' Group and its members maintain a regular and established place of business within the Northern District of California, by virtue of the presence of distribution servers for its Usenet newsgroup and the availability of access to the group's web and FTP servers?

Does service of process meet the requirements of Cal Code Civ. Proc. § 415.30 and the U.S. Constitution, in any or all of the following scenarios: (a) where service is effected by posting a copy of the summons and complaint to the Open Sesame Usenet newsgroup's website; (b) where service is effected by mailing copies to the Open Sesame email addresses of individual newsgroup subscribers; and/or (c) where service is effected by publishing a copy of the summons and complaint to an on-line newsletter known to be regularly read by the members of the Open Sesame User's Group?

INTRODUCTION

In 1984, largely basing its observations on the pronounced effect that had occurred in business and commerce as a result of late-twentieth century innovations in the area of telecommunications, the Supreme Court indicated that a defendant could not avoid the jurisdiction of the federal Courts "merely because the defendant did not physically enter the forum state." *Burger King v. Rudzewicz*, 417 U.S. 462, 476 (1984). Instead, the Supreme Court acknowledged that "it is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Id.*

Less than a decade after the Supreme Court observed that changes in telecommunications already had challenged the traditional concepts of personal jurisdiction the explosion in the popularity of the Internet, whose members are largely anonymous, even more dramatically altered the framework for

1 determining who had foreseeably directed their commercial activities at a given forum. In that regard, in
2 a 1993 *New Yorker* cartoon, now famous in Internet circles, two dogs are pictured sitting in front of a
3 computer with the caption: “On the Internet, nobody knows you’re a dog.” *New Yorker*, July 5, 1993,
4 at 61. This case presents the vexing response to the *New Yorker*’s cartoon, by asking the Court to
5 resolve the question of “given the fact that on the Internet nobody knows you’re a dog, what do you do
6 when the dog bites you and then hides behind its anonymity.” Here, the dog is an Internet Usenet group
7 known as Open Sesame, the unfortunate bitten “mailman” is Closed Corporation, the dog’s bite is
8 patent infringement, the dog bite occurred in California, and as the *New Yorker* saliently observed, the
9 dog remains hidden on the Internet.

10 In that regard, although the Internet may provide greater anonymity than generally provided in
11 the visceral world, this does not mean that patent infringers should be allowed to operate with total
12 freedom on the Internet, use the Internet to interact directly and foreseeably with a forum, and then
13 claim that because their actions were on the Internet that they are immune from justice in that forum.
14 That would be akin to saying, “On the Internet, anybody can infringe a patent.” Indeed, when a patent
15 is infringed, the wronged owner of that patent faces serious and difficult burdens in proving the allegation
16 of infringement. These burdens generally revolve around the technical questions concerning the patented
17 device and the infringing device. Usually there is little question, however, of who the infringer is or
18 where the infringement is occurring. All of this changes when the infringement occurs on the Internet.
19 This anonymity is further compounded by the lack of any concept of physical location with the Internet.
20 This lack of location led, in part, to the creation of the concept of cyberspace.

21 However, there are no courts in cyberspace to enforce Closed Corporation’s patent
22 protections. It is therefore necessary for some court, located in the real, tangible world to hear these
23 claims, or they will go unheard. This Court is, in fact, the appropriate forum for the adjudication of
24 these claims. Jurisdiction and venue are proper here given the actions of the defendants in directly and
25 foreseeably interacting with the forum. Traditional notions of fair play and justice will not be offended
26 by the extension of jurisdiction to a California forum. Moreover, the methods of service, although novel
27 because of the involvement of the Internet, are appropriate extensions of service methods recognized
28 and accepted for the more tangible world, and are the most effective way to reach those who operate
29 primarily on the Internet.

1 STATEMENT OF FACTS

2 At the evidentiary hearing schedule for October 23, 1999, Closed Corp. believes the testimony
3 will elicit the following facts. Closed Corp. is a California corporation that is headquartered in San Jose,
4 California, which manufactures a popular operating system for personal computers known as *Views*TM.
5 *Views*TM is protected by a United States patent. Closed Corp. licenses *Views*TM to a number of
6 computer manufacturers for sale with their computers and it is sold directly to consumers. The *Views*TM
7 software is a valuable piece of intellectual property and Closed Corp. has protected it by the use of
8 licensing agreements. These agreements allow third parties to develop applications for the *Views*TM
9 operating system, while preventing damaging and unauthorized disclosure of the *Views*TM code.

10 There are software developers who are unhappy with the methods that Closed Corp. has used
11 to protect its investment in *Views*TM. Some of these developers have banded together for the common
12 purpose of producing a product to compete with *Views*TM. This group, which calls itself the Open
13 Sesame Users' Group, has developed an operating system product known as *Open*. *Open* is an open
14 source development. This means that anyone may copy this freely available source code, modify it, and
15 redistribute it; subject only to the requirement that they not charge for it and that they attribute the
16 source of the code. In this manner, the software grows as individuals contribute and substantially
17 develop it.

18 Such a distributed development is made practical by the use of the Internet, a network of inter-
19 connected globally located computer networks, and the Usenet, a method for a large number of users to
20 share messages and have ongoing discussions on the Internet. The Usenet is essentially a large bulletin
21 board system. Users read and post messages in a particular discussion area, called a newsgroup, to a
22 local Usenet server. This is done using Usenet compatible software, e.g. any popular web browser.
23 These Usenet servers (computers running Usenet distribution software), located worldwide, spread the
24 messages across the Internet from Usenet server to Usenet server so that each server has a copy of
25 every message posted anywhere, for any group carried by that server. There are several hundred
26 thousand servers located worldwide, and many are operated by Internet service providers and by
27 universities. There are servers located in California operated by Stanford University, California Institute
28 of Technology, in addition to many others. Not every server carries every group, however. Individual
29 computer servers may only carry and forward a subset of newsgroups, typically based on which

1 hierarchy the newsgroup belongs to.

2 There are more than a thousand Usenet newsgroups, arranged in eight primary hierarchies:
3 *comp* (computer and software issues), *rec* (recreation and sports), *soc* (social issues), *sci* (science and
4 engineering), *misc* (miscellaneous), *news* (Usenet/newsgroup issues), *talk* (debate of various issues),
5 and *humanities* (arts and the humanities); a number of additional hierarchies which focus on localities,
6 states, and nations; and the *alt* hierarchy, which is the alternative hierarchy. Most servers carry all of
7 the eight primary hierarchies, but may not carry all of the others. Examples of a Usenet newsgroups are
8 *rec.sport.baseball.college*, which focuses on college baseball; *comp.os.ms-windows.apps.word-*
9 *proc*, which focuses on word processors for Microsoft Windows; and *misc.legal*, which focuses on
10 legal and legal ethics issues.

11 Usenet newsgroups in primary hierarchies do not spring from the ether, but require considerable
12 effort and planning to create. The method by which a new newsgroup is created for the eight primary
13 hierarchies is: (1) a proposal for discussion of the creation of a new newsgroup is posted to the
14 newsgroups *news.groups* and *news.announce.groups*, as well as any other appropriate groups, (2) if
15 after thirty days of discussion, a consensus is reached about the charter and administration of the
16 newsgroup, there will be call for a vote on the newsgroup; (3) votes are submitted by e-mail to a
17 designated volunteer from the Usenet Volunteer Votetaker (uvv-contact@uvv.org); (3) if after the
18 voting period ends (21-31 days determined at the time of the call for votes), at least 100 votes have
19 been received and two thirds of them favor the newsgroup, it will be created and an announcement will
20 be posted to *news.announce.newgroups*. David C. Lawrence, *The Guidelines for Newsgroup*
21 *Creations FAQ* (last modified Jan. 31, 1997)
22 [_Newsgroup](ftp://rtfm.mit.edu/pub/usenet/news.groups/How_to_Create_a_New_Usenet)>. Administrators of servers will configure their servers to carry this new newsgroup and it
23 will be propagated across the Internet. One issue that must be resolved prior to the call for votes, is
24 whether the newsgroup will be a moderated newsgroup or not. *Id.* In a moderated newsgroup, a
25 posted message is not automatically posted for all to see, but the local Usenet server, to which it is
26 posted, forwards the message via e-mail to the person who was designated as the newsgroup
27 moderator, when the newsgroup was set up. The moderator then decides whether the message should
28 be posted to the newsgroup or not. Dennis McKeon, *Moderated Newsgroups FAQ*, (last modified
29

1 March 11, 1997) <ftp://rtfm.mit.edu/pub/usenet/news.groups/Moderated_Newsgroups_FAQ>. These
2 rules of newsgroup creation don't apply, however, to newsgroups that are not in one of the eight
3 primary hierarchies. In these hierarchies, especially the *alt* hierarchy, anyone with access to a server
4 can create a new newsgroup. Because of this, many of the most extreme and fringe newsgroups are
5 within the *alt* hierarchy. However, a significant number of servers do not carry or forward the *alt*
6 hierarchy, so there is substantial benefit in terms of breadth of distribution to being part of one of the
7 eight primary hierarchies.

8 The Open Sesame Users' Group created a newsgroup for the development of the *Open*
9 software within a primary hierarchy. This newsgroup is called *comp.os.opensesame*. Members of the
10 Open Sesame group can subscribe to this newsgroup and post their changes to the software and
11 receive changes posted by others. This newsgroup is part of the *comp* hierarchy, but is not moderated.
12 Members may also use electronic mail (email) to send changes directly to other members. There is no
13 requirement that anyone who subscribes provide their true identity or physical mailing address, although
14 customarily posters to Usenet newsgroups may provide their email address, as well as their true name,
15 to allow other subscribers to contact them directly without having to post publicly to the newsgroup.
16 Nonetheless, members typically only submit suggested changes to *Open's* software which emulate
17 particularly desirable features of the *Views*TM well-known graphical user interface. Then, after a change
18 is submitted to the newsgroup, a subset of Open Sesame members decides if the change is useful and
19 then the change is posted to an FTP (File Transfer Protocol) and web server located in Finland. From
20 this file server anyone can download the latest version of the software that has been developed by the
21 Open Sesame group.

22 Utilizing this method, the Open Sesame group has collaboratively and iteratively created a new
23 graphical user interface (GUI) for the *Open* operating system, which makes *Open* far easier to use.
24 This GUI makes *Open* a viable competitor to the *Views*TM operating system for the vast majority of
25 users who demand a graphical user interface. The creation and distribution of this *Open* GUI across the
26 entire length and breadth of the Internet has resulted in this suit, as Closed Corp. contends that this
27 *Open* GUI infringes the patent protection granted to the *Views*TM software.

28 The identity of individual members of the Open Sesame group is currently unknown. By their
29 use of the Internet, this group has created a large and complex piece of software without the

1 requirement of being known or having their locations known. Although the developers of most open
2 developments include their names with their development, the members of the Open Sesame group have
3 deliberately chosen not to make their identities known. Through the use of discovery and other
4 technical means it is possible to eventually determine the true identities of the individuals who make up
5 this group. This anonymity has not prevented the software from gaining in popularity, however. Anyone
6 having access to the Internet may freely get a copy of the software, and some hardware manufacturers
7 are now allowing purchasers the option of having the *Open* software pre-installed on their computers. It
8 has been reported that some manufacturers are contemplating widespread commercial distribution of the
9 *Open* software including the *Open* GUI. Users of the *Open* software have recently protested at Closed
10 Corp.'s San Jose, California, headquarters demanding refunds for the price of the software
11 which had come pre-installed on their computer. This protest was widely publicized and Closed Corp.
12 has had to offer refunds of the purchase price of *Views*TM to *Open* users to avoid any further public
13 relations damage.

14 Because of the anonymous nature of the members of the Open Sesame Group, Closed Corp.
15 has filed suit against Open Sesame as a group; its individual members, as Does defendants 1-1000; and
16 Ms. Scape Goat, a self described user of the infringing software and member of the Open Sesame
17 Users' Group, who participated at the protest at Closed Corp.'s headquarters. Ms. Goat, a resident of
18 the Northern District of California was served, personally. The Open Sesame group was served via a
19 posting to the newsgroup that was set up for the development of the software, *comp.os.opensesame*.
20 The unnamed defendants were served by a e-mail to the addresses given on their Usenet postings.
21 Some of these were returned as undeliverable e-mail. Additionally, a notice was placed in the on-line
22 newsletter *Open-Source* (<http://www.open-source.org>). This newsletter is popular with the open
23 source software development community. Defendants now argue that there is a lack of jurisdiction in
24 California for this suit, that the Northern District of California, is an improper venue, and that service
25 upon Open Sesame group and the unnamed defendants was inadequate.

26 BURDEN OF PROOF

27 With respect to motions to dismiss is brought pursuant to Fed. R. Civ. P. 12(b)(2) for lack of
28 personal jurisdiction, "the plaintiff bears the burden of showing that the court has jurisdiction."
29 *Butcher's Union Local No. 498, United Food & Commercial Workers v. SDC Investment, Inc.*,

1 788 F.2d 535, 538 (9th Cir. 1986). Likewise, once a defendant challenges venue under Fed. R. Civ.
2 P. 12(b)(3), “the burden is on the plaintiff to show that venue is proper.” *Whiteman v. Resort*, No.
3 C98-04442 MMC (N.D. Cal. Mar. 17, 1999), 1999 WL 163044, at *1. *Accord Piedmont Label*
4 *Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir.1979 (“Plaintiff had the burden of
5 showing that venue was properly laid in the Northern District of California”). Moreover, where an
6 evidentiary hearing is held to ascertain whether personal jurisdiction or venue is proper, “the plaintiff
7 must demonstrate the court’s jurisdiction [or venue] by a preponderance of the evidence.”
8 *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996). *See also*
9 *Whiteman v. Resort*, No. C98-04442 MMC (N.D. Cal. Mar. 17, 1999), 1999 WL 163044, at *1-2
10 (noting that “[f]acts supporting venue may be shown by declaration, affidavit, oral testimony, or `other
11 evidence,” but concluding that plaintiff had failed to meet this burden).

12 However, in order to ameliorate the harsh consequences of granting motions to dismiss under
13 Rules 12(b)(2) or 12(b)(3), the trial court also retains the discretion to allow the plaintiff to proceed with
14 discovery to ascertain whether the plaintiff can demonstrate the existence of personal jurisdiction or
15 venue. *Butcher’s Union Local No. 498, United Food & Commercial Workers v. SDC Investment,*
16 *Inc.*, 788 F.2d at 540. To that end, the Ninth Circuit has noted that “[d]iscovery should ordinarily be
17 granted where `pertinent facts bearing on the question of jurisdiction are controverted or where a more
18 satisfactory showing of the facts is necessary.” *Id.* (quoting *Data Disc, Inc. v. Systems Technology*
19 *Associates, Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977)). Similarly, “the trial court may permit
20 discovery on . . . a motion [to dismiss for lack of venue], and indeed should do so where discovery
21 may be useful in resolving issues of fact presented by the motion, particularly since the necessity of
22 resolving such issues is created by the movant himself and the relevant evidence is properly within the
23 movant’s possession.” *Hayashi v. Red Wing Peat Corp.*, 396 F.2d 13, 14 (9th Cir. 1968).

24 In contrast to the burdens imposed upon plaintiff with respect to motions for lack of personal
25 jurisdiction or venue, the burden remains with defendant to prove that service was insufficient to support
26 a motion to quash and/or dismiss under Fed. R. Civ. P. 12(b)(5). *Bally Export Corp. v. Balicar,*
27 *Ltd.*, 804 F.2d 398, 404 (9th Cir. 1986). *See also 2 Moore’s Federal Practice* § 12.33[1], at 12-52
28 (3d ed. 1999) (“In all challenges to the sufficiency of either the process or service of process, the
29 burden of proof lies with the party raising the challenge”). Moreover, “[t]he standards set in Rule 4(d)

1 for service on individuals and corporations are to be liberally construed, to further the purposed of
2 finding personal jurisdiction in cases in which the party has received actual notice.” *Grammenos v.*
3 *Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972). Accordingly, “the fact of invalidity of one attempt at
4 service does not automatically require dismissal of the complaint,” and the trial court therefore ordinarily
5 should allow a plaintiff the opportunity to remedy any defective service before dismissing the complaint.
6 *Id.*, at 1071.

7 ARGUMENTS

8 I. PERSONAL JURISDICTION SHOULD BE FOUND AGAINST THE OPEN SESAME 9 USERS’ GROUP AND ITS MEMBERS

10 The Internet is “a decentralized, global medium of communications – or ‘cyberspace’ – that
11 links people, institutions, corporations, and governments around the world[.]” *ACLU v. Reno*, 892 F.
12 Supp. 824, 831 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997). Some networks are “closed” to other
13 networks, but most are connected to other computer networks so that each computer in such open
14 networks may communicate with others located in the same system. *Id.*, 892 F. Supp. at 831.
15 Accordingly, the Internet enters into every state within the United States. The non-physical nature of the
16 Internet makes applying the traditional location-based rules of jurisdiction problematic.

17 A federal court in California will exercise personal jurisdiction to the maximum extent that is
18 allowed under the federal constitution. The test for valid personal jurisdiction is a three-part test. “(1)
19 The nonresident defendant must do some act or consummate some transaction with the forum or
20 perform some act by which he purposefully avails himself of the privilege of conducting activity in the
21 forum, thereby invoking the benefits, and protections of its laws; (2) the claim must be one which arises
22 out of or results from the defendant’s forum-related activities; and (3) exercise of jurisdiction must be

23 *Panavision International L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998)
24 (quoting *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995)).

25 A. The Open Sesame Users’ Group And Its Members Purposefully Availed Themselves 26 Of The Forum

- 27 1. The Open Sesame Users’ Group And Its Members Created An Internet Based
28 Distributed Development Environment With Substantial Presence Within
29 California Which Could Reasonably Be Expected To Avail Itself Of Software
Developers And Users Located Within California.

1 Open software development efforts rely upon the availability and skill of highly motivated groups
2 of developers. Since the software to be developed will be distributed without cost, direct remuneration
3 is not a primary motivating factor. Developers have to be motivated by a strong desire to develop an
4 alternative to the commercial software that the open source development is intended to supplant.
5 Consequently, a key element in the success of such developments is access to skilled and motivated
6 software developers. Distributed development without geographic limitations is vital in allowing a critical
7 mass of developers to be assembled (virtually) to work on a single project. This is a major reason why
8 those wishing to develop open source software frequently do so by creating an Internet presence which
9 extends across the entire world and into many jurisdictions.

10 Simply creating an Internet presence, such as a web site, is not sufficient for a finding of
11 jurisdiction, because as the Ninth Circuit has recognized, without more, the mere creation of a Web site
12 “is not an act purposefully directed toward the forum state.” *Cybersell, Inc. v. Cybersell, Inc.*, 130
13 F.3d 414, 418 (9th Cir. 1997). However, in circumstances where a defendant conducts business over
14 the Internet by engaging in repeated and ongoing transactions with forum residents, the federal courts
15 routinely conclude that they may exercise personal jurisdiction over the defendant. *E.g.*, *CompuServe*
16 *v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (personal jurisdiction existed in Ohio where Texas
17 subscriber of computer network service developed “shareware” software and entered into ongoing
18 contract with service to have such shareware distributed on international computer network); *Zippo*
19 *Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997) (personal jurisdiction
20 sustained where defendant contracted with approximately 3000 individuals and several Internet access
21 providers in the forum state); *SuperGuide Corp. v. Kegan*, 987 F. Supp. 481, 486-487 (W.D.N.C.
22 1997) (court finds jurisdiction appropriate where there was a “reasonable inference” that a large
23 number of North Carolina customers had visited non-resident defendant’s website). For instance, as
24 the Court in *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) noted, where
25 a defendant maintains a Web site that invites users to join a mailing list in order to receive information
26 about the defendant’s service, personal jurisdiction over the defendant is appropriate. That is so,
27 because the defendant has “consciously decided to transmit advertising information to all Internet users,
28 knowing that such information will be transmitted globally,” and under such circumstances the mailing list
29 will “presumably includ[e] many residents” of the forum state. *Id.*

1 Here, like the situation in *Maritz*, in creating a newsgroup for the development of *Open*, the
2 Open Sesame Users' Group went far beyond merely creating a web presence similar to a passive web
3 site. The Open Sesame group created a forum encouraging developers to interact with one another and
4 to develop a complex and highly connected software system. This sort of development requires
5 iteration and complex communication between developers. The act of newsgroup creation, which
6 eventually led to the development of software infringing Closed Corp.'s patent, was an implicit call for
7 those developers who were interested, including those that might be located in California, to join in the
8 development of the *Open* software. It is also quite foreseeable that this development would attract
9 programmers from California. California plays a major role in the world of software development. This
10 is illustrated by the archetypal role of Silicon Valley in the computer industry, and the location of the
11 plaintiff, Closed Corp., within California. See *SuperGuide v. Kegan*, 987 F.Supp at 487 ("while the
12 number of hits to defendant's website originating in North Carolina is not now before the Court, a
13 reasonable inference which arises is that such are numerous inasmuch as North Carolina is one of the
14 populated states").

15 California also has a unique position relative to the Internet, being the birthplace of that system
16 and still maintaining a disproportionate share of Internet users, estimated to be 14.4% of all World-
17 Wide-Web users. Graphics, Visualization, and Usability Center, College of Computing, Georgia
18 Institute of Technology, *The Tenth WWW User Survey*,
19 <http://www.gvu.gatech.edu/user_surveys/survey-1998-10/>. Given this fact, it could be readily
20 expected that a distributed software development will make use of, and benefit from, developers within
21 California. Likewise it was reasonably foreseeable that that this software, if successfully developed and
22 distributed on the Internet, would be used in California. Cf. *Maritz, Inc. v. Cybergold, Inc.*, 947
23 F.Supp. at 1330 (131 website "hits" by Missouri residents enough for court to conclude there would be
24 "many" such hits by state residents). This reasonably foreseeable use and benefit from developers and
25 use of the software by users in California, targets the act of creating this distributed software
26 development effort toward California. This satisfies a basic tenet of jurisdictional analysis which holds
27 that the required contacts must be such that non-residents may anticipate being subjected to litigation in
28 the forum as a result of their activities. See *Burger King* at 472. Given the unique role of California in
29 the Internet and the computer industry, the defendants should have anticipated that, if there was a

1 problem with the software, such as a patent infringement, then they would be subject to litigation in
2 California.

3 By contrast, in *Barrett v. Catacomb Press*, 44 F.Supp.2d 717 (E.D. Pa. 1999), postings of
4 allegedly defamatory material to a Usenet newsgroup were analogized to a passive web site, which did
5 not directly solicit interaction with forum residents, and was held not to provide a sufficient basis for
6 jurisdiction. *Id.* at 728. The facts here can be distinguished in that newsgroups in *Barrett* were not
7 created specifically for the primary purpose of fostering active and ongoing interaction with other
8 newsgroup subscribers concerning the specific matter of the postings. Also distinguishing this case is the
9 fact that a submission of code or comments on code submitted to the Open Sesame newsgroup clearly
10 is an implicit solicitation to other subscribers to integrate this code into what they are producing, and to
11 make further improvements. Unlike this case, in *Barrett*, there was no evidence that the defendant
12 intended to solicit anyone to do anything based on his postings to the newsgroups in question.

13 Similarly, the present case is readily distinguishable from *Hasbro, Inc. v. Clue Computing,*
14 *Inc.*, 994 F. Supp. 34, 42 (D. Mass. 1997), in which the court found that it was not technically feasible
15 for the operator of a web site to limit access from a given jurisdiction, and therefore even though access
16 was available from a given state, that would not be sufficient for jurisdiction. Unlike in *Hasbro, Inc.*, the
17 technical medium being used here is not a web site, but a Usenet newsgroup. This distinction is critical,
18 as Usenet provides a mechanism for controlling who can post to the group. This mechanism is known
19 as moderation. Had the Open Sesame group wished to prevent the participation of residents of
20 California, or any forum or forums, from participating in the collaborative development, the use of a
21 moderator could have prevented any posting or participation by developers whose residence was either
22 undesirable or unknown. While this would not prevent interlopers from reading the posts, it would have
23 prevented meaningful participation in the development of the *Open* software by residents of any forum
24 that the Open Sesame group would have wished to exclude.

25
26 2. Jurisdiction Is Proper In California Under the “Effects Doctrine” as the *Effects*
of the Infringement Were Felt by the Plaintiff in California.

27 Jurisdiction may be based on the “effects” of the plaintiff’s actions. *See Calder v. Jones*, 465
28 U.S. 783 (1984). The standard for this “effects test” is “(1) intentional actions (2) expressly aimed at
29 the forum state (3) causing harm, the brunt of which is suffered – and which the defendant knows is

software. Closed Corp., as noted, is a California corporation, has its headquarters in California, and will suffer the effect of any lost sales of the *Views*TM software in California. Additionally, because of the large population of California and the prominent position of California as a location in the computing and software industry, a substantial share of Closed Corp.'s business is in California. Finally, since customers in California, especially the "Silicon Valley," in large part shape the definition of the market and set trends for others due to perception and reputation, the effects of the actions of the Open Sesame group in developing infringing software is felt in California, even more acutely than the even the disproportionate size of the California computer and software industry would suggest. The relative sophistication of the Open Sesame Users' Group and its members in specifically setting out to develop an alternative to Closed Corp.'s evidences a level of knowledge about the computer software business, and Closed Corp. in particular, that would indicate that the defendants knew of the likelihood of effects of their actions being felt in California. Finally, the protest by users of *Open* at Closed Corp.'s headquarters in San Jose, is further evidence of this knowledge. Jurisdiction against the Open Sesame Users' Group and its members for patent infringement therefore is supported in California, based upon the effects of their actions. *Cf. Inset*

1 *Systems, Inc. v. Instruction Set*, 937 F.Supp. 161, 162-165 (D. Conn. 1996) (personal jurisdiction
2 over non-resident defendant appropriate where defendant's contacts with Connecticut were limited to
3 posting of a website that was accessible to approximately 10,000 state residents and maintaining a toll-
4 free number, since "unlike television and radio advertising, the advertisement [here] is available
5

6
7 B. A Finding of Personal Jurisdiction Comports with "Traditional Notions of Fair Play and
Substantial Justice."

8 "Once it has been decided that a defendant purposefully established minimum contacts within the
9 forum State, these contacts may be considered in light of other factors to determine whether the assertion
10 of personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King*, 471 U.S.
11 at 476-477. In addressing this question seven factors are considered: (1) the extent of a defendant's
12 purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of the
13 conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the
14 dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to
15 the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Id.*
16 The factors are to be balanced and no one is dispositive. *Core-Vent*, 11 F. 3d at 1488.

17 1. Purposeful Interjection

18 "Even if there is sufficient 'interjection' into the state to satisfy the purposeful availment prong,
19 the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction
20 under the reasonableness prong." *Id.* (citing *Insurance Company of North America v. Marina Salina
21 Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981)). Here, the Open Sesame group and its members have
22 substantially interjected their activities into California. The Usenet newsgroup that was established to
23 develop the *Open* software is available from servers located in the state. Moreover, the entire Open
24 Sesame software effort is focused on developing a free alternative to a product produced and sold by a
25 California corporation. This effort implicitly solicits software developers from the Internet, including
26 those in California. The degree of interjection is very substantial.

27 2. Defendant's Burden in Litigating

28 Although the defendant's burden in litigating is a factor in assessing reasonableness, unless the
29 "inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear

1 justifications for the exercise of jurisdiction.” *Panavision Int’l v. Toeppen*, 141 F.3d at 1323 (citing
2 *Caruth v. International Psychoanalytical Ass’n*, 59 F.3d 126 128-29 (9th Cir. 1995)). The burden
3 on the individual defendants who make up the Open Sesame Users’ Group to litigate may be significant.
4 However, since the individuals are currently unknown, it is not possible to determine how great the
5 burden would be. This uncertainty is caused by defendants themselves, because they have consciously
6 elected to remain anonymous. More importantly, the very nature of the software development at issue
7 here indicates that the defendants are sophisticated users of the Internet and technology capable of
8 maintaining complex interactions from a distance. This is strong evidence that they would be able to
9 participate in their own defense from their own residence, if not California, with little difficulty.
10 Furthermore, this Court itself can minimize defendants’ burden, for as recognized by the Court in
11 *SuperGuide Corp.v. Kegan*, 987 F.Supp. at 487, “should discovery reveal that the hits from
12 [California] are insubstantial, the jurisdictional issue may be revisited.”

13 3. Sovereignty

14 Given that this is a patent infringement action, the choice of jurisdiction in California would not
15 conflict with the sovereignty of any other U.S. state. The analysis of a federal patent infringement claim
16 would be the same regardless of the U.S. jurisdiction chosen because the Federal Circuit has
17 jurisdiction over all such cases, wherever they arise. *See* 28 U.S.C. § 1338.

18 However, admittedly in this case, a number of the yet to be identified defendants may not be
19 U.S. citizens. “The foreign-acts-with-forum-effects jurisdiction principle must be applied with caution,
20 *Core-Vent*, 11 F.3d at 1489 (citing *Pacific Atlantic Trading*
21 *Co. v. M/V Main Exp.*, 758 F.2d 1325, 1330 (9th Cir. 1985)). In *Core-Vent Corp.*, the court
22 focused on the presence or absence of connections between the foreign defendants and the United
23 States in general, not merely California. Nonetheless, here the defendants set out to produce a software
24 package specifically as an alternative to the product of a U.S. corporation and created a Internet based
25 software development which was open to U.S. citizens acting within the U.S. Much more important,
26 however, is the fact that this is a patent infringement action. The territorial nature of patent protection
27 argues very strongly for the exercise of jurisdiction within the United States. This protection does not
28 extend to other sovereignties and is a violation of a right granted by the United States government. For
29 these reasons, the exercise of jurisdiction in California should not interfere with the sovereignty of any

141 F.3d at 1323 (citing *Gordy v. Daily News, L.P.*, 95 F.3d 829, 836 (9th Cir. 1996)). Closed Corp. is a California corporation with its headquarters in California. This factor weighs in favor of finding jurisdiction.

5. Efficient Resolution

The fifth *Core-Vent* factor focuses on the location of evidence, and is no longer weighed heavily by Courts due to advances in modern technology. See *Panavision Int'l*, 141 F.3d at 1323. Given the Internet savvy and ability of the defendants this factor should not weigh heavily against the reasonableness of jurisdiction.

6. Convenient and Effective Relief for the Plaintiff

Given the Usenet's anonymity, if California is not an appropriate forum for the adjudication of this matter, there may be no forum in which it is proper for this matter to be heard against the Open Sesame Users' Group in its entirety. The distributed nature of the Internet and the methods by which the Open Sesame Users' Group set out to develop their software make it virtually a certainty that the members as individuals would reside in multiple forums. This would result in substantial difficulty for the plaintiff in pursuing the defendants as individuals and brings the effectiveness of such an option into question.

7. Alternative Forum

It does not appear from the facts of this case that there is any other forum which has better claim to jurisdiction for this case. In fact, it would appear that if jurisdiction is not proper in California, then there is no other jurisdiction in which a claim may be made against the defendants in aggregate. The contacts between the Open Sesame Users' Group and any other forum where this claim might be brought are no better than the contacts in California. Further, given the plaintiff's residence in California, the effects are more acutely felt here than anywhere else. The Internet has no location it calls home, therefore this argument weighs in favor of the reasonableness of finding jurisdiction in California.

1
2 II. THE NORTHERN DISTRICT OF CALIFORNIA IS A PROPER VENUE FOR THIS SUIT

3 A. The Open Sesame Users' Group Meets the Residency Requirement for Venue under 28 USC
4 1400(b).

5 1. The Open Sesame Users' Group Is An Unincorporated Association.

6 For the purposes of venue, the rule for the residence of an unincorporated association has long
7 been treated to be the same as that for a corporation in patent infringement suits. *Sperry Products v.*
8 *Association of American Railroads*, 132 F.2d 408 (2nd Cir. 1942). Venue in patent infringement suits
9 is governed by 28 USC §1400(b), which provides:

10 (b) Any civil action for patent infringement may be brought in the judicial district
11 where the defendant resides, or where the defendant has committed acts of
12 infringement and has a regular and established place of business.

13 In 1988, Congress adopted a new definition of 'reside' for application to corporate defendants. That
14 definition is codified in 28 USC §1391(c), which states:

15 (c) For purposes of venue under this chapter, a defendant that is a corporation
16 shall be deemed to reside in any judicial district in which it is subject to personal
17 jurisdiction at the time the action is commenced. In a State which has more than
18 one judicial district and in which a defendant that is a corporation is subject to
19 personal jurisdiction at the time an action is commenced, such corporation shall
20 be deemed to reside in any district in that State within which its contacts would
21 be sufficient to subject it to personal jurisdiction if that district were a separate
22 State, and, if there is no such district, the corporation shall be deemed to reside
23 in the district within which it has the most significant contacts.

24 This definition of residency is applicable to questions of residence in patent infringement actions. *VE*
25 *Holdings Corporation v. Johnson Gas Appliance Company*, 917 F.2d 1574 (Fed. Cir 1990).
26 Consequently, if the Open Sesame Users' Group falls under the definition of an unincorporated
27 association and jurisdiction is appropriate in the Northern District of California then venue is proper in
28 the Northern District of California.

29 An unincorporated association is "a voluntary group of persons, without a charter, formed by
30 mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective."
31 *Associated Students of the University of California at Riverside v. Kleindienst*, 60 F.R.D. 65, 67
32 (C.D. Cal. 1973) (quoting *Local 4076, United Steelworkers v. United Steel-Workers*, 327 F.

1 Supp. 1400, 1403 (W.D. Pa. 1971)). As the First Circuit has recognized:

2 Because there is no “typical” unincorporated association, there can,
3 jurisdictionally speaking, be no mechanical taxonomy: the very breadth of the
4 array of associational institutions, and their diverse nature, necessitates using a
5 functional, flexible, case-specific methodology. Virtually by definition, an
unincorporated association tends to be *sui generis*.

6 *Donatelli v. National Hockey League*, 895 F.2d 450, 468 (1st Cir. 1990). Thus, it has been held that
7 “[u]nder California law, a group is an unincorporated association when its members share a common
8 purpose and when it functions ‘under a common name under circumstances where fairness requires the
9 *Coscarart v. Major League Baseball*, No. C96-1426 FM
10 (N.D. Cal. Jul. 11, 1996), 1996 WL 400988, at *2 (quoting *Barr v. United Methodist Church*, 90
11 Cal. App. 3d 259, 266 (4th Dist. 1979)). The Open Sesame Usenet group readily fits this definition.

12 The Open Sesame Users’ Group was created with the specific and common objective of
13 developing an alternative operating system to Closed Corp.’s software and it is in prosecution
14 of this objective that the alleged infringement of Closed Corp.’s patent protections has occurred. When
15 the Usenet newsgroup in question, *comp.os.opensesame* was created, it was created for the clear and
16 distinct purpose of facilitating the development of an alternative to the *Views*TM software. The
17 newsgroup was proposed, chartered, and voted into existence by supporters of this notion and these
18 people have been voluntarily participating in the development of the *Open GUI* since this time. Despite
19 common misconception, considerable coordination and order are needed to create a new newsgroup
20 within one of the eight primary newsgroups and few enterprises on the Internet, or in the more concrete
21 world, are clearer examples of voluntary groups working together on a common enterprise toward a
22 common objective than the distributed development of open source software.

23 Notwithstanding its broad definition, an unincorporated association can not simply be any
24 “amorphous or attenuated” organization lacking in “any authoritative criteria to determine
25 *Motta v. Samuel Weiser, Inc.* 598 F. Supp. 941, 950 (D. Maine 1984). However,
26 Open Sesame is not an amorphous organization. Here, by contrast there is membership-driven
27 authoritative criteria, including participation in and contribution by software developers to
28 *comp.os.opensesame*. While it is true that currently the actual names and addresses of these
29 participants in the Open Sesame newsgroup are masked by their use of the Internet, if this action is

1 allowed to proceed the true identities of these developers will be determinable through investigation and
2 discovery. More importantly, “[f]airness requires [the identification of group as an unincorporated
3 association] when an individual alleges the group has violated his rights.” *Coscarart*, 1996 WC
4 400988, at *2. That rule is paramount here. Closed Corp. has identified a substantial violation of its
5 intellectual property rights, and “fairness” therefore dictates Open Sesame be identified as an
6 unincorporated association.

7 In that regard, this case stands in stark contrast to *California Clippers, Inc. v. United States*
8 *Soccer Football Association*, 314 F. Supp. 1057 (N.D. Cal. 1970). There, the court ruled that the
9 International Games Committee of the USSFA was not an unincorporated association because it had
10 “no charter, by-laws, no office or place of business, mailing address, no bank account, no assets or
11 obligations, and has never transacted any business.” *Id.* at 1068. By contrast, the Open Sesame Group
12 has a charter. A charter is a necessary and required element prior to forming a Usenet newsgroup in a
13 primary hierarchy. The Open Sesame group has some form of structure, although the full details of it
14 are unclear. It is known that although anyone can participate in the development of the *Open* software
15 (via the Open Sesame newsgroup), the decision as to which contributions make it to the web and FTP
16 servers in Finland for distribution is made by a small group of developers. Although the Open Sesame
17 Users’ Group may not have an office in the physical world, in fact they do have a virtual office. Their
18 virtual office is the *comp.os.opensesame* newsgroup. This allows the members to meet, communicate,
19 collaborate, and develop new software in concert. Merely because this ‘office’ does not have four
20 walls and a ceiling does not mean that it is not an office, any more than the fact that Amazon.com does
21 not have a single physical retail book outlet does not mean that it is not a ‘bookstore.’

22 Finally, the Open Sesame group has clearly transacted business. The existence of the *Open*
23 GUI, which is the subject of this action, is the manifestation of these transactions. Each time someone
24 downloads a copy of the *Open* software, the Open Sesame Users’ Group transacts business and each
25 time a computer manufacturer installs the *Open* software on to a computer the Open Sesame Users’
26 Group transacts business. The members of the Open Sesame Users’ Group have worked together in
27 close concert to achieve their objective of developing an alternative product to Closed Corp.’s
28 software. Although the form of concerted action may be defined in terms of Internet
29 technology, the basic principle of a voluntary group working toward a common objective has not.

1 Admittedly, some opinions focus on the use of the “methods and forms used by incorporated
2 *Hecht v. Malley*, 265 U.S. 144, 157 (1923). Form and structure is not dispositive however.
3 In *Hecht*, the court noted “the word ‘association’ as used in the Act clearly includes “Massachusetts
4 Trusts” such as those herein involved, having quasi-corporate organizations under which they are
5 engaged in carrying on business enterprises. What other form of “associations”, if any, it includes, we
6 *Id.* (footnote omitted). More recent cases have focused less on the
7 form and structure. *Project Basic Tenants Union v. Rhode Island Housing and Mortgage Finance*
8 *Corp.*, 636 F. Supp. 1453 (D. R.I. 1986) (Union lacked structure, had no officers, budget, by-laws or
9 set group of members, but was unincorporated association due to distinct purpose and specific functions
10 toward that end.) *Steuer v. Phelps*, 41 Cal. App. 3d 468 (1974) (Nine member church group was an
11 unincorporated association, even though it had no officers and had engaged in only one business
12 transaction, the purchase of an automobile.) Finally, courts concede that where a group is “commonly
13 understood, referred to, and contributed to” under a given name like Open Sesame, fairness dictates
14 that such a group be deemed a legal entity. *Ripon Society v. National Republican Party*, 565 F.2d
15 567, 571-72 n.5 (D.C. Cir. 1975).

16 The Open Sesame Users’ Group had enough structure to give itself a commonly recognized
17 name, create its own charter, set up a primary hierarchy newsgroup, develop a complex software
18 system, coordinate updates to the software through an editorial board structure, and publish the
19 developments on the web. This voluntary group set out to achieve a specific goal and met that goal.
20 The Open Sesame Users’ Group is the quintessential embodiment of an unincorporated association.

21
22 2. The Open Sesame User’s Group And Its Individual Members Have Sufficient
23 Contacts With The Northern District Of California To Make Jurisdiction Proper

24 Under 28 U.S.C. §1391(c), a corporation resides, for purposes of venue, in a judicial district
25 when its contacts with the district would be sufficient for the establishment of personal jurisdiction. The
26 same rule applies for unincorporated associations. *Sperry Products, Inc, Denver & Rio Grande*
27 *Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967). As discussed
28 above, the defendant has substantial contacts with the California, and specifically the Northern District
29 of California, which would make a finding of personal jurisdiction proper. Consequently, venue is
proper.

1 The Open Sesame User's Group and its members, as discussed above, set out to develop a
2 software system, in a distributed manner utilizing the Internet. This act had the foreseeable consequence
3 of having direct contacts into California, due to the disproportionate presence of Californians on the
4 Internet and the significant role of California in the area of software development. The heart of
5 California's computer presence is the "Silicon Valley," located in the Northern District of California.
6 Stanford University, the University of California, Berkeley, and other educational institutions with
7 substantial computer and software development efforts are located in the Northern District. Finally, the
8 effects of the Open Sesame Group's actions is felt most acutely in the Northern District. This is the site
9 of Closed Corp.'s headquarters. As a primary seat of the computer industry it is where Closed Corp.
10 will stand to lose substantial sales opportunities to *Open*. The effects are magnified more, by the
11 preeminent and perceived leadership role that the individuals and firms of 'Silicon Valley' have
12 throughout the computer industry.

13
14 B. The Development of the Infringing Software Via Usenet Constitutes Infringement Within
15 The Judicial District and The Internet Provides a Permanent Place of Business Within
16 the District.

17 Under 35 U.S.C §271, anyone who "makes, uses, offers to sell, or sells" a patented good
18 within the United States is a patent infringer. As discussed above, the use of the Internet and Usenet
19 allowed the Open Sesame Users' Group to make the *Open* software everywhere that the Usenet and
20 the Internet penetrate. Likewise the placement of the software on a server in Finland, given the
21 foreseeability that it would be accessed from the United States and from California, constitutes an offer
22 to sell the software within the District. The fact that the only price that the Open Sesame developers
23 exact is a promise for attribution, per the standard open source licensing agreement, does not negate the
24 fact that this is an offer to sell the software, literally for a promise, in California.

25 The Internet allows companies like Amazon.com, eBay, and others to have a permanent place
26 of business, wherever the Internet can be found. This basic fact has led to the creation of an entire
27 segment of our economy known as e-commerce. Similarly the Internet allows the Open Sesame Users'
28 Group and its members to have a permanent place of business for the distribution and development of
29 their software everywhere, including in the Northern District of California. It is true that previous cases
have generally focused on the existence of a physical situs, as a regular and established place of
business. *Re Cordis Corp.*, 769 F.2d 722 (Fed. Cir. 1985), *Stewart Warner Corporation v.*

1 *Hunter Engineering Co.*, 163 U.S.P.Q. 326 (N.D. Ill 1969), *IPCO Hospital Supply Corp. v. Les*
2 *Fils D’Auguste Maillefer S.A.*, 446 F. Supp. 206 (SD NY 1978). However, there is no adequate
3 definition of physical location for an Internet business which would not put the business out of the reach
4 of almost any forum in which it was actively operating. The Supreme Court has recognized the difficulty
5 in applying old standards in light of “changes taking place in the law, the technology, and the industrial
6 structure related to telecommunications” and has advocated a more general approach to analyzing such
7 situations. *Denver Area Education Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727,
8 742 (1996). This more general approach leads to the conclusion that the Open Sesame Group has a
9 permanent and established place of business within the Northern District of California.

10 The Open Sesame Group has developed and sold its software in the Northern District of
11 California. Through the Internet, the Open Sesame Group maintains a permanent and established, albeit
12 virtual, place of business in the Northern District of California. Venue therefore is appropriate in the
13 Northern District of California.

14
15 C. Principles of Equity and Reasonableness and the Underlying Principles of Venue Argue
16 for the Finding of Proper Venue in the Northern District of California.

17 The rationale for the restrictive nature of venue in patent infringement suits arises from the
18 peculiar nature of such suits:

19 The patent venue statute reflects a legislative policy recognizing the technical and
20 intricate nature of patent litigation. Because of the obvious difficulty involved in a
21 court attempting to ascertain from the mass of technical data presented the
22 pertinent and determinative facts, Congress saw fit to narrowly confine the
23 venue provisions applicable to this type action. It was their belief that
24 practicality and convenience are best served when the case is prosecuted where
25 the alleged acts of infringement occurred and where the defendant has a regular
26 and established business.

27 *Bradford Novelty Co. v. Manheim*, 156 F. Supp. 489, 491 (SD NY 1957) (citing *Ruth v. Eagle-*
28 *Picher Co.*, 225 F.2d 572 (10th Cir. 1955)). When the alleged infringement occurs on the Internet and
29 the technical data and relevant facts are available everywhere with Internet access, as easily as they are
available anywhere else, the rationale of convenience and fairness to the defendants are substantially
mitigated. While this principle does not obviate the need to adhere to the language of the statute, when
the question of what a “regular and established place of business” or infringement within the District

1 means in an Internet context arises, it provides a measure for applying these rules to that context.

2 If venue is strictly tied to physical location, then the enforcement of U. S. patent protection is
3 seriously undermined. Defendants, such as the Open Sesame User’s Group and its members can
4 readily insure that their only physical presence is outside the U.S. The international aspect of the
5 Internet then allows them to fully and freely maintain development and distribution within the U.S. of
6 software which infringes U.S. patents, but not necessarily those of the sovereignty in which their server
7 is located. This would then leave the patent holder with two options: attempt to identify each individual
8 user in the U.S. and pursue patent infringement actions against them, or simply allow their intellectual
9 property rights to go undefended to any who would choose to abuse them. The former option is not
10 palatable from either a practical point of view or a judicial efficiency view, and the latter option is simply
11 an abandonment of Constitutionally created rights to technological highwaymen.

12
13 **III. SERVICE OF PROCESS IS VALID AGAINST THE OPEN SESAME USERS’
GROUP AND DOE DEFENDANTS 1-1000.**

14 A. Service By Posting A Copy of the Summons and Complaint to *comp.os.opensesame*
15 Constituted Valid Service To The Open Sesame Users’ Group.

16 Service of process must conform to both Constitutional as well as statutory requirements.
17 Constitutionally, the requirement is that service must be “notice reasonably calculated, under all the
18 circumstances, to apprise interested parties of the pendency of the action and afford them an
19 opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.
20 306, 314 (1952). Statutorily, service of process must conform with federal and state requirements.

21 Service on an unincorporated association, such as the Open Sesame Users’ Group is governed
22 under Federal Rules of Civil Procedure 4(h) which holds that service on an unincorporated association
23 may be effected:

- 24 (1) in a judicial district of the United States in the manner prescribed for
25 individuals by subdivision (e)(1), or by delivering a copy of the summons and of
26 the complaint to an officer, a managing or general agent, or to any other agent
27 authorized by appointment or by law to receive service of process and, if the
28 agent is one authorized by statute to receive service and the statute so requires,
29 by also mailing a copy to the defendant, or
(2) in a place not within any judicial district of the United States in any manner
prescribed for individuals by subdivision (f) except personal delivery as
provided in paragraph (2)(C)(i) thereof.

1 California Code of Civil Procedure §416.40, likewise defines the standards for service of
2 process on an unincorporated association,

3 A summons may be served on an unincorporated association (including a
4 partnership) by delivering a copy of the summons and of the complaint:

5 (a) If the association is a general or limited partnership, to the person designated
6 as agent for service of process as provided in Section 24003 of the
7 Corporations Code or to a general partner or the general manager of the
8 partnership;

9 (b) If the association is not a general or limited partnership, to the person
10 designated as agent for service of process as provided in Section 24003 of the
11 Corporations Code or to the president or other head of the association, a vice
12 president, a secretary or assistant secretary, a treasurer or assistant treasurer, a
13 general manager, or a person authorized by the association to receive service of
14 process;

15 (c) When authorized by Section 15700 or 24007 of the Corporations Code, as
16 provided by the applicable section.

17 The Open Sesame Users' Group does not fall within subsection (a), so the question is whether
18 the posting of the notice to *comp.os.opensesame* would constitute delivery of the notice to one
19 of the people designated in subsection (b), or could be authorized under (c). It is clear that the
20 California code anticipates a more traditional organizational structure for an unincorporated
21 association than the Open Sesame Users' Group appears to possess. However, it is clear that
22 there is some organizational structure to the Users' Group. Only the modifications to the *Open*
23 software deemed useful were merged by a small group of developers and posted to the FTP
24 and web server maintained by the group in Finland. Since the Open Sesame Users' group was
25 chartered for the purpose of producing and enhancing the *Open* software, the control of what
26 software is posted manifests leadership of the organization. This small group of developers
27 constitute the head of the association as envisioned in Cal. Civ. Proc. Code §416.40 and the
28 managing agent under F.R.C.P. 4(h). Likewise, the self imposed requirement that software
29 posted to the newsgroup would be evaluated for usefulness implies diligence in monitoring the
comp.os.opensesame newsgroup. For these reasons, the posting to the newsgroup should and
does constitute delivery to the head of the Open Sesame Users' Group. Closed Corp. has

1 made use of the same method that the group itself relies upon to conduct its own day-to-day
2 business with its leadership in order to inform that leadership of this suit. No other form of
3 delivery would be as effective, given the circumstances, to inform the parties of the pendency of
4 this action.

5 Under Cal. Civ. Proc. Code §416.40(c), service may be as permitted under California
6 Corporations Code §24007, which provides that:

7 If designation of an agent for the purpose of service of process has not been
8 made as provided in Section 24003, or if the agent designated cannot with
9 reasonable diligence be found at the address specified in the index referred to in
10 Section 24004 for delivery by hand of the process, and it is shown by affidavit
11 to the satisfaction of a court or judge that process against an unincorporated
12 association cannot be served with reasonable diligence upon the designated
13 agent by hand or the unincorporated association in the manner provided for in
14 Section 415.10 or 415.30 of the Code of Civil Procedure or subdivision (a) of
15 Section 415.20 of the Code of Civil Procedure, the court or judge may make
16 an order that service be made upon the unincorporated association by delivery
of a copy of the process to any one or more of the association's members
designated in the order and by mailing a copy of the process to the association
at its last known address. Service in this manner constitutes personal service
upon the unincorporated association.

17 If the court finds that service by posting to the Usenet newsgroup was inadequate service, then
18 the court may allow service on the association by delivery to the one identified member of the
19 association, Ms. Goat, who has already been served. Since the association has never had any
20 known address, the second part of this requirement may also be best effected by service on
21 Ms. Goat.

22
23 B. Service By Electronically Mailing (e-mailing) to the E-mail Addresses of Posters to
24 *comp.os.opensesame*, Posting on the *comp.os.opensesame* Newsgroup, and
Publishing in the Open Source Newsletter Constituted Adequate Service of Process To
Doe Defendants 1-1000.

25 The problems presented by this case have recently been recognized by this court, "With the rise
26 of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright
27 infringement, and trademark infringement, entirely on-line. The tortfeasor can act pseudonymously or
28 anonymously and may give fictitious or incomplete identifying information." *Columbia Insurance Co.*
29 *v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999). It has been noted that "in such cases the

1 traditional reluctance for permitting filings against John Doe defendants or fictitious names and the
2 traditional enforcement of strict compliance with service requirements should be tempered by the need
3 to provide injured parties with a forum in which they may seek redress for grievances.” *Id.*

4 Unlike most distributed open source software development, the developers of *Open* have
5 chosen to remain anonymous. Their meeting location exists only in cyberspace, and their use of the
6 Internet allows them to maintain the organization necessary to achieve the development of a complex
7 operating system software without requiring the traditional trappings of conventional organizations.
8 However, this should not mean that the members of the Open Sesame Users’ Group can infringe at will
9 within California and avoid service. Cal. Civ. Proc. Code § 413.30 authorizes the court to order
10 alternative methods of service. The relevant provision holds,

11 Where no provision is made in this chapter or other law for the service of
12 summons, the court in which the action is pending may direct that summons be
13 served in a manner which is reasonably calculated to give actual notice to the
14 party to be served and that proof of such service be made as prescribed by the
15 court.

16 The developers of the *Open* operating system use the Internet, including web sites, Usenet newsgroups,
17 and e-mail to instigate, develop, and distribute the software. They eschewed a more traditional
18 organization or collaborative techniques. As a consequence of their choices, no traditional method of
19 service proscribed in statute, including first class mail, or publication in a traditional print newspaper, is
20 as likely to provide these defendants with actual notice, as the efforts undertaken by Closed Corp.
21 Closed Corp. is using the very methods that the defendants relied on to develop the infringing software
22 to notify them of this suit. Closed Corp. is not e-mailing arbitrary individuals, but rather those individuals
23 who gave e-mail addresses in their postings to the *comp.os.opensesame* newsgroup. Closed Corp. is
24 not posting the notice to arbitrary web sites or on-line newsletters, but to the *OpenSource* newsletter, a
25 newsletter specifically targeted to, and popular with, the open source development community. Closed
26 Corp. did not post the notice to arbitrary Usenet newsgroups, but to *comp.os.opensesame*, the very
27 newsgroup created and utilized by the defendants to develop the infringing software at issue. These are
28 actions more calculated to give actual notice to the defendants in this action, than any traditional form of
29 service, and should be supported as constituting valid service.

1 C. Even If Service of Process Against Doe Defendants 1-1000 Was Not Sufficient, This
2 Suit Should Be Allowed To Continue, Until The Doe Defendants Can Be Identified.

3 Even if service against the Open Sesame Users' Group and the unidentified individual members
4 is not adequate, this action should be allowed to go forward until discovery allows for the identification
5 of the Doe defendants and they can be served in a more traditional manner. Generally courts are
6 reluctant to allow discovery to go forward in order to identify defendants. *Columbia Ins.* at 578.
7 “[L]imiting principles should apply to the determination of whether discovery to uncover the identity of a
8 defendant is warranted.” *Id.* These principles manifest themselves as a three part test: 1) the defendant
9 must be identified “with sufficient specificity such that the Court can determine that defendant is a real
10 person or entity who could be sued in federal court ... to ensure that federal requirements of jurisdiction
11 and justiciability can be satisfied[,]” 2) “all previous steps taken to locate the elusive defendant” must
12 be identified to ensure “that plaintiffs make a good faith effort to comply with the requirements of service
13 of process[,]”, and 3) the “plaintiff should establish to the Court’s satisfaction that plaintiff’s suit against
14 *Id.* at 578-79.

15 The requirement that the unidentified entity be sufficiently identified as one who can be sued in
16 federal court is met by the facts and arguments given in the on the appropriateness of jurisdiction above.
17 These defendants are real entities who have actively engaged in distributed software development using
18 the Internet and have thereby had significant foreseeable contacts with California. Secondly, the
19 plaintiff’s good faith effort to identify and notify the defendants is evidenced by the gathering of e-mail
20 addresses from the Usenet newsgroup, the e-mailing to those addresses, and posting of notice to
21 Internet locations most likely to alert the individual defendants to the suit. The act of using e-mail to
22 notify defendants has been seen as evidence of a plaintiff’s good faith effort to serve a defendant. *Id.* at
23 579. Most significantly, plaintiff has identified at least one actual person – Ms. Scape Goat. Finally, the
24 defendant has presented a case for infringement of its U.S. patents in the original cause of action against
25 the defendants. Defendants have not alleged any facts to counter those arguments and evidence that the
26 *Open* software infringes patents held by Closed Corp. on *Views*TM. For these reasons it is proper to
27 allow discovery to go forward against Ms. Goat and those entities that have had dealings with the Open
28 Sesame group and its members, including the hardware manufacturers who are now bundling the *Open*
29 software on machines they sell, in order to ascertain the true identities of the defendants so that they may

1 be served.

2 CONCLUSION

3 The Internet is not the wild west, it is not without law or order. Just as actions on the Internet
4 have repercussion which effect and harm persons who inhabit the tangible world in which we all live, so
5 must individuals who act on the Internet be subject to the laws and jurisdiction of courts in the tangible
6 world for the administration of justice. In this case, the Open Sesame Users' Group, the members of
7 that group, and Ms. Goat have all taken actions on the Internet which fairly warrant the continued
8 administration of that justice in the Northern District of California.

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