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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 CLOSED CORPORATION, a California
11 Corporation,

Plaintiff,

12 vs.

13 OPEN SESAME USERS GROUP, DOES 1-
14 1000, SCAPE GOAT,

Defendant

) Case No.: CT-0001-DFO

) DEFENDANTS' MOTION TO DISMISS;
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT THEREOF

) DATE: October 23, 1999

) TIME: 9:00 a.m.

) PLACE: CT

17
18 TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

19 PLEASE TAKE NOTICE that on October 23, 1999, at 9:00 a.m. in the Courtroom of the
20 Honorable Judge O'Scannlain, Defendants hereby move the Court to dismiss Plaintiff Closed
21 Corporation's complaint in the above-captioned action.

22 The Motion will be based on the grounds that (1) Defendant Open Sesame is not a legal
23 entity capable of being sued [F.R.C.P. 17(b)]; (2) this Court lacks personal jurisdiction over the
24 Defendants [F.R.C.P. Rule 12(b)(2)]; (3) Venue is not proper [28 U.S.C. § 1400(b)]; and (3)
25 Service of Process on Defendants Open Sesame and DOES 1-1000 was not proper (Cal. Code
26 Civ. Proc. 413.30, 415.30-415.50).
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1
2 MEMORANDUM OF POINTS AND AUTHORITIES

3 I.

4 INTRODUCTION

5 The Internet does not and should not provide an excuse to abandon the traditional rules
6 that are designed to embody basic concepts of Due Process, to protect individuals from the
7 burdens and risks of being called into a distant forum with which they have no significant
8 connection. Yet the traditional rules on personal jurisdiction, venue and service of process still
9 allow an injured victim to reach a commercial enterprise that uses modern electronic means
10 regularly to solicit commercial business in the forum. This is not such a case. The defendants
11 are individuals, not commercial entities; most of them reside outside California and some reside
12 outside the United States. None is engaged in commercial activities in California or elsewhere
13 related to the plaintiff's claims.
14

15 If the plaintiff has patent infringement claims to bring, it should be left to sue the
16 computer manufacturers and other *commercial* entities that are using the allegedly infringing
17 program. Therefore, Defendants' motion to dismiss should be granted.
18

19 A. Questions Presented

- 20 1. Is an unmoderated Internet Usenet Group which has no by-laws, office space, funding,
21 employees or appointed representatives, and no distinct, identifiable membership an
22 "unincorporated association" capable of being sued under F.R.C.P. 17(b)?
23
24
25 2. Do the traditional principles of Due Process permit finding personal jurisdiction over an
26 individual with no contacts with, or commercial interests in, the forum by virtue of the
27 individual's posting a notice on an unmoderated Usenet hosted outside the United States?
28

- 1 3. Does an individual's participation in an unmoderated Usenet that is a "passive" web site
2 outside the forum and not engaged in commercial activity constitute sufficient minimum
3 contacts with the forum?
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- 5
6 4. Can proper venue exist under 28 U.S.C. § 1400(b) where defendants in a patent
7 infringement suit do not reside in the forum and have no regular and established place of
8 business in the forum?
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- 10
11 5. Can proper venue under 28 U.S.C. § 1400(b) and § 1391(c) be found to exist in the forum
12 for an unmoderated Usenet where the Usenet is a passive web site not targeted at the
13 forum and not engaged in commercial activity?
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- 15
16 6. Is the emailing of the summons and complaint to several email addresses obtained from
17 the Usenet Archive proper service under Cal. Code Civ. Proc. § 415.30 or § 415.40?
18
- 19
20 7. Would the answer to Question 6 be affected by showing (i) some of the email messages
21 were returned as undeliverable, and (ii) those that weren't returned did not send back a
22 return receipt indicating who actually received notice?
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- 24
25 8. Is the posting of the summons and complaint to OpenSource a valid publication under
26 Cal. Code Civ. Proc. § 415.40 where the Internet newsletter has no list of subscribers; is
27 not published or printed at regular intervals; and has no publisher, printer, foreman or
28 clerk to create an affidavit of the time and place of publication?

1 B. Facts

2 Plaintiff Closed Corp. is the creator and owner of what has become the world's dominant
3 PC operating system ("Views). Its complaint alleges that the members of an Internet users group
4 (or Usenet) have infringed its patents when they created a freely-available alternative operating
5 system ("Open"). The defendants are essentially unknown to Closed and apparently scattered
6 around the country and the world.
7

8 The defendants have collectively -- and spontaneously -- created "Open" in response to
9 Closed's increasingly restrictive licensing practices that had begun in the mid-1990s. Closed
10 would only reveal source code to those licensees who would agree not to make any
11 modifications, modules, plug-ins or enhancements--with the result that third party software
12 developers and users became locked into Closed-sponsored applications.
13

14 Open Sesame is an unmoderated Usenet, also known as an unmoderated newsgroup.
15 Once the group is registered and assigned a name, anyone can "subscribe" (i.e., participate) by
16 reading and posting messages to the group. Users are often anonymous, identified only by their
17 email addresses. Posted messages on the news server are propagated to adjacent news servers
18 which in turn distribute to other servers, and so on. An unmoderated Usenet has no central
19 structure or controlling entity to coordinate or direct its affairs, exclude others, or limit the
20 posting of messages.¹ The Open Sesame users' group is hosted on a main server in Finland. In
21 addition, Usenet messages are often replicated on "mirror servers" located around the world.
22
23 This reduces Internet traffic to the host server. Operators of these mirror servers typically do not
24 monitor the content of the users' groups and the user group participants have no control over the
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¹ Linux User Group HOWTO, Kendall Grant Clark, <http://www.nlug.org/archive/lug-howto/lug.html> (on Feb. 28, 1998 v.1.6.1).

1 mirror servers. It is known that open Sesame is carried on mirror servers at the California
2 Institute of Technology and at Stanford University.

3 The user community did not like Closed's regime of secrecy and restraints. Various user
4 groups sprang up, in which participants freely exchanged ideas on how to develop alternative
5 operating systems. One of the more successful of these is the defendant Open Sesame, whose
6 members (i.e., participants) gradually over time created the Open operating system. Open
7 started as a rudimentary operating system in the public domain and was tweaked and expanded
8 by countless users in the group. The process was one of continuous innovation. Each
9 modification was posted to Open Sesame site, to be tested and critiqued by others.
10
11 Modifications deemed useful were merged into the Open baseline by a small group of developers
12 and then posted on the main server.
13

14 The defendants were not individually or collectively in business to develop an operating
15 system for profit. They were simply a random and self-selected set of innovators. Yet what
16 they did had potential commercial implications and--more importantly for this case--threatened
17 the commercial dominance that Closed had created for Views and was trying to create for
18 Views-based applications.
19

20 Some of the defendants recognized that it would be important to develop a graphic user
21 interface ("GUI"), if Open were to be useful to a lot of users. Members of Open Sesame group
22 did this, with substantial effort and without access to the Views GUI, which is based on secret
23 source code that could not be examined or copied.
24

25 The Open program and its GUI are freely available in the computer community.
26 Because of Open's versatility and popularity among users, some well-known computer
27 manufacturers have begun to preload Open on their machines as an alternative to Views.
28

1 Because Open is essentially free, it has brought Closed unwelcome competition to Views – and
2 Closed has sued. Interestingly, Closed has chosen to sue the defendants (who are simply
3 innovators without an economic stake in Open) rather than the well-known computer makers
4 which have substituted Open for Views on their PCs.
5

6 Pursuant to their claims, Plaintiffs have served an individual member of Open Sesame
7 who made an anti-Views speech in San Jose. Plaintiff has also attempted to serve the Open
8 Sesame group itself, and a thousand unknown defendants, by posting copies of the summons and
9 complaint to the internet newsletter, OpenSource, and by emailing copies of the summons to
10 several email addresses obtained from the Usenet Archive. Some of these emails were returned
11 as undeliverable.
12

13 II.

14 OPEN SESAME IS NOT A LEGAL ENTITY CAPABLE OF BEING SUED BY PLAINTIFF

15 Open Sesame is an unmoderated Usenet. Therefore, there is no controlling authority
16 that directs its activities or controls membership. Because an “unincorporated association” is the
17 only type of legal entity that could possibly include groups such as Open Sesame, the Plaintiff
18 must show Open Sesame is an unincorporated association before it can sue it under its common
19 name.
20

21 Where a federal substantive right is claimed, a federal court must apply federal and not
22 state law in determining what constitutes an unincorporated association for capacity purposes.
23 F.R.C.P. 17(b), U.S.C.A.; Associated Students of the University of California at Riverside v.
24 Kleindienst, 60 F.R.D. 65, 66-67 (C.D. Cal. 1973). Patent infringement is a federal substantive
25 right. Therefore, federal law must be used to determine whether the Open Sesame Users Group
26 is an unincorporated association. The U.S. Supreme Court has defined an unincorporated
27
28

1 association as:

2 “a body of persons united without a charter, but upon the methods and forms used by
3 incorporated bodies for the prosecution of some common enterprise.” Hecht v. Malley,
4 265 U.S. 144, 157 (1923).

5
6 The Open Sesame Users Group does not fit this definition because it has none of the
7 “methods and forms” used by corporations. An unincorporated association must be an organized
8 group made from persons who become members voluntarily but subject to certain rules or by-
9 laws. Members are customarily subject to discipline for violations or noncompliance with the
10 rules of the association. See Yonce v. Miners Memorial Hospital Assn., 161 F.Supp. 178, 186
11 (W.D. Virginia 1958). Furthermore, a group will not be recognized as an unincorporated
12 association unless it has a distinct, identifiable membership. See Motta v. Samuel Weiser, Inc.,
13 598 F.Supp. 941, 949 (D.Maine 1984). In Motta, the court found that the secret fraternity
14 known as Ordo Templi Orientis (“OTO”) was not an unincorporated association because it was an
15 “amorphous and attenuated” group without any authoritative criteria to define membership. This
16 despite the fact that the fraternity had regular meetings, membership rituals, doctrines and
17 appointed representatives. Id. at 943.

18
19 Similarly, Open has no centralized authority or distinct, identifiable membership. There
20 are no rules for participating or mechanisms for restricting access or “membership.” Indeed,
21 anyone in the world with internet access and the proper newsreader software can become a
22 “member” simply by accessing the site and reading or posting messages. An individual may post
23 messages regularly or never access the site again. If a message posted is “off-topic” or otherwise
24 inappropriate, there is no mechanism for disciplining the user for noncompliance.

25
26 In addition, membership in Open Sesame cannot be determined from old Usenet archives.
27
28

1 Individuals who access the Usenet do not assent to membership in Open Sesame simply by
2 posting email messages. In Johnson v. South Blue Hill Cemetery Assoc, 221 A.2d 280 (Me.
3 1966), the court held there was no unincorporated association where the necessary conditions
4 upon which membership could be predicated were wanting. There, the purchase of a cemetery
5 lot was insufficient to find assent to become a member of a cemetery association where no by-
6 laws existed which defined or regulated membership eligibility. Id. at 283. Where no
7 membership criteria are established, actions taken by a group participant are not sufficient to
8 characterize such action as an assent on the part of the participant to become a member of the
9 association and the rights and liabilities that usually arise from membership in such an
10 association cannot be enforced. Id. (emphasis added). Likewise, those who posted messages to
11 the Open Sesame Users group did not assent to becoming members of an association without
12 some kind of objective criterion for membership. Indeed, there was no criteria of any kind for
13 accessing Open Sesame. Anyone could access the Usenet to read or post messages. While some
14 individuals provided inputs, others could just read the postings of others, ie, “lurking.” None of
15 these activities could be said to be assenting to membership. Because there were no conditions
16 upon which membership in Open Sesame was predicated, membership is not sufficiently definite
17 and determinate to form an unincorporated association.
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22 Even if membership in Open Sesame could be ascertained at any given time, it would still
23 be too informal and transitory to qualify as an incorporated association. In California Clippers v.
24 U.S. Soccer Football Assoc., 314 F.Supp. 1057 (N.D. Cal. 1970), this Court held that the
25 International Games Committee was not an unincorporated association because it lacked
26 organizational form. Id. at 1068. Like the Committee in California Clippers, Open Sesame has
27 no charter, by-laws or articles. It has no office, staff or place of business, no mailing address
28

1 other than an internet URL, and no bank account, assets or obligations. The members of Open
2 Sesame have never even met as a group. Therefore, it is not an unincorporated association.

3 A distinct purpose alone will not provide structure sufficient to qualify a group as an
4 unincorporated association. While unincorporated associations have been found to exist even
5 where a group lacked by-laws, other “methods and forms” used by corporations were present.
6 The court in Project Basic Tenants Union v. Rhode Island Housing and Mortgage Finance Corp.,
7 636 F. Supp. 1453 (D. R.I. 1986), found that a tenants union with no by-laws was an
8 unincorporated association, and distinguished the Committee in California Clippers by pointing
9 out that the tenants group had office space, funding, and a full-time staff person. Open Sesame
10 has no office space, funding or employees. Therefore, it cannot be an unincorporated
11 association.
12
13

14 Because Open Sesame is simply a Usenet site frequented by a loose and transitory
15 collaboration of internet enthusiasts and not an unincorporated association, it is not a legal entity
16 capable of being sued by Plaintiff.
17

18 III.

19 THIS COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANTS

20 DOES 1-1000

21 A. This Court Should Continue To Apply the Fundamental Ideas of Fairness on Which 22 Personal Jurisdiction Rests Under the Constitution and Our Legal Tradition

23 To satisfy due process, the exercise of personal jurisdiction must comport with
24 “traditional notions of fair play and substantial justice.” International Shoe v. Washington, 326
25 U.S. 310, 320, 66 S.Ct. 154, 160 (1945) (which quoted Milliken v. Meyer, 311 U.S. 457, 463, 61
26 S.Ct. 339, 343, 85 L.Ed. 278 (1940)).
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28

1 Five factors have been used to determine the fairness and reasonableness of asserting
2 personal jurisdiction: 1) Defendants' burden of appearing, 2) California's interest in
3 adjudicating the dispute, 3) the Plaintiff's interest in obtaining convenient and effective relief, 4)
4 the judicial system's interest in obtaining the most effective resolution of the controversy, and 5)
5 the common interests of all sovereigns in promoting substantive social policies. See Burger King
6 v. Rudzewicz, 471 U.S. 462, 477 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson,
7 444 U.S. 286, 292 (1980)).
8

9 Factor (1): The Open Sesame Usenet is accessible to anyone in the world with internet
10 access. Other than Scape Goat, none of the defendants have been shown to live in the forum.
11 Many undoubtedly reside outside the United States. Therefore, having to defend a potentially
12 protracted lawsuit in California presents an incredibly large burden on these defendants and
13 weighs heavily against the reasonableness of asserting jurisdiction. In addition, none of the
14 defendants receive any remuneration from their work on Open that could help offset the costs of
15 defending a suit in a distant forum.
16
17

18 Factor (2): Unlike more traditional infringement cases, there is no physical situs here.
19 Rather, because the alleged infringement occurred over the internet, which has no physical
20 boundaries, California has no interest that is stronger than any other forum (save perhaps Finland
21 where the server is located). Nor is this a traditional case where witnesses and evidence needed
22 for adjudication of the dispute are local.
23

24 Factor (3): Plaintiff's alleged injury was not centered in California. While the Plaintiff's
25 headquarters is located in California, the plaintiff does business all over the world. Therefore, it
26 would not be a significant burden for the Plaintiff to litigate this dispute in some other forum.
27

28 Factor (4): Dragging a lot of non-commercial defendants – who may be far away and/or

1 foreign – into a forum with which they have no special connection, is neither efficient nor
2 reasonable. Indeed, the most efficient resolution would be to proceed against the commercial
3 entities that are selling the allegedly infringing GUI.

4
5 Factor (5): The Internet is a global phenomenon. As such, different countries each have
6 their own interest in regulating Internet activity. Demanding jurisdiction over activities that take
7 place entirely on the Internet can therefore subject defendants to double (or multiple) liability in
8 different forums. This issue is particularly serious where non-commercial defendants are
9 involved. In this case, the problem could be avoided if Closed confined its efforts to the
10 domestic U.S. manufacturers who loaded the allegedly infringing Open GUI.

11
12 Based on these five factors, exercising personal jurisdiction over the defendants is not
13 reasonable.

14 **B. This Court Lacks Personal Jurisdiction Over DOES 1-1000 Because DOES 1-1000 Do Not**
15 **Have the Required Minimum Contacts With California Such That Exercising Jurisdiction**
16 **Would Be Reasonable**

17
18 Before subjecting a non-resident defendant to personal jurisdiction, due process requires
19 that the defendant have sufficient minimum contacts with the forum state such that maintenance
20 of the suit does not offend “traditional notions of fair play and substantial justice.” International
21 Shoe Co, 326 U.S. at 216. In addition, the required minimum contacts must be purposeful, so
22 that non-residents may anticipate being haled into court as a result of their activities. See Burger
23 King, 417 U.S. at 472. Furthermore, the Plaintiff has the burden of showing that the Defendants
24 purposefully availed themselves of the protections and benefits of the forum. See Carteret
25 Savings Bank, FA v. Shushan, 954 F.2d 141, 146 (3rd Cir. 1992) (holding that once defendant
26 raises the defense of lack of personal jurisdiction, the plaintiff bears the burden of proving, by a
27
28

1 preponderance of the evidence, facts sufficient to establish personal jurisdiction.)

2 Plaintiff alleges that the defendants purposefully availed themselves of the privilege of
3 doing business in California due to the accessibility of the Open Sesame Users Group and the
4 FTP server web page to anyone with internet access in California. While a majority of internet
5 jurisdiction cases have focused on defendants' activities on the web, the principles outlined are
6 equally applicable to Usenets.
7

8 In determining whether there is purposeful availment such that it is reasonably
9 foreseeable that an individual will be haled into court solely on the basis of internet activity,
10 courts have generally looked to the following factors:
11

- 12
- 13 1) whether the web site is "passive" or "active"
- 14 2) whether the web page was targeted at the forum, and
- 15 3) commercial v. noncommercial nature of the activity.
16

17

18 1. The Open Sesame Usenet is a "passive" site

19 Courts have declined to exercise jurisdiction where the only contact with the forum is
20 through a "passive" web site that does little more than make information accessible to those who
21 seek it. Indeed, the Ninth Circuit concluded that no court has ever held that an Internet
22 advertisement alone was sufficient to subject a party to jurisdiction in another state. See
23 Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-19 (9th Cir. 1997). The creation of a web
24 site, "like placing a product into the stream of commerce, may be felt nationwide or worldwide
25 but, without more, it is not an act purposefully directed toward the forum state." Bensusan
26 Restaurant Corp. v. King, 937 F.Supp. 295, 301 (S.D.N.Y. 1996), aff'd, 126 F.3d 25 (2d Cir.
27
28

1 1997).

2 Posting messages to a Usenet is treated the same way as posting to a passive web site for
3 the purpose of determining personal jurisdiction. Barrett v. Catacombs Press, 44 F.Supp. 2d.
4 717, 728 (E.D. Pa. 1999) (noting that, like a passive web site, membership in a Usenet is at the
5 option of the individual user and anyone who is interested can become a member.) Id.

7 Personal jurisdiction based on Internet activity is directly proportionate to the nature and
8 quality of the commercial activity conducted. Zippo, Mfg. Co. v. Zippo Dot Com., Inc, 952 F.
9 Supp. 1119, 1124 (W.D. Pa. 1997). Personal jurisdiction is almost always held proper for those
10 who clearly do business over the Internet by entering into contracts with foreign residents and
11 knowingly and repeatedly transmitting computer files. Id. See, e.g., CompuServe, Inc. v.
12 Patterson, 89 F.3d 1257 (6th Cir. 1996) (where defendant sold software over the internet and
13 entered into a distribution contract with forum resident). At the other end of the continuum are
14 those who simply post information on a “passive” web site that does little more than make the
15 information available to users in foreign jurisdictions. Zippo, 952 F.Supp. at 1124. No sufficient
16 grounds exist for exercising personal jurisdiction in these types of cases. See also Bensusan
17 Restaurant Corp. v. King, 937 F.Supp. 295 (S.D.N.Y. 1996) (holding that an advertisement on a
18 passive web site was insufficient to trigger personal jurisdiction). In the middle are web sites
19 where a user can exchange information with the host computer. Zippo, 952 F.Supp. at 1124. In
20 such cases, the level of interactivity and commercial nature of the information being exchanged
21 must be determined before personal jurisdiction can be exercised. Id.

25 In cases involving passive web sites where personal jurisdiction has been exercised, the
26 courts have consistently found additional contacts directed at the forum. See, e.g., Panavision
27 Intn’l. L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (attempting to extort money from the
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1 Plaintiff, Defendant sent email and made telephone calls to the forum); Bochan v. La Fontaine,
2 1999 U.S. Dist. LEXIS 8253 (E.D.Va., May 26, 1999) (posting defamatory messages and
3 soliciting business in the forum); Zippo Mfg. Co., 952 F.Supp. at 1126-27 (entering into
4 contractual agreement via email); Compuserve, 89 F.3d at 1263 (entering into a contract with
5 forum ‘choice of law’ provision); Hasbro, Inc. v. Clue Computing, Inc., 944 F.Supp. 34, 44 (D.
6 Mass. 1997) (using web site to solicit additional commercial contacts with forum residents);
7 Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998) (traveling to the forum to promote the web
8 page). Here, the defendants never entered into any contract with anyone in California and never
9 solicited additional contacts with forum residents. None of the defendants visited, telephoned or
10 even emailed anyone in California. The Open Sesame Usenet is completely free and accessible
11 to anyone with internet access. None of the defendants can control or restrict its access by
12 residents in California or anywhere else. Therefore, the defendants have not acted to
13 purposefully direct their activities toward California.

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17 This approach is consistent with traditional minimum contacts analysis. See Asahi Metal
18 Indus. Co., Ltd. v. Superior Court of Cal., 480 U.S. 102 (1987) (rejecting contention that placing
19 a product in the stream of commerce is enough to establish personal jurisdiction). Similarly,
20 mere fortuitous or unilateral conduct by a user in bringing the product into the forum does not
21 meet the “purposeful availment” requirement. See World-Wide Volkswagen v. Woodson, 444
22 U.S. 286 (1980) (holding that a defendant’s contacts with the forum should be such that he
23 should reasonably foresee being haled into court there). Id. at 297. Here, the defendants have no
24 control over who accesses the Open Sesame Usenet and unilaterally brings it into the forum.
25 Therefore, the existence of the Open Sesame Usenet, and the fact that anyone in California can
26 unilaterally access it, does not support finding the defendants purposefully availed themselves of
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1 California.

2 2. The Open Sesame Usenet does not target California

3 Open Sesame is an unmoderated Usenet. Therefore, anyone on the internet can access
4 the site and either post messages or simply read what others have posted. More importantly, no
5 one can control the distribution of the Usenet messages. All messages are automatically
6 forwarded to adjacent Usenet servers which in turn propagate them to additional servers. In
7 Barrett, 44 F.Supp. 2d at 717, the court held that a defendant's non-commercial postings on a
8 Usenet were insufficient for establishing personal jurisdiction. Unlike more traditional activities
9 such as the distribution of magazines where the distributor can affirmatively decide not to sell in
10 certain forums, no such control exists over areas of delivery after posting to a Usenet. Id. at 728.
11 Because there is no way for the defendants to limit distribution of the Open Sesame Usenet, the
12 Defendants cannot be targeting California.

13 In addition to the Usenet servers, there are "mirror servers" that copy other web sites and
14 Usenet content for local distribution. There are countless mirror servers located around the
15 world. Although several such sites are known to exist in California, the Defendants have no
16 control over them. Because the Defendants have no control over what the mirror servers decide
17 to reproduce, they are not targeting California.

18 Likewise, the Open operating system itself is not targeted at California (or Views in
19 particular). On the contrary, it is designed to be the most flexible, broadly applicable, and
20 customizable it can be to allow users to modify it to fit their individual needs regardless of where
21 they reside or what operating system they currently use. Therefore, the court's decision in
22 Toeppen, 141 F.3d 1316 (9th Cir. 1998) is distinguishable. In that case
23 the defendant deliberately registered Panavision's trademarks as domain names in an attempt to
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1 extort money from Panavision. Consequently, the defendant knew that his conduct would have
2 the effect of injuring Panavision in California. The court applied the “effects doctrine”
3 articulated in Calder v. Jones, 465 U.S. 783 (1984), where purposeful avilment could be found
4 if the defendant’s conduct was aimed at or had an effect in the forum state. Panavision, 141 F.3d
5 at 1322. Indeed, the web site in Panavision had no commercial value in connection with any
6 other forum except the Plaintiff’s since its sole purpose was to tie up the Panasonic domain name
7 until Panavision paid the defendant’s price. In stark contrast, Open provides a very powerful
8 and flexible OS that can be used worldwide, not just in California. Because Views is sold
9 throughout the world, the injury cannot be said to be concentrated in California. Also, Open can
10 be used to replace any operating system, not just Views. Therefore, the development of Open is
11 not tortuous conduct aimed expressly at the forum.
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14 In addition, the effects doctrine has been narrowly construed by most circuits. See, e.g.,
15 IMO Industries, Inc. v. Kiekert, 155 F.3d 254, 256 (3rd Cir. 1998) (agreeing with First, Fourth,
16 Fifth, Eighth, Ninth and Tenth Circuits in holding that jurisdiction under Calder requires more
17 than finding that the harm is primarily felt within the forum. Also held that the holding in
18 Panavision and Calder are limited to their facts (the unique relationship between the motion
19 picture industry and the forum)). Id. at 265. The defendant must have expressly aimed his
20 tortuous conduct at the forum such that the forum can be said to be the “focal point” of the
21 tortuous activity. Id. Unlike the motion picture industry in Panavision, which provides a unique
22 and concentrated market for film cameras, the Views operating systems are sold and used
23 worldwide. Because Views is not uniquely related to California, California cannot be said to be
24 the “focal point” for the alleged tortuous activity.
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28 The effects doctrine is inapplicable in the present case. Although Open was initially

1 developed as an alternative to Views, it does not target Views exclusively. While providing a
2 better product inevitably results in some adverse effect to a competitor, this is not the type of
3 activity required to trigger the effects doctrine. Because neither the Open product nor the Open
4 Sesame Usenet targeted California, the second factor weighs against finding personal
5 jurisdiction.
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8 3. Defendants' participation on the Open Sesame site was not commercial activity

9 This case does not involve any commercial activity. None of the defendants have
10 received any remuneration for their participation in the Open Sesame Usenet. Indeed, there has
11 been no sales activity at all -- Open remains free and downloadable to anyone with internet
12 access.
13

14 This is in stark contrast to most cases where personal jurisdiction for web-based activity
15 has been found. In the vast majority of these cases, the defendants were engaged in some kind of
16 commercial activity over the web. See, e.g., Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th
17 Cir. 1996) (defendant entered into a contract to sell software over the Internet); Maritz v.
18 Cybergold, Inc., 947 F.Supp. 1328 (E.D. Mo. 1996) (advertising subscriptions to its mailing list);
19 Zippo Mfg. Co. v. Zippo Dot Com., Inc., 952 F.Supp. 1119 (W.D. Pa. 1997) (holding personal
20 jurisdiction should be exercised in proportion to the quality and nature of the commercial activity
21 exercised over the internet). Because the defendants in the present case did not engage in any
22 commercial activity, most other authorities are distinguishable in determining whether internet
23 activities alone can support a finding of personal jurisdiction.
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IV

THIS COURT DOES NOT HAVE PROPER VENUE OVER DEFENDANTS DOES 1-1000
AND OPEN SESAME

28 U.S.C. Section 1400(b) states that “any civil action for patent infringement may be brought in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business.”

A. This Court Does Not Have Proper Venue Over Does 1-1000 Under 28 U.S.C. Section 1400(b)

For individual defendants in a patent infringement case, Section 1400(b) is the exclusive provision for determining venue. Therefore, for venue to be proper in this court, the Plaintiff must show that each of the Does 1-1000 either: 1) resides in the Northern District of California, or 2) has committed acts of infringement and established a regular place of business here.

Closed has been unable to show that any Open user other than Scape Goat resides in this district. Anyone with internet access can download the Open source code from the FTP server in Finland, and can do so from anywhere in the world. The individuals who participate on the Open Sesame users group are also geographically anonymous. Therefore, the Plaintiff has not met the first test for establishing venue for Does 1-1000.

Similarly, even if Plaintiff’s assertion that Open infringes Views was true, the Northern District of California would still not be a proper venue under the second test, which requires that defendants “establish a regular place of business” in the district. Here, the Plaintiff has failed to show any presence whatsoever of Does 1-1000 in the district. Furthermore, the mirror server at Stanford cannot provide the basis for a regular and established place of business because it is not within the defendants’ control. No commercial activity or economic benefits flow back to the

1 Open Sesame users from the mirror servers. Also, there is no contractual agreement or funding
2 between the owner of the Stanford mirror server and any of the Defendants. Therefore, the
3 Defendants cannot be said to have established a regular place of business in the Northern District
4 of California.

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6 B. This Court Does Not Have Proper Venue Over Open Sesame Under 28 U.S.C. Section
7 1400(b) as Modified by Section 1391(c)

8 If Plaintiff succeeds in arguing that Open Sesame is an unincorporated association,
9 section 1400(b) is supplemented with 1391(c) to determine proper venue. See VE Holding Corp.
10 v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir 1990); see also Denver R.G.W.R. Co. v.
11 Brotherhood of R.R. Trainmen, 387 U.S. 556 (1967) (holding 1391(c) applies to unincorporated
12 associations). 28 U.S.C. Section 1391(c) states:

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14 For purposes of venue under this chapter, a defendant that is a corporation shall be
15 deemed to reside in any judicial district in which it is subject to personal jurisdiction at
16 the time the action is commenced.

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18 Because there is no separate venue analysis under 1391(c), venue is only proper if this
19 court can exercise personal jurisdiction over Open Sesame. To establish personal jurisdiction,
20 the Plaintiff has the burden of showing, by a preponderance of the evidence, that Open Sesame
21 purposefully availed itself of the protections and benefits of the forum. See Carteret Savings
22 Bank, 954 F.2d at 146. Under the same reasons discussed in Part III *supra*, the Open Sesame
23 Usenet does not constitute purposeful availment of the benefits and protections of the Northern
24 District of California such that the exercise of personal jurisdiction would comport with Due
25 Process. Therefore, venue is also improper.
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V.

SERVICE OF PROCESS ON DEFENDANTS DOES 1-1000 AND OPEN SESAME
WAS IMPROPER

A. Service of Process on DOES 1-1000 Was Improper

To constitute valid service of process, two tests must be met. First, service must meet the constitutional standard of “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1952). Second, the notice must conform to the applicable rule or statute governing the method of service. See Marshall v. State, 544 N.Y.S.2d 437 (Ct. Cl. N.Y. 1989).

Failure to comply with the rule-based requirement invalidates service. See, e.g., Magnuson v. Video Yesteryear, 85 F.3d 1424, (9th Cir. 1996) (holding service by Federal Express defective when rule stated that such papers had to be served personally or by “mail”); Erbacci, Cerone and Moriarty, Ltd. V. United States, 166 F.R.D. 298 (S.D. N.Y. 1996) (faxing not authorized service). But see Calabrese v. Springer Personnel, 534 N.Y.S. 2d 83 (Civ. Ct. 1988) (permitting service by fax under N.Y. law given widespread use and reliability of fax machines). On the rare occasion that an alternative method of service has been allowed, the court usually granted it only when service pursuant to the statute was impossible and where the defendant had actual notice but was actively evading service. See, e.g., New England Merchants National Bank v. Iran Power Generation and Transmission Co., 495 F. Supp. 73 (S.D. N.Y. 1980) (allowing service via telex because political unrest made it impossible to serve process on defendants who had actual notice of action but were avoiding service.) Here, there is no evidence to suggest that the defendants had actual notice or were attempting to evade service.

1 Courts have rejected alternative methods of service not specifically authorized by statute,
2 even where the opposing party received actual notice. See Marshall, 544 N.Y.S.2d. at 546.
3 Therefore, even if the Defendants had actual notice, the alternative methods of service employed
4 by the Plaintiff in this case do not constitute proper service.
5

6 1. Emailing Summons to Email Addresses Found in the Usenet Archive was Not Sufficient

7 Service of Process Under Cal. Code Civ. Proc. §415.30 Because it was Not Reasonably
8 Calculated to Provide Actual Notice

9 No courts in the United States have recognized email as a proper method of service.
10 Indeed, this Court recently held that email is not a sufficient form of service for complying with
11 F.R.C.P. 4. See Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 1999 U.S. Dist. LEXIS
12 12652 at *16 (N.D. Cal. 1999). Other courts have reached the same conclusion. See, e.g.,
13 Wawa, Inc. v. Christensen, 1999 U.S. dist. LEXIS 11510 at *4 (E.D. Pa. 1999) (stating that
14 electronic mail is not an approved method of service under FRCP 4). Therefore, service by email
15 is not a proper method of service.
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18 In addition, Closed did not know who it was sending the email messages to when it
19 emailed copies of the complaint and summons to addresses listed in the Usenet archive. Indeed,
20 many of the messages were returned as undeliverable, demonstrating how unreliable this method
21 is. This attempted “service by spam” cannot constitute proper service of process because it is not
22 reasonably calculated to provide actual notice.
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24 Furthermore, even if email could constitute valid service by mail, it would not be proper
25 in this case. Cal. Code Civ. Proc. 415.30, which governs service of residents by mail, only
26 authorizes the plaintiff to mail the defendant a request for waiver of service. It does not
27 authorize service by mail per se. In the absence of the Defendants’ written waiver, the plaintiff
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1 must serve the Defendants in a different way. Here, the plaintiff sent email messages to some of
2 the Defendants who had email addresses listed on the Open Sesame Usenet archive, not knowing
3 where these defendants reside. If any of these defendants resides in California, the email
4 message will not constitute proper service for that individual.
5

6 While Cal. Code Civ. Proc. 415.40 allows service by mail upon individuals located
7 outside the state, a return receipt is required. So even if service by email was allowed by courts,
8 which it is not, it would not constitute valid service under 415.40 unless a return message was
9 available. While the plaintiff may argue that the “mail undeliverable” message provides such a
10 function, this argument is not convincing. The undeliverable messages are sent only for those
11 messages that can not be delivered - no such notice is sent when an email message is not
12 returned. Furthermore, even if an email is not bounced back to the sender, there is no way of
13 ascertaining who ultimately received the message without some kind of return receipt. Just as
14 real mail or faxes can be delivered to the wrong place due to typos or misrouting, so too can
15 email messages. It is because of this possibility that return receipts are required for regular mail
16 in the first place. The return receipt usually carries the signature of the person accepting
17 delivery so the success of service may be ascertained. No such signed declaration of delivery is
18 present here. Therefore, Plaintiff’s emailing of copies of the summons and complaint to
19 unknown email addresses from the Usenet archive did not constitute proper service.
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23 2. Posting Summons to OpenSource was Not a Valid Publication Under Cal. Code Civ.

24 Proc. Section 415.50

25 Service by publication is authorized only where the court finds that the party to be served
26 cannot with reasonable diligence be served in any other manner. Cal. Code of Civ. Proc.
27 415.50(a). Section 415.50 says that “except as otherwise provided by statute, the publication
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1 shall be made as provided by Section 6064 of the Government Code....

2 requirements for publication of notice are determined by Government Code sections 6060-6066.

3 Section 6060 states:

4 “Whenever any law provides the publication of notice shall be made pursuant to a
5 designated section of this article, such notice shall be published in a newspaper of general
6 circulation for the period prescribed, the number of times, and in the manner provided in
7 that section.”

8
9 Government Code Section 6000 defines a “newspaper of general circulation” as a
10 newspaper published for the dissemination of local or telegraphic news and intelligence of a
11 general character, which has a bona fide subscription list of paying subscribers, and has been
12 established, printed and published at regular intervals in the State, county or city where
13 publication, notice of publication, or official advertising is to be given or made for at least one
14 year preceding the date of the publication, notice or advertisement.

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17 OpenSource is exclusively an internet newsletter. Unlike more traditional print media, it
18 is not disseminated to a list of subscribers. Although some internet publications can only be
19 accessed by paying subscribers, OpenSource is open to anyone who wishes to access it.
20 Therefore, there is no set list of subscribers, and definitely not a list of “paying subscribers” as
21 required by Section 6000. Therefore, OpenSource is not a newspaper of general circulation as
22 required for proper service by publication under Section 6060.

23
24 Furthermore, OpenSource is not “established, printed and published at regular intervals in
25 the State, county, or city where publication, notice by publication, or official advertising is to be
26 given.” While the Plaintiff may argue that OpenSource is published at regular intervals because it
27 can be accessed from the internet at any time, this is a misinterpretation of the requirement.
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1 While a traditional print magazine may be purchased 24 hours a day in some convenience stores,
2 this does not automatically mean that the magazine is published at regular intervals. This
3 criterion is determined by how often new issues are produced and disseminated in the area where
4 notice is to be given. Unlike traditional print media, internet newsletters may be updated
5 continuously throughout a week, a day, or even an hour and be instantaneously available to
6 anyone in the world with internet access. Such volatile and unpredictable content changes do not
7 meet the “regular intervals” requirement of Section 6060. Therefore, the OpenSource newsletter
8 does not fall within Cal. Civ. Proc. 415.50.
9

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11 Even if OpenSource did meet the requirements of Gov’t Code Section 6000, service of
12 process in this case would still be improper. Cal. Civ. Proc. Section 417.10(b) requires proof of
13 service by publication pursuant to 415.50 be made by “affidavit of the publisher or printer, or his
14 foreman or principal clerk, showing the time and place of publication” The OpenSource
15 newsletter has no publisher, printer, foreman or clerk. Therefore, service by posting to
16 OpenSource is not proper.
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18 3. Posting Summons to the Usenet Was Not Sufficient Service of Process Under Cal.

19 Code Civ. Proc. §413.30 Because it was Not Reasonably Calculated to Provide
20 Actual Notice
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22 Cal. Civ. Proc. Section 413.30 authorizes the court to order alternative methods of service
23 “reasonably calculated to give actual notice” only where service cannot be effected under any
24 other provision of the Code.

25 Posting a copy of the summons and complaint to the Open Sesame Usenet does not meet
26 the due process requirement of being “reasonably calculated, under all the circumstances, to
27 apprise interested parties of the pendency of the action and afford them an opportunity to present
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1 their objections.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1952). To
2 be served, an individual would have to access the Open Sesame Usenet and open the message
3 containing the copy of the complaint and summons. New visitors would thus be “served” even
4 though they had never participated in the Usenet before and some long-time members would not
5 receive notice if they did not visit the site in a timely manner. Messages posted on Usenets are
6 automatically removed after a time to make room for new messages. Furthermore, the
7 propagation of messages from a Usenet server to adjacent servers is not always reliable. Because
8 there is no way to know with any degree of certainty whether the notice has reached a defendant
9 (or rather, the defendant has reached the notice), posting notice on a Usenet is not reasonably
10 calculated to provide actual notice and cannot constitute valid service.
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13 B. Service of Process on Open Sesame Was Improper

14 Because Open Sesame is not an unincorporated association, it is not an entity that can be
15 sued or served under F.R.C.P. 17(b). Rule 17(b) states that an “unincorporated association ...
16 may sue or be sued in its common name for the purpose of enforcing for or against it a
17 substantive right existing under the Constitution or laws of the United States.”
18

19 Even if Open Sesame was an unincorporated association; however, service of process
20 was improper. F.R.C.P. 4(h) states:
21

22 Service of process upon an unincorporated association may be effected 1) in a
23 judicial district of the United States a) pursuant to the law of the state where the
24 district court is located or b) by delivering a copy of the summons and complaint
25 to an officer, a managing or general agent, or to any other agent authorized by
26 appointment or by law to receive service of process; or 2) in a place not within any
27 judicial district of the United States in any manner prescribed for individuals by
28 subdivision (f), service upon individuals in a foreign country.

29 There is no officer or agent authorized by appointment or law to receive service for Open
30 Sesame. Membership is unrestricted, unlimited and transitory. While a small group of

1 developers incorporate changes into the Open baseline, the identity of these individuals is
2 unknown, and there is no indication that the same individuals perform the duties each time. So
3 even if Plaintiff succeeds in arguing that Open Sesame is an unincorporated association, service
4 of process was not proper.
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6 **VI.**

7 **CONCLUSION**

8 For all the foregoing reasons, Defendants respectfully submit that this Motion to Dismiss
9 be granted in its entirety with prejudice.
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