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JUDGE O'SCANNLAIN

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 CLOSED CORPORATION, a California
12 Corporation,

13 Plaintiff,

14 vs.

15 OPEN SESAME USERS GROUP, DOES 1-
16 1000, SCAPE GOAT,

17 Defendant

) Case No.: CT-0001-DFO

) SUMMARY OF EXPERT TESTIMONY
) FOR LINUS TORVALDS

) DATE: October 23, 1999

) TIME: 9:00 a.m.

) PLACE: CT

1 list or newsgroup. These inputs may then be incorporated into the OSS baseline by some subset
2 of volunteers.

3 7. Most OSS efforts use a web site to distribute the current released and
4 development versions of the project. This site may also be used for archival purposes and access
5 to code releases (in addition to FTP access). The Open OSS effort uses an FTP server in Finland
6 to distribute the latest Open source code and instructions for compiling it.
7

8 8. Code assets (source code, documentation, specifications, etc.) are often
9 contained in a development repository. Typically, read-access to such repositories is open and
10 anonymous. Write-access may be restricted to a subset of the development group.
11

12 9. Message boards which support public, potentially anonymous, posts of
13 new information are utilized for many OSS projects. Typically, such boards are accessed and
14 manipulated through web access as part of a project's web site.
15

16 10. Until recently, the primary mechanism for code dissemination and project
17 information was via NetNews or Usenet. Usenet is a semi-organized, topical, world-wide set of
18 message boards (called newsgroups) that has asynchronous propagation. There are unmoderated
19 and moderated newsgroups, as well as "official" and "unofficial" (alt.*) newsgroups.
20

21 11. Moderated newsgroups employ an individual or group of individuals to
22 monitor messages posted to the newsgroup to prevent abuses. Such moderation of an OSS
23 medium contradicts the point of OSS – all should be permitted to participate and express their
24 ideas without bias. Using a moderated newsgroup to exclude residents of a particular locale
25 would not be practical as exclusion of posts would be nearly impossible to validate as little or no
26 relationship exists between source addresses and geography. Such exclusion efforts would also
27 be easily circumvented by posting to another account or through any one of hundreds of
28

1 newsgroup servers. It would also be perceived as “censorship” in the OSS community, resulting
2 in a chilling effect on participation.

3 12. The existence of moderators creates a dramatic side-effect on newsgroup
4 discussions because the moderators become bottlenecks through which the entire discussion must
5 pass. For an extremely large newsgroup with a high volume of messages, this would greatly
6 slow the rate of discussion.
7

8 13. It is not difficult to create a new newsgroup. New newsgroups are created
9 every day. Even for official (comp) sites, only a limited number of people are needed to vote for
10 the topic before it is approved. Even if a proposed newsgroup doesn’t get enough votes (which is
11 highly unlikely), there is no mechanism to enforce the vote and prevent the establishment of the
12 newsgroup anyway.
13

14 14. The Open group uses an unmoderated Usenet newsgroup (called Open
15 Sesame) as their primary communication mechanism.
16

17 15. Most OSS teams are entirely self-funded. Participants make and charge no
18 money for their efforts. Machine time or network availability is donated by individuals, or the
19 companies for whom the individuals work, knowingly or unknowingly.
20

21 16. Individuals who participate in the Open Sesame Usenet newsgroup do so
22 for an unlimited variety of personal reasons, including dissatisfaction with the operating
23 performance of Views, dislike of Closed’s restrictive business practices, or simply for fun. Not
24 all individuals who post messages share a common goal.
25

26 17. Thousands of OSS development efforts exist around the world.

27 18. Most academic institution research, and a great deal of industry R&D, fits
28 into an OSS model. Many companies that produce proprietary (non-OSS) technologies rely on

1 OSS products to create their commercial products. These companies typically cannot create such
2 products via closed means due to the restrictions on such usage. Typically, this type of use can
3 be divided into three categories: service-based models (e.g. Linus distributors, Cyclic), product-
4 centric models (e.g., Bitstream, Ghostscript), and mixed models (e.g., Cygnus). There are also
5 various licenses that exist in the OSS community, such as (L)GPL, BSD, SCSL, Apple and
6 Ghostscript.
7

8 19. The threat of litigation will have a chilling effect on OSS participation and
9 development, and in turn on industry and Internet innovation.
10

11 E-Mail

12 20. Email is not always reliable. Either the email arrives completely or it does
13 not arrive at all. If the message is not delivered, the sender may be alerted to this fact by a “mail
14 undeliverable” message. For example, users of a Closed Barter TM server for email do not
15 receive mail this way. In addition, some users utilize “gateway” mechanisms to retrieve changes
16 to web sites and posts to newsgroups via email which can further reduce the likelihood that email
17 will be delivered.
18

19 21. There are no “return receipts” for email messages. The best that can be
20 accomplished is a message that informs the sender whether the email was accepted by some mail
21 server at some time. It cannot tell the sender if the message ever got to the desired user in
22 question. These delivery status messages may themselves be unreliable by indicating that a
23 message has been read when, in fact, it has not.
24

25 Newsgroup Message Distribution

26 22. Propagation of messages on the Usenet servers is uneven and unreliable.
27 Just because a post was placed on a site at a given time does not mean that it will continue to be
28

1 there from that point onward. Malicious action, hardware or software failure, and a host of other
2 problems can cause the message in question to be unavailable to readers.

3 23. Off-topic messages (a.k.a. “spam”) have been a problem on many
4 newsgroup sites. Most sites allow the individual users to “tune” what types of, and how much,
5 material they are shown. Participants may filter out certain topics and keywords, most notably,
6 information with respect to Closed. All material posted to the newsgroup is not necessarily seen
7 by participants.
8

9 24. Location of the news or web server does not affect access to OSS data.
10 There are no network boundaries, so physical location of a HTTP or FTP server has nothing to do
11 with user access and use.
12

13 25. Newsgroup participants have no idea where a given server is located
14 geographically.
15

16 26. Mirror servers exist throughout the world (web or FTP) that may carry all
17 or part of a newsgroup’s content. Users of the newsgroup have no control over *what* content
18 mirror servers duplicate and make available for distribution, *where* the servers are located, or
19 *when* they distribute material.
20

21 27. Many so-called “passive” web sites feature discussion forums similar to
22 newsgroups, or otherwise facilitate communal exchange of information.

23 28. Licensing requirements for Open require that source code modifications be
24 made public. This is accomplished by posting the modification incorporated into the Open
25 baseline on the newsgroup. The new baselined version of Open is then posted on the FTP server
26 in Finland.
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