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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLOSED CORPORATION, a California Corporation, Plaintiff, vs. OPEN SESAME USERS GROUP, DOES 1-1000, SCAPE GOAT, Defendant	Case No.: CT-0001-DFO DEFENDANTS' REPLY BRIEF DATE: October 23, 1999 TIME: 9:00 a.m. PLACE: CT

INTRODUCTION

The Plaintiff invites this Court to engage in an unprecedented and fundamentally unfair exercise of judicial imperialism. The Court should, Plaintiff contends, summon to San Jose a random collection of enthusiastic amateurs who are united not by formal organization but by an inconvenient and no doubt annoying distaste for Closed’s flagship product. Those being summoned include individuals who may have worked on creating the allegedly infringing graphic user interface (GUI) and many others who did not. The alleged defendants apparently come from all walks of life in all continents – from Peoria, Perth, Pretoria, Punjab, Prague and Paris, and many other places. The group no doubt includes students, engineers, professors, doctors, unemployed hackers, retired persons, housewives, and maybe even the next Bill Gates. They simply do not constitute an organization in any meaningful sense; they are not an illegal conspiracy; and they are – most clearly – not a successful profit-making enterprise like Closed.

Assuming that Plaintiff succeeded in getting most of these alleged defendants here to the Courthouse in San Jose (or obtained default judgment against them for not showing up), what would the Plaintiff ask this Court to do – other than declare that the Open GUI infringed Closed's patent? Would it ask the Court to:

- Enjoin the Defendants' from licensing the GUI? (A rather futile exercise since they are not engaged in licensing it.)
- Eliminate the offending GUI from the public domain? (How?)
- Disband Open Sesame? (How?)
- Enjoin the Defendants from using the Open OS or the Open GUI themselves?
- Order Ms. Scape Goat and the other defendants to stop speaking out against Views? Or communicating with each other on this subject?
- Order the Defendants to stop thinking about ways to invent around Views?
- Award punitive damages? (There being no basis for a normal damage award against these amateur innovators and their "organization".)

What becomes abundantly clear is that, in the name of Internet novelty, the Plaintiff seeks to summon to this Courthouse with great difficulty, the wrong defendants from afar, to seek mostly wrong (or irrelevant) remedies, all based on the novel and unfair jurisdictional theories created for the occasion. If Plaintiff's patent were found to be infringed, then the right remedy against the right parties would be an injunction and damage award against any corporations which had adopted, used, and offered in the market, PCs loaded with the Open GUI.

OPEN SESAME IS NOT AN UNINCORPORATED ASSOCIATION

"It is elementary that a court may not recognize an association as a legal entity under a statute or, alternatively, determine that a right vests in the individual members of an association unless the association has a distinct, identifiable membership." See Motta v. Samuel Weiser, Inc., 598 F.Supp. 941, 949 (D.Maine 1984). Plaintiff's argument that participation in Open Sesame provides sufficient authoritative criteria to define membership is invalid for several reasons:

First, as an unmoderated newsgroup, Open Sesame has no centralized authority or ability to restrict access. Indeed, anyone in the world can participate via the Internet by reading or posting messages. If a message is "off-topic" or otherwise inappropriate, no mechanism exists to discipline a user for noncompliance or prevent them from participating then or in the future. Because there is no ability to exclude participation in the newsgroup, membership is not defined.

Second, membership cannot be determined from old Usenet archives. Individuals who access Open Sesame do not assent to membership simply by posting messages. Where the "basic and necessary conditions upon which membership in the defendant Association could be predicated are wanting, the rights and liabilities as usually arise from membership in an unincorporated voluntary association cannot be left for their enforcement to such loose contacts as evidenced herein." Motta, 598 F.Supp. at 949 (quoting Johnson v. South Blue Hill Cemetery Assoc., 221 A.2d 280 (Me. 1966)). Because there exists no membership criteria for participating in Open Sesame, participation in the newsgroup cannot characterize assent to membership by participants.

Finally, users may post a message only once, every day, or never visit the site again. Such informal, transitory and attenuated "membership" cannot qualify as an unincorporated association. See California Clippers v. U.S. Soccer Football Assoc. [1]

Next, Plaintiff asserts that newsgroups "require considerable effort and planning to create," and for this reason they should be deemed unincorporated associations. This argument is invalid. First, it is not difficult to create a new newsgroup. If the topic is semi-serious and a hundred people can be convinced to vote for it – out of an Internet population numbering in the tens of millions – the new newsgroup is created. Therefore, a newsgroup's existence is less

[1] 314 F.Supp 1057 (N.D. Cal. 1970).

evidence of effort and planning than of acceptance of a valid topic of discussion by the Usenet community. Second, method of creation is not the standard by which the existence of an unincorporated association is measured. Rather, it is the organizational structure, specifically, its "distinct, identifiable membership," after its creation that is important.

Because none of the Defendants have the ability to prescribe the conditions or qualifications of membership, to enlarge or reduce membership or the scope of activities, to dissolve the group, or do any of the other things that they would be able to do if the newsgroup were an unincorporated association, Open Sesame is not an unincorporated association.

NEITHER OPEN SESAME NOR DOES 1-1000 HAD SUFFICIENT MINIMUM CONTACTS WITH CALIFORNIA TO ESTABLISH PERSONAL JURISDICTION

Traditional jurisdictional analysis requires that a defendant have certain purposeful, "minimum contacts" with the forum state before that defendant can be haled into the forum to defend a lawsuit. See International Shoe v. Washington, 326 U.S. 310 (1945); Burger King v. Rudzewicz, 471 U.S. 462 (1985). However, Plaintiff would ask this court to discard this approach in favor of a new standard that bases jurisdiction not on any actual contacts the defendant has with the forum, but rather on the statistical likelihood that the defendant could have contacts with the forum. This is not the standard.[2]

Plaintiff argues that Defendants purposefully availed themselves of transacting business in California by virtue of a study that claims "14.4% of all World-Wide-Web users" reside in California, thereby making it foreseeable that a "distributed software development might make use of, and benefit from, developers within California.[3] Plaintiff does not show that any developers in California actually *were* involved in developing Open, only that it is *possible* that

[2] Even the decision in Inset Systems v. Instruction Set, 937 F.Supp. 161 (D.Conn. 1996), which has been rejected by most courts as overly broad, based jurisdiction on evidence of actual, multiple "hits" to the defendant's web page by Connecticut residents.

some residents in California *may* be working on *some* distributed software development project or using the product. Not only are these not sufficient minimum contacts for exercising personal jurisdiction, they are not "contacts."

Neither is the existence of a passive website alone enough to find personal jurisdiction. See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997). A newsgroup is akin to a passive web site for the purpose of determining personal jurisdiction.[4] In cases involving passive web sites where personal jurisdiction was found, courts consistently found additional contacts directed at the forum.[5] This is consistent with jurisdictional analysis outlined by the Supreme Court, which has rejected finding jurisdiction where a defendant's only contacts with a forum were the placing of a product into the stream of commerce.[6] Similarly, the Defendants here should not be forced to defend a lawsuit in California simply because mirror servers outside the Defendants' control brought the newsgroup into California and the Open Sesame newsgroup can be accessed by California residents.

Next, Plaintiff argues that personal jurisdiction is proper because Open Sesame "targets" California. This argument fails for several reasons. First, because Open Sesame is an unmoderated newsgroup, it has no means whatsoever to exclude anyone in the world from reading and posting messages. Neither is Open Sesame's content directed exclusively at California residents. Because anyone in the world can access and participate in the site, Open

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[3] Plaintiff's Opening Brief, p.7, lines 9, 12-13.

[4] Barrett v. Catacombs Press, 44 F.Supp.2d 717, 728 (E.D. Pa. 1999).

[5] Panavision Intn'l. L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (attempting to extort money from the Plaintiff, Defendant sent email and made telephone calls to the forum); Bochan v. La Fontaine, 1999 U.S. Dist. LEXIS 8253 (E.D.Va., May 26, 1999) (posting defamatory messages and soliciting business in the forum); Zippo Mfg. Co., 952 F.Supp. at 1126-27 (entering into contractual agreement via email); Compuserve, 89 F.3d at 1263 (entering into a contract with forum 'choice of law' provision); Hasbro, Inc. v. Clue Computing, Inc., 944 F.Supp. 34, 44 (D. Mass. 1997) (using web site to solicit additional commercial contacts with forum residents); Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998) (traveling to the forum to promote the web page).

1 Sesame is not targeting any specific forum.

2 Next, Plaintiff contends that, because Open Sesame could have been created as a
3 moderated newsgroup, it targets California regardless of the fact that it is an unmoderated group.
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5 This argument is invalid. Not only is there no requirement that a newsgroup be moderated, in
6 Open Sesame's case such moderation would greatly encumber the newsgroup because of the
7 volume of discussions that would have to pass through the bottleneck of a moderator. In
8 addition, as email addresses provide no clue as to the geographic location of the sender, there is
9 no practical and effective way for even a moderated newsgroup to screen users from a particular
10 locale. Users from the blacklisted forum could easily circumvent screening measures by using
11 email hosted on servers located outside the forum or simply by supplying inaccurate information.
12 Furthermore, even if effective screening measures could be devised, Defendants would be forced
13 to exclude users from any forum where they faced potential liability. Because the Views product
14 is located everywhere, the only option for Defendants in this case would be not to have a
15 newsgroup at all. This would have a disastrous chilling effect on Internet innovation.
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17 Plaintiff's argument that personal jurisdiction is proper under the "effects doctrine"
18 outlined in Calder v. Jones,[7] is invalid. Because the Defendants cannot limit access or
19 distribution of the Open Sesame newsgroup, this case is clearly distinguishable from
20 Indianapolis Colts, Inc. v. Metro. Baltimore Football Club L.P.,[8] and Calder, where the
21 defendants had control over distribution of their product. Because Views is sold worldwide,
22 California is not the focal point of any harm suffered. Therefore, Plaintiff's reliance on
23 Panavision Int'l,L.P., v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (where plaintiff's harm centered
24 in California because of the presence of the movie industry) is misplaced. Furthermore, courts
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[6] Asahi Metal Industry Co. v. Superior Court ,480 U.S. 102 (1987)
[7] 465 U.S. 783 (1984).
[8] 34 F.3d 410 (7th Cir. 1994)

have "refused to extend the [effects doctrine] to defendants whose contacts are more remote. Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1486 (9th Cir. 1993). "[W]e refused to accept the plaintiff's argument that the effects of libel are felt and jurisdiction exists wherever a corporate plaintiff resides." Id. Similarly, the effects doctrine should not be applied here simply because Plaintiff's headquarters is located in California.

Finally, Plaintiff asserts that because "defendants are sophisticated users of the Internet and technology capable of maintaining complex interactions from a distance[,] [t]his is strong evidence that they would be able to participate in their own defense from their own residence, if not California, with little difficulty."[9] This sorely underestimates the burdens that foreign defendants will face if forced to defend a lawsuit in California. "The Supreme Court has recognized that defending a lawsuit in a foreign country can impose a substantial burden on a nonresident alien." Core-Vent at 1488. Because none of the defendants receive any remuneration for their participation in Open Sesame, a vast majority participate only as a hobby and must hold other, paying jobs that they will be forced to take time off from for this lawsuit. In addition, for many of the defendants, English is not their primary language. For this and many other reasons, exercising personal jurisdiction over Defendants in this case would not comport with "traditional notions of fair play and substantial justice."

THIS COURT DOES NOT HAVE PROPER VENUE OVER THE DEFENDANTS

Courts have held that a web advertisement does not constitute transacting business" in a state. See Hearst v. Godberger, 1997 WL 97097 (S.D.N.Y.) (holding that a web site with national advertisements for legal services did not constitute the transaction of business in New York nor the solicitation of business because it was viewable by persons in all 50 states). To hold otherwise would allow jurisdiction (and venue) in any

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[9] Plaintiff's Opening Brief, p.10, lines 15-17.

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forum in the world. Therefore, Defendants are not "transacting business" and California cannot constitute their "regular and established place of business" under 28 U.S.C. 1400(b).

Plaintiff contends that the Open Sesame newsgroup and the FTP server in Finland constitute an "offer to sell" Open to California residents and that this constitutes a regular and established place of business in California. Despite the obvious fact that Open is free and none of the Defendants are offering to sell it, the existence of Open Source code and instructions on the FTP server do not fit with the definition of a valid offer. Anyone can access the site and download the code, no strings attached. Although those who make modifications to the code are asked to post those changes to the newsgroup, there is no mechanism to enforce this and no evidence that Open Sesame can sue for breach of contract. There is no click license, only the honor system. Even if the FTP server was an offer, it would not constitute a "regular and established place of business" in California any more than offering to sell legal services in a national newspaper or a website viewable worldwide would constitute a regular and established place of business in New York. Id.

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

No court in the United States has recognized email as a valid form of service. Because there is no return receipt to disclose who is actually receiving the email, it is not reasonably calculated to provide actual notice and, therefore, will not constitute proper service under Cal. Code Civ. Proc. 415.30 or 413.30. Furthermore, posting the summons to the newsgroup is not valid service on Does 1-1000 under Cal. Code of Civ. Proc. 413.30 because it is not reasonably calculated to give Does 1-1000 actual notice given the fact that newsgroup messages are removed after a time to make way for new messages and many users don't read all messages, filter messages, or simply never check messages.

Furthermore, given the ease with which a summons could be reproduced, altered and posted on newsgroups and adjacent servers that were not the newsgroups being served, users would have great difficulty determining whether such summons were the genuine article or simply an Internet hoax. Therefore, posting of the summons is not valid service.

Because Open Sesame is not an unincorporated association, it cannot be served. However, even if it were an unincorporated association, service here would be invalid. Plaintiff argues that the subset of developers suffice as the "head" of Open Sesame for purposes of service of process under Cal. Code Civ. Proc. 416.40. This argument is unavailing as the identity of the developers is unknown and emailing them would suffer from the same shortfalls as emailing Does 1-1000. Furthermore, because membership in Open Sesame is unlimited and transitory, different individuals may be performing the developer task each time. Therefore, posting the summons to the newsgroup is not valid service.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that their Motion to Dismiss be granted.

October 19, 1999 By: ___________________________

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