

*Open* is a versatile, highly effective, and free operating system created entirely by volunteers who participate in the Open Sesame unmoderated newsgroup. Plaintiff, Closed Corp., seeks to drag this unknown, random collection of enthusiastic amateurs -- who are united not by formal organization but simply an inconvenient and no doubt annoying distaste for Closed's flagship product, *Views*, -- into court to halt their potentially threatening software innovation. As many of these unknown participants undoubtedly reside outside of California, and even the United States, dragging them into California to defend this lawsuit is inconsistent with both the Constitutional requirements of fairness and traditional principles of jurisdiction.

Rather than go after corporations that are offering to sell PCs loaded with the allegedly infringing *Open* graphical user interface (GUI), Plaintiff's attorneys are seeking to shut down software innovation at its source by dragging unknown and unidentified Open Sesame participants into this California courtroom. Because Plaintiff has no idea who the developers of the *Open* GUI really are, it is seeking to sue them in an anonymous capacity (DOES 1-1000) and suing the Open Sesame newsgroup itself as an "unincorporated association."

Anyone with Internet access and the proper newsreader software may participate in Open Sesame. As an unmoderated newsgroup, there is no membership criteria or any other mechanism to restrict participation or the content of messages. Users are usually anonymous, identified only by email addresses. Because there is no distinct or definable membership, Open Sesame cannot be an unincorporated association under the principles outlined in *Motta v. Samuel Weiser, Inc.*

Other than Scape Goat, who resides in California and was served while speaking out against Closed Corp. at a protest rally, none of the other Defendants have any contacts with California. The Open Sesame newsgroup is hosted on an FTP server in Finland, and although some mirror servers carry the newsgroup in California, none of them are affiliated with or controlled by Open Sesame participants. Recent court decisions such as *Compuserve v. Patterson*, *Cybersell Inc. v. Cybersell, Inc.*, and *Barrett v. Catacombs Press*, make it clear that simply having a web site or newsgroup that is accessible by forum residents via the Internet is not enough to find personal jurisdiction. Because the Defendants have no contacts with California other than a newsgroup and web page that can be accessed by California residents via the Internet, personal jurisdiction over Defendants is not proper in California.

Similarly, because none of the Defendants have received any money or other compensation from California for their participation in Open Sesame, California certainly cannot constitute their "regular and established place of business" as required to find venue under 28 U.S.C. section 1400(b).

Finally, other than Scape Goat, none of the Defendants was properly served in this case. No courts in the United States have recognized email as a proper method of service. Furthermore, due to the transitory nature of the Open Sesame newsgroup, posting the summons to the newsgroup was not reasonably calculated to provide actual notice of the lawsuit as required under Cal. Code of Civ. Proc. 415.50 or 413.30.

For all the foregoing reasons, this case should be dismissed.