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CLOSED CORP. V. OPEN SESAME:
A SIMULATED INFRINGEMENT CASE
ARISING IN CYBERSPACE*

Closed Corporation is a California software company that develops and markets the popular operating system (OS) Views. Views is typically bundled with computer systems and is also marketed directly to consumers, either as a full installation or as an upgrade from an earlier version. Closed also markets a number of business and home applications (e.g., word processing, spreadsheets, Internet browsers) that run under Views. These applications are either copyrighted, patented, or both. Views itself is patented, a patent which Closed vigorously protects.

Starting in the mid-1990s, new releases of Views became increasingly complex and proprietary. Closed adopted the practice of releasing the source code to application developers only with stringent licensing restrictions. Even then, Closed would withhold much of the code. Among other things, these restrictions precluded third-party modifications, modules, plug-ins, and enhancements to the Views OS. As a result, software developers and users became locked into applications developed by Closed and its licensees.

Mostly in response to these restrictive practices, computer engineers and high-end users around the world began developing alternate operating systems. One particularly successful effort was undertaken by an Internet Usenet Group, *comp.os.opensesame*, (Open Sesame).¹ This group, many of whose members are anonymous,

* Prepared by David J. Steele and Karl Manheim.

1. An Internet users' group, or USENET group, is an e-mail distribution system. Once the group is registered and assigned a name, anyone can "subscribe" (i.e., participate) by reading and posting messages to the group. Users are often anonymous, identified only by their e-mail addresses. In the case of Open Sesame, the users' group is hosted on a main server in Finland. User groups are often carried (the messages are replicated) by "mirror servers" located around the world. This reduces Internet traffic to the host server. Operators of these mirror servers typically do not monitor the content of the users'

developed an OS which they call Open.

The Open operating system has many advantages over Views. For one, its source code is completely open. This means that anyone with developer skills can alter the OS to meet unique needs or to improve its functionality for others. Indeed, this is exactly how the Open OS developed. Open started as a rudimentary OS in the public domain and was tweaked and expanded by countless users on the Open Sesame user group. As each modification was posted to the user group, it would be tested and critiqued by others. Modifications deemed useful were then merged into the Open baseline by a small group of developers and posted on the main FTP server for distribution.² In this manner, a highly versatile and functional OS has emerged with limitless potential.

One drawback to Open, until recently, has been the OS's user interface. Views achieved market dominance in the mid-1990s by providing a seamless interface, or shell, between user, OS, and application. Closed's development of a graphical "desktop environment" was central to expansion of the home PC market. This also caused a cultural shift, where end users came to expect graphical interfaces on all their computers and applications.

The loose collaboration of developers on Open Sesame were among the first to recognize this phenomenon. Much effort went into developing a graphical user interface (GUI) shell to run on top of Open. Since the Views GUI shell is based on closed source code, it could not be copied or examined. Nonetheless, members of Open Sesame succeeded in developing a comparable GUI shell. Recent versions of Open have much the same look and feel as Views. Commentators have hailed the Open shell and OS as very user-friendly.

Indeed, within the past year, some well-known computer makers have even begun to preload Open on their machines as an alternate to Views. Because Open is essentially free, this reduces consumer costs and makes the hardware market more competitive.

groups. It is known that Open Sesame is carried on mirror servers at the California Institute of Technology and at Stanford University, among others.

2. The main FTP (distribution) server is located in Finland and hosts a Web site containing the latest official version of the Open source code (including any merged and accepted modifications) and the instructions for compiling it.

Anyone on the Internet can obtain the source code for Open, compile it, and then install it on his or her computer. There are also indications that some commercial companies may soon start selling pre-compiled, fully operating versions of Open, along with documentation and support services. Once this occurs, it is thought that Open will start displacing Views as the operating system of choice on many home and business computers. In the meantime, Open source code and compiling instructions remain free and downloadable from the main FTP (distribution) server and the Open Sesame user group. No one on the Open Sesame users group has ever received any remuneration for his or her contribution.

Closed has watched these developments with some trepidation. While its loss of market share is relatively insignificant at this time, the potential is there to have a major impact. This became painfully obvious to Closed when a number of users held a well-publicized protest at the company headquarters outside of San Jose. The demonstrators demanded refunds on unused copies of Views that came pre-packaged with new computer systems. They each uninstalled Views and replaced it with Open prior to starting and configuring their computers. Since they had neither used their copies of Views, nor voluntarily purchased the product, they now wanted refunds. To avoid a public relations disaster, Closed agreed to refund the bundled price of Views to anyone who returned an unopened copy and signed a form indicating he was using Open as his operating system.

Closed believes that Open infringes on its Views patents. The company has filed an infringement suit in U.S. District Court for the Northern District of California. The complaint alleges patent infringement, unfair business practices, trade libel, and related claims. It seeks an unspecified amount of damages in excess of \$1 million and an injunction against further distribution and use of the Open OS.

On the surface, this is a routine infringement case. What makes it highly unusual, however, is the identity (or lack thereof) of the defendants. Because Open was developed through disassociated collaboration on an Internet users group, there is no single identifiable infringer to sue. Accordingly, Closed has named the Open Sesame users group itself, along with Does 1-1000, and an individual, Scape

Goat. Ms. Goat was one of the demonstrators at the San Jose protest who represented that she was using Open as her OS.

The complaint, in part, alleges as follows:

1. This Court has jurisdiction over this controversy pursuant to 28 U.S.C. § 1338.³ Venue is proper in this District pursuant to 28 U.S.C. § 1400(b).⁴
2. Defendant Open Sesame is an Internet users group whose members, individually and in concert with others, make, use, and distribute a product which literally infringes Plaintiff's patent.
3. Defendants Doe 1-1000 are subscribers to the Open Sesame Users Group and have participated in the unlawful activities described herein. Plaintiff is unaware of the true identities of said defendants, and will amend this Complaint to include their names when they have been ascertained.
4. By virtue of her admitted usage of Open, Defendant Scape Goat is an infringer of the patent. She resides in the Northern District of California.

Closed served the summons and complaint on Scape Goat by personal service when she was at the San Jose protest, but was obviously not able to do so on the other defendants. Instead, Closed effectuated service on Open Sesame by posting a copy of the summons and complaint to the users group itself. Closed contends that this constitutes proper service on Open Sesame pursuant to California Code of Civil Procedure sections 415.40 (service by mail), 415.50 (service by publication) or, in the alternative, 413.30 (other manner of service reasonably calculated to give notice).⁵ As for the Doe defendants, Closed obtained e-mail addresses for several Open Sesame subscribers from the newsgroup's Usenet archive. Closed sent the

3. 28 U.S.C. § 1338 states in subsection (a): "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases."

4. The venue statute, 28 U.S.C. § 1400, states in subsection (b): "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."

5. Under Rules 4(e)(1) and 4(h) of the Federal Rules of Civil Procedure, service on individuals and associations may be made in accordance with state law.

notice via e-mail to those addresses. Some of the e-mail bounced back as undeliverable. Closed does not know, at this time, to whom the e-mail addresses belong, nor where those individuals reside. Closed also published the summons and complaint to an Internet newsletter, *OpenSource*. This on-line newsletter (<http://www.opensource.org>) is read regularly by many Open users. Closed claims that this substituted method of service complies with California Code of Civil Procedure section 415.50 or section 413.30.

As soon as she was served, Scape Goat contacted the Internet Frontier Foundation (IFF) for assistance. IFF agreed to take the case to defend the rights of the Internet community. Lawyers for IFF made a "special appearance" on behalf of all defendants, where they moved to dismiss the case pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure (lack of personal jurisdiction), Rule 12(b)(3) (improper venue), and Rule 12(b)(5) (insufficiency of service of process). More specifically, IFF claims: (1) none of the unnamed defendants have had sufficient "minimum contacts" with the forum state to justify personal jurisdiction; (2) venue is improper in the Northern District because not all defendants live there and the alleged infringing activity did not occur there; and (3) the substituted service of process on the Internet users group and Does 1-1000 was inadequate.

The federal judge assigned to the case set the Motion to Dismiss for an evidentiary hearing. His minute order to the parties stated:

Personal Jurisdiction and venue in this case depends upon the nature of defendants' "presence" within the forum state (California). This requires analysis of where the alleged infringing activity occurred, the nature of that activity, and whether defendants "purposefully availed" themselves of the protection of California laws. These factors, in turn, will require an evaluation of collaborative work over the Internet. This is also important in assessing whether service of process is adequately made by posting notice of the lawsuit to an Internet users group and Internet newsletter.

For the foregoing reasons, the parties are ordered to appear at an evidentiary hearing on October 23, 1999, at

which time they will present sufficient expert testimony to support their contentions regarding personal jurisdiction, venue, and service of process.

Briefs of the parties, together with summaries of their respective expert's testimony, shall be filed with the Court by October 8, 1999, and concurrently served on opposing counsel.

At the evidentiary hearing on October 23, 1999, lawyers for IFF will present their arguments and expert testimony as to why jurisdiction, venue, and service are all inadequate. Lawyers for Closed will argue and present evidence to the contrary. The District Judge may either rule from the bench, or take the matter under submission.