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Defendants' Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF CALIFORNIA

CLOSED CORPORATION, a California Corporation,	Case No.: CT-0001-DFO
Plaintiff,	**DEFENDANTS' MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
v.	
OPEN SESAME USERS GROUP, DOES 1-1000, SCAPE GOAT,	DATE: October 23, 1999 TIME: 9:00 a.m. PLACE: CT
Defendants.	

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 23, 1999, at 9:00 a.m. in the courtroom of the Honorable Judge O'Scannlain, Defendants OPEN SESAME USERS GROUP, DOES 1-1000, and SCAPE GOAT hereby move to dismiss Plaintiff CLOSED CORPORATION's complaint in the above-captioned action.

This Motion is based on the attached Memorandum of Points and Authorities, the Declaration of Dr. Linus Torvalds, and on such oral argument and evidence that may be presented at the hearing of this Motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case illustrates the ways in which the Internet has engendered new forms of collective human interaction. The Internet enables people scattered across the globe to join forces and engage in collaborative projects. At the same time, each contributor to these collaborative projects may preserve his or her own anonymity. The result is a peculiar "virtual association" whose members may be completely unknown to each other or known only by their "handle," or nickname. Such associations lack the hallmarks of traditional associations with respect to organizational structure, membership criteria, physical meeting place, etc. As a result, the legal rights of these virtual associations are difficult to define and nearly impossible to enforce.

The Plaintiff, Closed Corporation (Closed), would have the Court perform this impossible task: to engage in an unprecedented and fundamentally unfair exercise of judicial imperialism. Closed essentially contends that the Court should summon an unidentified and unknown number of Internet users, many of whom are scattered throughout the world, to travel en masse to the Western District of California in order to be harassed by Closed's frivolous claims.

The Defendants, participants in the Usenet newsgroup *comp.os.opensesame* (Open Sesame), come from all walks of life and every imaginable location—Peoria, Pretoria, Perth, Punjab, Prague, Paris, among countless other locations around the world. The group no doubt includes students, engineers, professors, doctors, unemployed hackers, retired persons, housewives, and perhaps even the next Bill Gates. One thing, however, is clear: They do not form an entity capable of being sued or served with process. Defendants are not an identifiable group of people; they are not an unincorporated association; they are not an illegal conspiracy; nor are they a commercial enterprise that profits from their activities, like Closed. As

far as the law is concerned, their disassociated collaboration simply does not give rise to an independent legal entity.

Defendants are merely a random group of enthusiastic amateurs, united only by their common distaste for Closed's flagship product, Views. In an effort to provide a cheaper, more effective product for the benefit of the entire world, Defendants gave their free time and effort toward the creation of an alternative to Views, the operating system software called Open. Defendants have done so without any form of compensation or reward, other than the satisfaction of knowing that they are serving the public good. Closed, fearing that its stranglehold on the operating system software market is now threatened by a more versatile, more effective, and absolutely free product, now seeks to enjoin the public's use of Open by filing suit against—who else—but the public itself.

Those who may be summoned include individuals who may have worked on creating the allegedly infringing graphical user interface (GUI) employed in Open, those who may have merely used Open, and potentially many others who have no involvement in this matter whatsoever. Such is the nature of this action: speculative at best and vexatious to all those involved. Closed even goes so far as to sue members of the general public, such as Ms. Scape Goat, who merely sought to exercise her First Amendment rights by protesting against Closed's monopolistic practices.

Perhaps more importantly, what is patently missing from this suit is the most crucial element of any legal cause of action: an available remedy. Assuming that Closed could somehow summon all, or even most, of these alleged Defendants to the Western District courthouse (or could obtain a default judgment against them for not appearing), what could this Court possibly do, other than declare that the Open GUI has somehow infringed Closed's patent? Could the Court:

- Enjoin the Defendants from licensing the GUI when they are not currently licensing it?
- Enjoin the Defendants from using the Open OS or the Open GUI, even though it is freely available on the Internet?

- Order that the offending GUI be eliminated from the entire Internet?
- Ban the Open Sesame newsgroup's and its participants' right to associate?
- Order Ms. Scape Goat and the other Defendants to stop speaking out against Views, or to stop speaking with each other on this subject?
- Order the Defendants to stop thinking about ways to invent around Views?

What becomes abundantly clear is that Closed is seeking to summon to this courthouse innocent and well-meaning people from scattered parts of the globe, based on novel jurisdictional theories, and for the sole purpose of seeking impossible remedies. Even if Closed's patent has truly been infringed, the offenders are not *comp.os.opensesame* participants or protesters, but the corporations that are currently offering personal computers loaded with the Open GUI on the consumer market.

The Internet does not and should not provide an excuse to abandon the traditional concepts of due process, designed to protect individuals from the unnecessary burdens and risks of being haled into a distant forum with which they have no significant connection. Internet users should not be fair game in every jurisdiction in which an allegedly aggrieved plaintiff may reside. Although the traditional rules on personal jurisdiction, venue, and service of process permit an injured victim to reach a commercial enterprise that uses modern electronic means in its endeavors, this is simply not such a case.

The Defendants are individuals—not commercial entities—many of whom reside outside California and outside the United States. More importantly, *none* of the alleged activities that may have given rise to Closed's specious claims took place in or has any connection to California. Accordingly, Defendants' Motion to Dismiss should be granted with prejudice.

II. QUESTIONS PRESENTED

1. Is an unmoderated Internet Usenet newsgroup, which has no bylaws, office space, funding, employees, or appointed

representatives, and no distinct, identifiable membership, a legal entity capable of being sued in its common name for patent infringement?

2. Do the traditional principles of due process permit finding personal jurisdiction over an individual with no contacts with, or commercial interests in, the forum by virtue of the individual's posting a message on an unmoderated newsgroup hosted outside the United States?

3. Does an individual's participation in an unmoderated newsgroup that is similar to a "passive" Web site, located outside the forum state and not engaged in commercial activity, constitute sufficient minimum contacts with the forum state?

4. Is venue proper under 28 U.S.C. § 1400(b), where Defendants do not reside in the forum and have no regular and established place of business in the forum?

5. Is venue in the forum state proper under 28 U.S.C. § 1400(b) and § 1391(c) for an unmoderated newsgroup whose noncommercial activities are not targeted at the forum?

6. Is the e-mailing of the summons and complaint to several e-mail addresses obtained from the newsgroup archive proper service under California Code of Civil Procedure section 415.30 or section 415.40?

7. Would the answer to Question 6 be affected by showing (*a*) some of the e-mail messages were returned as undeliverable, and (*b*) those that were not returned did not send back a return receipt indicating who actually received notice?

8. Is the posting of the summons and complaint to the Open-Source Internet newsletter a valid publication under California Code of Civil Procedure section 415.40, where *OpenSource* has no list of subscribers, is not published or printed at regular intervals, and has no publisher, printer, foreman, or clerk to create an affidavit as to the time and place of publication?

III. STATEMENT OF FACTS

Closed is the owner and patent-holder of the Views operating system software for personal computers. Closed has filed suit for patent infringement against a Usenet newsgroup, Open Sesame, the unidentified participants of Open Sesame (Does 1-1000), and Ms. Scape Goat, an individual user of the allegedly infringing product, Open.

Open Sesame is an unmoderated Usenet newsgroup. Once a newsgroup is registered and assigned a name, anyone can "subscribe" (i.e., participate) by reading and posting messages to the group. An unmoderated newsgroup has no central structure or controlling entity to coordinate or direct its affairs, exclude others, or limit the posting of messages. Users are often anonymous, identified only by an e-mail address.

Open Sesame is hosted on a news server in Finland. Anyone can participate in the group by posting a message on the host server or on any of the mirror news servers located around the world that carry the newsgroup. The message is then automatically propagated to all of the other servers. This reduces Internet traffic to the host server. Operators of these mirror servers typically do not monitor the content of the newsgroups they carry and the newsgroup participants do not exercise any control over the mirror servers. Open Sesame is carried on mirror servers at the California Institute of Technology and Stanford University.

The newsgroup freely distributes the Open operating system and users participate on a purely volunteer basis. They created Open in response to Closed's increasingly restrictive licensing practices.

Closed would only reveal the source code for Views to those licensees who agreed not to make any modifications, modules, plug-ins, or enhancements to Views—with the result that third-party software developers and users became locked into Closed-sponsored applications. In other words, Closed has acquired its very own highly coveted and highly profitable monopoly.

Naturally, the general Internet community does not like Closed's regime of secrecy and restraints. Various user groups have sprung up, in which participants freely exchange ideas on how to develop alternative operating systems. One of the more successful of these is Open Sesame. Open Sesame participants collaborated to develop the Open operating system entirely on-line by posting their suggestions onto the newsgroup, to be tested and critiqued by others. A core group of users then chose which of these changes to incorporate into the code base and re-posted the newest version of Open to *comp.os.opensesame*. The process was one of continuous innovation.

Some of the Open Sesame participants recognized that it would be important to develop a graphical user interface, if Open were to be useful for most users. They eventually developed a GUI for Open, with substantial independent effort and without any access to the Views GUI, which is based on a secret source code that cannot be examined or copied.

Open Sesame is not individually nor collectively in the business of developing Open for profit. It is simply the Usenet meeting place for a random and self-selected set of innovators. Yet, what Open Sesame has done has potential commercial implications and, more significantly, threatens the commercial dominance that Closed has created for Views and Views-based applications. The Open program and its GUI are freely available in the Internet community. Because of Open's versatility and popularity among users, some well-known computer manufacturers have begun to pre-load Open on their machines as an alternative to Views. This presents a grave threat to Closed's monopolistic grasp on the operating system market. Thus, Closed has brought this desperate action against Open Sesame, its participants—anonymous innovators without any economic stake in Open—and people who use Open, such as Ms. Goat.

Pursuant to this action, Closed personally served Ms. Goat and purportedly served the remaining Defendants by posting its summons and complaint on Open Sesame, by e-mailing its summons and complaint to e-mail addresses found on the Open Sesame archive, and by posting its summons and complaint on *OpenSource*, a Web site dedicated to the development of the Open system. Closed has not demonstrated, however, that *any* of the alleged infringers of its Views software has been given actual notice of this suit. Some of Closed's e-mails were returned as undeliverable, and there is no proof that the remainder reached the intended recipients. Moreover, Closed's posting of the summons and complaint on Open Sesame and *OpenSource* could easily be overlooked or simply ignored by even those individuals who happen to see them by chance.

This case is before the Court on Defendants' Motion to Dismiss (by special appearance) for lack of personal jurisdiction, improper venue, and improper service of process. The Court has set Defendants' motion for an evidentiary hearing.

IV. LEGAL STANDARD

With respect to motions to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, "the plaintiff bears the burden of showing that the court has jurisdiction." *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986). Likewise, once a defendant challenges venue under Federal Rule of Civil Procedure 12(b)(3), "the burden is on the plaintiff to show that venue is proper." *Whiteman v. Grand Wailea Resort*, No. C98-04442, 1999 WL 163044, at *1 (N.D. Cal. Mar. 17, 1999); *accord Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979) ("Plaintiff had the burden of showing that venue was properly laid in the Northern District of California."). However, the defendant has the burden of proving that service of process was insufficient to support a motion to dismiss under Federal Rule of Civil Procedure 12(b)(5). *See Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (9th Cir. 1986).

On any of the above matters, the court may hold "a full-blown evidentiary hearing at which the court will adjudicate the jurisdictional issue definitively before the case reaches trial." *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 145-46 (1st Cir. 1995). In such a situation, the plaintiff must establish jurisdiction *by a preponderance of the evidence*, just as it would have had to do at trial. *See Data Disc, Inc. v. Systems Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

V. OPEN SESAME IS NOT AN UNINCORPORATED ASSOCIATION OR ANY OTHER LEGAL ENTITY CAPABLE OF BEING SUED

Since an "unincorporated association" is the only type of legal entity that Open Sesame could possibly be, Closed has the burden of proving by a preponderance of the evidence that Open Sesame is subject to personal jurisdiction before it can proceed with its action against the newsgroup. *See Data Disc*, 557 F.2d at 1285. Open Sesame is clearly not an unincorporated association—or any other legal entity capable of being sued. Open Sesame, known as *comp.os.opensesame*, is an unmoderated newsgroup. There is no controlling authority that directs its activities or controls membership. It is not an association. It is one among thousands of newsgroups on the Usenet—a virtual bulletin board. Therefore, Open Sesame is no more subject to suit than is an office bulletin board.

Where a federal substantive right is claimed, a federal court must apply federal and not state law in determining what constitutes an unincorporated association for capacity purposes. *See* Fed. R. Civ. P. 17(b); *Associated Students of the Univ. of Cal. at Riverside v. Kleindienst*, 60 F.R.D. 65, 66-67 (C.D. Cal. 1973). Closed alleges infringements of its Views patent, a violation of a federal substantive right. Therefore, federal law must be used to determine whether the Open Sesame newsgroup is an unincorporated association.

An unincorporated association is an organized group comprised of persons who have voluntarily and deliberately become members, are subject to certain rules or bylaws, and are subject to discipline for violations or noncompliance with the rules of the association. *See Yonce v. Miners Mem'l Hosp. Ass'n*, 161 F. Supp. 178, 186 (W.D.

Va. 1958). There are no rules for participating in or mechanisms for restricting access to Open Sesame. Indeed, anyone in the world with Internet access and the proper newsreader software can access the site and read or post messages. An individual may post messages regularly or simply post a single message and never access the site again. If a message posted is "off-topic" or otherwise inappropriate, there is no mechanism for disciplining the user for noncompliance. Thus, there are virtually no rules or bylaws to govern the Open Sesame newsgroup.

Furthermore, a group cannot be recognized as an unincorporated association unless it has a "distinct, identifiable membership." *Motta v. Samuel Weiser, Inc.*, 598 F. Supp. 941, 949 (D. Me. 1984). In *Motta*, self-professed members of an occult fraternity claimed that the fraternity was the rightful owner of copyrights in the writings of Aleister Crowley. *See id.* The court rejected the plaintiffs' claim on the ground that the fraternity was not an unincorporated association and therefore not a legal entity capable of owning the copyrights. *See id.* The court emphasized that an unincorporated association "connotes a well-defined group of legal persons connected by a common purpose or interest [that] affords a court objective criteria by which it may ascertain the membership." *Id.* at 950. The court concluded that the fraternity was not an unincorporated association because it was an "amorphous and attenuated" group and there was no evidence of "any authoritative criteria to determine membership" in the group. *Id.* Without such criteria, "a court cannot grant requested relief to the members of an association." *Id.* The court reached this conclusion despite the fact that the fraternity had regular meetings, membership rituals, doctrines, and appointed representatives. *See id.* at 943.

Similarly, Open Sesame has no centralized authority or distinct, identifiable membership. In fact, Closed has yet to identify *even one* of Open Sesame's purported members. As in *Motta*, those who posted messages to the Open Sesame users group were not subject to any sort of "authoritative criteria to determine membership." *Id.* at 950. Indeed, there was and continues to be no criteria of any kind required for access to Open Sesame. Anyone can access Open Sesame to read or post messages. As such, none of these individuals can

be deemed "a well-defined group of legal persons." *Id.* Because there are no conditions upon which membership in Open Sesame is predicated, membership is not sufficiently definite and determinate to form an unincorporated association.

In addition, members cannot fairly be ascertained from old archives of messages on the Open Sesame newsgroup. Individuals who access Open Sesame do not assent to membership simply by posting e-mail messages. In *Johnson v. South Blue Hill Cemetery Ass'n*, 221 A.2d 280 (Me. 1966), the court held there was no unincorporated association where the necessary conditions upon which membership could be predicated were wanting. *See id.* at 283. There, the purchase of a cemetery lot was insufficient to find that plaintiff had become a member of a cemetery association where no bylaws existed which defined or regulated membership eligibility. *See id.* at 283. In the absence of any membership criteria, an individual does not assent to membership in the association merely by participating in the association's activities, and the rights and liabilities that usually arise from membership in such an association cannot be enforced against that individual. *See id.*

Even if membership in Open Sesame could be ascertained at any given time, it would still be too informal and transitory to qualify as an incorporated association. In *California Clippers, Inc. v. United States Soccer Football Ass'n*, 314 F. Supp. 1057 (N.D. Cal. 1970), the court held that the International Games Committee was not an unincorporated association because it lacked organizational form. *See id.* at 1068. It found that the Committee was "only the most informal and transitory of organizations." *Id.* The court noted that the Committee had no charter, bylaws, articles, office, place of business, mailing address, bank account, assets, or obligations; did not transact any business; and apparently never even met. *See id.*

Similarly, Open Sesame has no charter, bylaws, articles, office, or place of business. It has no mailing address other than an Internet URL and no bank account, assets, or obligations. Open Sesame has never transacted business, and its users have never met as a group. All of these facts are undisputed by Closed.

Moreover, a distinct purpose alone will not provide structure sufficient to qualify a group as an unincorporated association. While

unincorporated associations have been found to exist even where a group lacked bylaws, other "methods and forms" used by corporations were present. The court in *Project Basic Tenants Union v. Rhode Island Hous. & Mortgage Fin. Corp.*, 636 F. Supp. 1453 (D.R.I. 1986), found that a tenants union with no bylaws, elected officers, budget, and "apparently no set group of members" was an unincorporated association, but was careful to distinguish *California Clippers* by pointing out that the tenants union had an office space, funding, and a full-time staff person and was "far from an amorphous or transitory group." *Id.* at 1458. However, Open Sesame has no such office space, funding, or employees, and is clearly a transitory collection of Internet users. Therefore, *Project Basic Tenants Union* is inapplicable to the case at bar.

Accordingly, because Open Sesame is simply a Usenet newsgroup frequented by an unidentifiable and potentially infinite number of Internet enthusiasts, it is not an unincorporated association, nor any other legal entity capable of being sued.

VI. THE COURT LACKS PERSONAL JURISDICTION OVER OPEN SESAME AND THE DOE DEFENDANTS

A federal district court in California will exercise personal jurisdiction to the maximum extent permitted by the Federal Constitution. *See* Cal. Civ. Proc. Code § 410.10. Before subjecting a non-resident defendant to personal jurisdiction, due process requires that the defendant have sufficient "minimum contacts" with the forum state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In addition, the required minimum contacts must be purposeful, so that non-residents may anticipate being haled into court as a result of their activities. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The plaintiff has the burden of showing that the defendants purposefully availed themselves of the benefits and protections of the forum. *See Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992) (holding that once defendant raises the defense of lack of personal jurisdiction, the

plaintiff bears the burden of proving, by a preponderance of the evidence, facts sufficient to establish personal jurisdiction).

Courts generally use a three-part test to determine whether specific jurisdiction may be exercised:

> (1)The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activity in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998).

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

A. Open Sesame and the Doe Defendants Did Not Purposefully Avail Themselves of the Benefits and Protections of California

Courts generally apply a "sliding scale" to determine whether the defendant's Internet contacts with the forum satisfy the "purposeful availment" prong of the minimum contacts test. As a general rule, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet." *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). Personal jurisdiction is almost always held proper for those who clearly do business over the Internet by entering into contracts with forum residents and knowingly and repeatedly transmitting computer files to the forum state. *See id.*; *see also CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (exercising personal

jurisdiction where defendant sold software over the Internet and entered into a distribution contract with forum resident).

At the other end of the scale are those who simply post information on a "passive" Web site that does little more than make the information available to users in foreign jurisdictions. *See Zippo*, 952 F. Supp. at 1124. No sufficient grounds exist for exercising personal jurisdiction in these types of cases. *See, e.g., Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (holding that an advertisement on a passive Web site was insufficient to trigger personal jurisdiction). Between these extremes are cases in which the defendant created interactive Web sites, which allow users to exchange information with the host computer. *See Zippo*, 952 F. Supp. at 1124. Such cases are examined for the level of interactivity and commercial nature of the information being exchanged on the Web site. *See id.*

No court has ever sought to exercise personal jurisdiction over a defendant based solely on his or her activities on a Usenet newsgroup. The reason is clear: The exercise of personal jurisdiction in such a situation cannot possibly pass constitutional muster. Defendants will examine each of the above three categories in turn:

1) whether Open Sesame is "passive" or "interactive,"[1]
2) whether Open Sesame was targeted at California, and
3) whether Open Sesame and its users engaged in commercial activity.

1. The Open Sesame Newsgroup Is Akin to a "Passive" Web Site

In cases involving passive Web sites, courts have typically held that the defendant has not purposefully availed himself of the forum state. *See, e.g., Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th

1. Web sites are distinguished as either passive or interactive. An interactive Web site usually provides some type of service that involves a repeated transmission of computer files over the Internet and may require an Internet user to enter into a contract. A passive Web site, in contrast, merely advertises or displays information, which can be accessed via the Internet. *See* David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Website*, 15 J. MARSHALL J. COMPUTER & INFO. L. 819 (1997).

Cir. 1997); *Bensusan*, 937 F. Supp. at 295. Indeed, the Ninth Circuit has noted that no court has *ever* held that an Internet advertisement alone was sufficient to subject a party to jurisdiction in another state. *See Cybersell*, 130 F.3d at 418. The creation of a Web site, "like placing a product into the stream of commerce, may be felt nationwide or worldwide but, without more, it is not an act purposefully directed toward the forum state." *Bensusan*, 937 F. Supp. at 301.

In *Cybersell*, a Ninth Circuit panel held that an advertiser who posted a passive Web site that was accessible in the forum, but did "nothing to encourage people [in the forum] to access its site," and who did not conduct any commercial activity in the forum, was not subject to personal jurisdiction in the forum state. *Cybersell*, 130 F.3d at 418. The court emphasized that the minimum contacts test requires "'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Id.* at 418.

Like the advertiser in *Cybersell*, Open Sesame has done "nothing to encourage people [in the forum] to access its site" and has not conducted any commercial activity in California. *Cybersell*, 130 F.3d at 418-19. Open Sesame is akin to a passive Web site in that it is completely free and accessible to anyone with Internet access. It does not encourage or solicit California residents, nor does it enjoy any of the particular benefits or protections of California. Open Sesame has never entered into any contract with anyone in California, nor has it ever done business with California residents. Significantly, Defendants have no control over who unilaterally accesses Open Sesame and are not even technologically capable of denying a California resident free access to the newsgroup.

In cases involving passive Web sites where personal jurisdiction has been exercised, the courts have consistently found additional contacts directed at the forum. *See, e.g.*, *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998) (attempting to extort money from the plaintiff, defendant sent e-mail and made telephone calls to the forum); *CompuServe*, 89 F.3d at 1263 (defendant entered into a contract containing a forum "choice of law" provision); *Bochan v. La Fontaine*, 68 F. Supp. 2d 692 (E.D. Va. 1999) (defendant posted defamatory messages and solicited business in the forum); *Blumenthal*

v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (defendant traveled to the forum to promote Web site); *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 44 (D. Mass. 1997) (defendant used Web site to solicit additional commercial contacts with forum residents); *Zippo Mfg. Co.*, 952 F. Supp. at 1126-27 (defendant entered into contracts with forum residents via e-mail).

Here, no such additional contacts exist. The mere fact that Open Sesame is carried on mirror servers at Stanford and California Institute of Technology is not a sufficient basis to exercise personal jurisdiction, because such mirror servers are not controlled or directed by Open Sesame. They are merely replicas of the main server in Finland and, like a television, do not physically represent the information and people involved. Therefore, Open Sesame should not be subject to personal jurisdiction in California.

This approach is consistent with traditional minimum contacts analysis. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (plurality) (rejecting contention that placing a product in the stream of commerce is enough to establish personal jurisdiction). Mere fortuitous or unilateral conduct by a user in bringing the product into the forum does not meet the "purposeful availment" requirement. *See World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (holding that a defendant's contacts with the forum should be such that he should reasonably foresee being haled into court there).

As in *Asahi*, Defendants here merely placed their messages into the "stream" of the Internet for all who wish to see them. They have no control over Open Sesame messages beyond that initial step. Moreover, it is not reasonably foreseeable that Defendants should be subject to suit in California, a forum with which they have no significant contacts. Their contacts with California are no greater than their contacts with any other state—or any other part of the on-line world. Accordingly, it is evident that since Defendants have not purposefully availed themselves of California's benefits and protections, they should not be subject to suit there.

2. Open Sesame Does Not Target California

In *Barrett v. Catacombs Press,* 44 F. Supp. 2d 717 (E.D. Pa. 1999), the court held that merely posting messages to Usenet newsgroups accessible in the forum was akin to the maintenance of a passive Web site and therefore insufficient to establish personal jurisdiction in the forum. The court noted that the defendant "did not participate in any on-line interactions such as the acceptance of information from forum residents" nor did she use her Internet posts "to encourage contacts with forum residents." *Id.* at 728. The court also noted that the defendant's postings were of a non-commercial nature, distinguishing her from the "commercial entrepreneurs in other Internet cases who have actively availed themselves of the privilege of conducting business in the forum state." *Id.*

The present case is indistinguishable from *Barrett.* Since Open Sesame is an unmoderated newsgroup, anyone on the Internet can access the site and either post messages or simply read what others have posted. Open Sesame, being inherently non-commercial, does not encourage posts from any particular forum, including California, nor does it selectively reject any. All messages are automatically forwarded to mirror newsgroup servers, which in turn propagate them to additional servers around the world. Thus, there is no way Defendants could possibly target California.

Likewise, the Open operating system itself is not targeted at California (or at Views in particular). On the contrary, it is designed to be the most flexible, broadly applicable, and customizable operating software in order to allow users to modify it to fit their individual needs, regardless of where they reside or what operating system they currently use.

The court's decision in *Panavision*, 141 F.3d 1316, is thereby distinguishable. In that case, the defendant deliberately registered Panavision's trademarks as domain names in an attempt to extort money from Panavision in exchange for the valuable domain names. Applying the "effects doctrine" articulated in *Calder v. Jones*, 465 U.S. 783 (1984) (finding purposeful availment where the defendant's conduct was aimed at or had an effect in the forum state), the court concluded that defendant had purposefully availed himself of

California because he knew that his conduct would have the effect of injuring Panavision in California. *See Panavision*, 141 F.3d at 1322. Indeed, the subject domain names in *Panavision* had no real commercial value to anyone other than Panavision, a California corporation.

In stark contrast, Open provides a very powerful and flexible OS that can be used worldwide, not just in California. And since Views is sold throughout the world, any purported injury could not be concentrated in California. Also, Open can be used to replace any operating system, not just Views. Therefore, the development of Open could not possibly be aimed expressly at California or Views.

In addition, the effects doctrine has been narrowly construed by most circuits. *See, e.g.*, *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 256 (3d Cir. 1998) (agreeing with First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits in holding that jurisdiction under *Calder* requires more than a finding that the harm is primarily felt within the forum). The Third Circuit has held that the holdings in *Panavision* and *Calder* are limited to their facts—the unique relationship between the motion picture industry and the forum. *See id.* at 265. The defendant must expressly aim his or her tortious conduct at the forum such that the forum can be said to be the "focal point" of the tortious activity. *See id.* Unlike the motion picture industry in *Panavision*, which provides a unique and concentrated market for film cameras, Open Sesame is accessible to users worldwide. Neither Open nor Views is uniquely related to California. Therefore, California cannot be deemed the focal point for any alleged infringement.

The effects doctrine is simply inapplicable to the present case. Although Open was initially developed as an alternative to Views, it does not target Views specifically. While providing a better product inevitably results in some adverse effect to a competitor, this is not the type of activity required to trigger the effects doctrine. Because neither the Open product nor the Open Sesame newsgroup targeted California, this factor also weighs against finding personal jurisdiction. *See Bensusan*, 937 F. Supp. 295 (holding that defendant's non-directional Internet activity was insufficient to support personal jurisdiction).

3. Defendants' Participation on Open Sesame Is Not a Commercial Activity

The Supreme Court long ago held that the "commercial" nature of an individual's contacts with the forum is an important factor for determining whether the defendant purposefully availed himself of the forum state. *See Kulko v. Superior Court*, 436 U.S. 84, 101 (1978). This case does not involve any commercially motivated activity. None of the Defendants has received any remuneration for his or her participation in the Open Sesame newsgroup, nor will any of them do so in the future. Indeed, there has been no sales activity at all involving Open or its GUI—it remains free to download for anyone with Internet access.

This is in stark contrast to most cases where personal jurisdiction for Web-based activity has been found. In the vast majority of these cases, the defendants were engaged in some kind of clearly commercial activity over the Web. *See, e.g.*, *CompuServe*, 89 F.3d at 1257 (defendant entered into a contract to sell software over the Internet); *Zippo*, 952 F. Supp. at 1119 (holding personal jurisdiction should be exercised in proportion to the quality and nature of the commercial activity exercised over the Internet); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996) (advertising subscriptions to its mailing list). Since Defendants have not engaged in any clearly commercial activity, this factor cannot support the exercise of personal jurisdiction.

B. The Exercise of Personal Jurisdiction over Open Sesame and the Doe Defendants Would Be Unreasonable

Satisfying the "purposeful availment" tests does not end the due process inquiry. Courts must also evaluate the fairness and reasonableness of asserting personal jurisdiction in light of the following factors: (1) the defendants' burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy,

and (5) the common interests of all sovereigns in promoting substantive social policies. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

1. Defendants' Burden of Appearing

As the Supreme Court emphasized in *Asahi*, "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness" of jurisdiction. *Asahi*, 480 U.S. at 114. The Open Sesame newsgroup is accessible to anyone in the world with Internet access. Other than Ms. Scape Goat, Closed has not established that any of the Defendants reside in California. Many undoubtedly reside outside California and outside the United States. Having to defend a potentially protracted lawsuit in California will impose a substantial financial burden on those Defendants residing outside California. In addition, none of the Defendants receives any remuneration from his or her work on Open to help offset the costs of defending a suit in a distant forum. Accordingly, this factor weighs against the exercise of jurisdiction.

2. California's Interest in Adjudicating the Dispute

Unlike more traditional patent infringement cases, there is no physical situs here. Rather, because the alleged infringement occurred over the Internet, which has no physical boundaries, California's interest is no stronger than any other forum in the world. If any jurisdiction in the world should have an interest in adjudicating this matter, it must be Finland, where the main server is located. Moreover, this is not the type of case where key witnesses and evidence necessary for adjudication of the dispute are located in the forum.

3. Plaintiff's Interest in Obtaining Convenient and Effective Relief

Closed's alleged injury was not centered in California. While Closed's headquarters are located in California, its Views software and the Open operating system are used around the world. Therefore, it would not be a significant burden for the Plaintiff to litigate this dispute in another forum.

4. Judicial Economy

Dragging a host of *non*-commercial defendants—who may be far away or foreign—into a forum with which they have no special connection is neither efficient nor reasonable. Rather, the most efficient resolution would be to proceed against the commercial entities that are selling the allegedly infringing GUI.

5. Social Policy

The Internet is a global phenomenon. As such, different countries have their own interest in regulating Internet activity. Adopting a very liberal test for jurisdiction with respect to activities that take place entirely on the Internet will therefore result in Defendants' being subjected to double (or multiple) liability in different forums. This issue is particularly serious where non-commercial defendants are involved. In this case, the problem could be avoided if Closed confined its efforts to the domestic U.S. manufacturers who loaded the allegedly infringing Open GUI.

Certainly, it would not be in the interest of foreign sovereigns to have their citizens dragged into U.S. courts in order to defend themselves against precarious lawsuits such as this. Based on the above factors, the exercise of personal jurisdiction over the Defendants is clearly not reasonable.

VII. VENUE IS IMPROPER AS TO THE DOE DEFENDANTS AND OPEN SESAME

Section 1400(b) of Title 28 of the United States Code states that "[a]ny 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." 28 U.S.C. § 1400(b) (1994).

A. Venue Is Improper for the Doe Defendants Under 28 U.S.C. § 1400(b)

For individual defendants in a patent infringement case, § 1400(b) is the exclusive provision for determining venue. Therefore, to establish proper venue, the plaintiff must show that each of the

Doe Defendants either: (1) resides in the Western District of California, or (2) has committed acts of infringement *and* has a regular and established place of business here.

Closed has not shown that any Open Sesame user or user of the Open software, other than Ms. 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. Therefore, every other Defendant could potentially reside outside of California until proven otherwise.

As to the second prong, even if we assume arguendo that Open infringes Views, the Western District of California would still be an improper venue because Closed has failed to establish that any of the Doe Defendants "has a regular and established place of business" in this District. The mirror server at Stanford cannot possibly be a regular and established place of business because it is not within the Defendants' control. In addition, no commercial activity or economic benefits flow back to the Open Sesame users from the mirror servers. In addition, there is no contractual agreement or funding between the owner of the Stanford mirror server and any of the Defendants. Therefore, the Western District of California is an improper venue for the Doe Defendants.

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

Should the Court deem that Open Sesame is an unincorporated association, 28 U.S.C. § 1391(c) supplements § 1400(b) in determining proper venue for corporations and unincorporated associations. *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990); *see also Denver & Rio Grande W. R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556 (1967) (holding that § 1391(c) applies to unincorporated associations). Section 1391(c) states:

> For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial

> district in which it is subject to personal jurisdiction at the time the action is commenced.

28 U.S.C. § 1391(c).

Therefore, venue is only proper if this Court can exercise personal jurisdiction over Open Sesame. To establish personal jurisdiction, the Plaintiff has the burden of showing, by a preponderance of the evidence, that Open Sesame purposefully availed itself of the protections and benefits of the forum. *See Carteret Sav. Bank*, 954 F.2d at 146. Under the same reasons discussed in Part VI, *supra*, the Open Sesame newsgroup has not purposefully availed itself of the benefits and protections of California such that the exercise of personal jurisdiction would comport with due process. Accordingly, venue is also improper.

VIII. SERVICE OF PROCESS ON THE DOE DEFENDANTS AND OPEN SESAME WAS IMPROPER

Open Sesame and the Doe Defendants were purportedly served by Plaintiff in three ways: (1) by posting the summons and complaint to Open Sesame, (2) by posting the summons and complaint to the *OpenSource* Web site, and (3) by e-mailing the summons and complaint to the e-mail addresses of past Open Sesame users. For the reasons outlined below, all of these forms of service are improper.

To constitute valid service of process, two tests must be met. First, the method of service must be authorized by the applicable rule or statute (in federal courts, Federal Rule of Civil Procedure Rule 4). *See Marshall v. State*, 544 N.Y.S.2d 437 (Ct. Cl. 1989). Second, 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 (1950).

Under Federal Rule of Civil Procedure Rule 4(e), service upon an individual may be effected either (1) pursuant to the law of the state in which the district court is located, or (2) by delivering a copy of the summons and complaint to the individual personally, by

leaving a copy of the summons and complaint at the individual's residence, or by delivering a copy of the summons and complaint to the individual's agent for receiving service. *See* Fed. R. Civ. P. 4(e). Since Closed did not employ any of the methods under (2) above, its methods of service must comport with California law.

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 was defective because Rule 5(b) stated that such papers had to be served personally or by U.S. mail); *Erbacci, Cerone & Moriarty, Ltd. v. United States*, 166 F.R.D. 298 (S.D.N.Y. 1996) (holding that Rule 5(b) does not authorize service by fax). *But see Calabrese v. Springer Personnel of N.Y., Inc.*, 534 N.Y.S.2d 83 (Civ. Ct. 1988) (permitting service by fax under New York law given widespread use and reliability of fax machines).

On the rare occasion that an alternative method of service has been allowed, courts usually only uphold it 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 Nat'l Bank v. Iran Power Generation & 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.

However, courts have rejected alternative methods of service not specifically authorized by statute, even where the opposing party received actual notice. *See Marshall*, 544 N.Y.S.2d at 438. As discussed below, none of the methods employed by Closed is authorized by federal or California rules governing service of process. Therefore, even if the Defendants were given actual notice (which has not been proven), the alternative methods of service employed by Closed in this case do not constitute proper service.

A. E-mailing the Summons and Complaint to E-mail Addresses Found in Open Sesame Was Not Sufficient Service of Process Under California Code of Civil Procedure Section 415.30

No court in the United States has recognized e-mail as a proper method of service. Indeed, many courts have recently held that e-mail is *not* a sufficient form of service for complying with Federal Rule of Civil Procedure 4. *See Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). In this case, Closed did even not know the identities of its recipients when it e-mailed copies of the complaint and summons to addresses listed in the Open Sesame archive. Indeed, many of the messages were returned as undeliverable, demonstrating how unreliable this method truly is. This attempted "service by spam" cannot constitute proper service of process because it is not reasonably calculated to provide actual notice.

Furthermore, even if e-mail did constitute valid service of process, it would not be proper in this case. California Code of Civil Procedure section 415.30, which governs service of residents by mail, only permits the plaintiff to mail the defendant when it is making a request for waiver of service. *See* Cal. Civ. Proc. Code § 415.30 (1973). It does not authorize service by mail *per se*. In the absence of the Defendants' written waiver, the Plaintiff must serve the Defendants in a manner more reasonably calculated to provide actual notice. *See id.* Perhaps Closed should first ascertain the identities of the alleged infringing parties of its Views software before it seeks to hale them into court.

California Code of Civil Procedure section 415.40 permits service by "mail" upon individuals located outside the state, but a return receipt is required. *See* Cal. Civ. Proc. Code § 415.40 (1973). So even if service by e-mail were permitted by courts, which it is not, it would not constitute valid service under section 415.40 because no return receipt is available for e-mail. While the plaintiff may argue that the "mail undeliverable" message provides such a function, this argument is not determinative. Undeliverable messages merely indicate that the e-mail did not reach its intended destination on that particular occasion. They do not indicate whether or not the recipient received actual notice.

Furthermore, even if an e-mail is not bounced back to the sender, there is no way of ascertaining who ultimately received the message without some kind of *signed* return receipt. Just as postal mail or faxes can be delivered to the wrong place due to typos or misrouting, so too can e-mail messages. It is because of this possibility that return receipts are required for postal mail in the first place. The return receipt usually carries the signature of the person accepting delivery so the success of service may be ascertained. No such signed declaration of delivery is present here. Therefore, Plaintiff's e-mailing of copies of the summons and complaint to unknown e-mail addresses from the newsgroup archive does not constitute proper service.

B. Posting the Summons and Complaint to Open Sesame Was Not Sufficient Service of Process Under Federal Rule of Civil Procedure 4(h) and California Code of Civil Procedure Section 415.40

Since Open Sesame is not an unincorporated association, it is not an entity that can be served pursuant to the Federal Rules of Civil Procedure. However, if the court should find that Open Sesame is an unincorporated association, Federal Rule of Civil Procedure 17(b) states that an "unincorporated association . . . may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." Fed. R. Civ. P. 17(b).

Pursuant to Federal Rule of Civil Procedure 4(h), service on an unincorporated association may be effected as follows: (1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or (2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof. *See* Fed. R. Civ. P. 4(h).

In the instant case, there is no officer or agent authorized by appointment or law to receive service for Open Sesame. Membership is unrestricted, unlimited, and transitory. While a small group of developers incorporate changes into the Open base code, the identity of these individuals is unknown, and there is no indication that the same individuals perform these duties each time. So even if Plaintiff succeeds in arguing that Open Sesame is an unincorporated association, service of process was not proper under Rule 4(h).

Under California Code of Civil Procedure section 416.40, an unincorporated association may be served by delivering a copy of the summons and of the complaint: "(b) . . . to the person designated as agent for service of process as provided in Section 24003 of the Corporations Code or to the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process; or (c) when authorized by Section 15700 or 24007 of the Corporations Code, as provided by the applicable section." Cal. Civ. Proc. Code § 416.40.

To receive Closed's service of process, an individual has to access the Open Sesame newsgroup and open the *specific* message containing the copy of the complaint and summons. However, this message is in no way targeted at the purported patent infringers. New visitors may receive Closed's notice even though they have never participated in the newsgroup before, while long-time users may never receive notice simply because they did not visit the site. Messages posted on newsgroups are automatically removed after a time to make room for new messages. Furthermore, the propagation of messages from a primary newsgroup server to mirror servers is not always reliable. There is no way to know with any degree of certainty whether the notice has reached a defendant (or rather, whether the defendant received the notice). Therefore, posting notice on Open Sesame is not reasonably calculated to provide actual notice and cannot constitute valid service.

C. Posting the Summons and Complaint to Open-Source Was Not a Valid Publication Under California Code of Civil Procedure Section 415.50

Service by publication is authorized only where the court finds that the party to be served cannot with reasonable diligence be served in any other manner. *See* Cal. Civ. Proc. Code § 415.50(a). Section 415.50 says that "[e]xcept as otherwise provided by statute, the publication shall be made as provided by Section 6064 of the Government Code." *Id.* The specific requirements for publication of notice are determined by California Government Code sections 6060 to 6066. Section 6060 states:

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

Cal. Gov. Code § 6060.

California Government Code section 6000 defines a "newspaper of general circulation" as

> a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement.

Cal. Gov. Code § 6000.

OpenSource is exclusively an Internet newsletter. Unlike more traditional print media, it is not disseminated to a list of subscribers. Although some Internet publications can only be accessed by paying subscribers, *OpenSource* is open to anyone who wishes to access it. Therefore, there is no set list of subscribers, and definitely no list of "paying subscribers" as section 6000 dictates. Therefore, *OpenSource* is not a "newspaper of general circulation" as required by section 6060.

Furthermore, *OpenSource* is not "established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given." Cal. Gov. Code § 6000. While Closed may argue that *OpenSource* is published at regular intervals because it can be accessed from the Internet at any time, this does not satisfy the requirement. While traditional print magazines may be purchased twenty-four hours a day in some convenience stores, this does not automatically mean that such magazines are published at regular intervals. This criterion is determined by how often new issues are produced and disseminated in the area where notice is to be given. Unlike traditional print media, Internet newsletters may be updated continuously throughout a week, a day, or even an hour and may be instantaneously available to anyone in the world with Internet access. Such volatile and unpredictable content changes do not meet the "regular intervals" requirement of section 6060. Therefore, the *OpenSource* newsletter does not satisfy the requirements of California Code of Civil Procedure section 415.50.

Even if *OpenSource* did meet the requirements of California Government Code section 6000, service of process in this case would still be improper. California Code of Civil Procedure section 417.10(b) requires proof of service by publication pursuant to section 415.50 be made by "affidavit of the publisher or printer, or his foreman or principal clerk, showing the time and place of publication." Cal. Civ. Proc. Code § 417.10(b). Since the *OpenSource* newsletter has no publisher, printer, foreman, or clerk, service by posting to *OpenSource* cannot possibly be proper.

IX. CONCLUSION

For all the foregoing reasons, Defendants respectfully request that their Motion to Dismiss be granted with prejudice.

Dated: October 11, 1999

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