6-1-2001

Opinion

Richard A. Posner

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT *

CLOSED CORPORATION, a California Corporation, Plaintiff and Appellee, v. OPEN SESAME USERS' GROUP, Defendant and Appellant.	Case No. CT-0001-RAP OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF CALIFORNIA

DAIRMUID O'SCANNLAIN, CIRCUIT JUDGE, PRESIDING[1]

ARGUED AND SUBMITTED

DECEMBER 9, 2000—PASADENA, CALIFORNIA

FILED DECEMBER 9, 2000

Before: Hon. Richard A. Posner, Circuit Judge[2]
United States Court of Appeals for the Fourteenth Circuit

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* The jurisdiction of the Fourteenth Circuit extends to cases tried under the auspices of The Program for Law & Technology at California Institute of Technology and Loyola Law School. This appeal was heard as part of the "At The Crossroads Program" held at Caltech on December 9, 2000. This opinion is the lightly edited text of the oral opinion that Judge Posner delivered at the end of the oral argument on December 9, 2000.

1. Circuit Judge of the Ninth Circuit, sitting by designation.
2. Circuit Judge of the Seventh Circuit, sitting by designation.

COUNSEL

Terrence P. McMahon, Monte M.F. Cooper, Orrick, Herrington & Sutcliffe, LLP, Menlo Park, California, attorneys for the plaintiff-appellee.

Don Baker, Baker & Miller, LLP, Washington, D.C., attorney for the defendant-appellant.

SUMMARY

Affirming a decision of the District Court denying Appellant's Motion to Dismiss under Fed. R. Civ. P. 12(b) for lack of personal jurisdiction, venue, and improper service of process. The District Court certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). The Court of Appeals granted discretionary review under Fed. R. App. P. 5.

OPINION

POSNER, Circuit Judge:

This is a suit by Appellee, Closed Corporation, against Appellant, Open Sesame Users' Group, and others. The suit is for patent infringement. Closed, the manufacturer and patentee of a graphical user interface of its operating system, claims that the Defendant is infringing this GUI. I emphasize that the case is in a very preliminary posture and nothing that I'm going to say should be understood as expressing any view about the merits of the case—whether there has been infringement, whether there has been willful infringement, whether there might be a defense to a charge of infringement, and what kind of relief might be appropriate if there was an infringement. The case is before me on an appeal from the denial by the District Court of a motion to dismiss the suit as having been brought against an entity, this users' group, that is not suable, as having failed to come within the jurisdiction of the District Court, and as having been initiated with improper service of process on the Defendant.

The facts, as they have been developed at this stage, are very rudimentary, very skimpy, and I can summarize them very briefly. Closed Corporation is the manufacturer and seller of the dominant

operating system for use in personal computers, and as I said, it has patent protection on a part of this operating system. The Defendant is a counterpart, a parallel, to the well-known Linux group. This Open Sesame group consists basically of a Web site on which members of the group, volunteers from all over the world, post suggested improvements to an operating system initially put on the Web, presumably by the anonymous founders, the masterminds, the controlling group of this rather amorphous users' group that is the Defendant. The Defendant could be regarded as more of a movement than a group. It's one of the Open Source movements. It believes that the source code for an operating system should be in the public domain, rather than being proprietary, and it wants to make it easily and widely available by publishing it on the Open Sesame Web site, thus enabling anybody in the world who wants to work on the operating system created from this source code to do so. Anybody in the world can post on the Web site suggestions for improving the operating system. A small group of developers, also unnamed and anonymous, screen suggested improvements to the operating system and decide which ones will be incorporated in the next version.

The principal issue on this appeal involves not the issue of jurisdiction or the issue of service of process, but the issue of the suability of the Open Sesame Users' Group. It's not a corporation, it's not a partnership, it's not a proprietorship, it's not a collection of known individuals, it's not a union, and it's not a government agency. It doesn't fit any of the conventional pigeonholes of suability. Rule 17(b) of the Federal Rules of Civil Procedure does authorize suits against unincorporated associations, however, so the question then is whether this users' group, which is basically some unknown people who are more or less supervising the evolution of this operating system by screening the suggestions that are posted on the Web, should be classified as an association. After listening to the argument, and reading the briefs and the other papers, I am comfortable with the idea that the association should be, at least provisionally, suable. It would be premature to terminate this litigation at this stage just because of the amorphous character of the association. If the allegations in the complaint are true, and they may well be—that remains to be determined but certainly I have no basis for supposing them false—a group of people is trying to destroy the valuable intellectual

property of a major corporation in California. It is trying to hurt the corporation by using its patented property to create a rival operating system, which it no doubt hopes will someday become the standard operating system. Already this operating system is being loaded onto computers sold in competition with the computers that load Closed Corporation's operating system. There ought to be a remedy for this misconduct. It ought to be possible for the victim of this kind of wrongful conduct at least to get into court and have an opportunity to find out exactly who is doing this and how it might be stopped.

I see the association as a kind of placeholder for the actual infringers of the patent, who will be identified in the course of the litigation. If the litigation is permitted to continue, at least for the present, then it will be possible for the Plaintiff, using the tools of pretrial discovery, to find out who the small group of developers is that screens the Web site, screens suggestions for improvements in the operating system, and thus is responsible for the evolution of this operating system toward commercial viability. There may be a mastermind corresponding to Mr. Torvald of the Linux Open Source group, or there may be other individuals who are particularly responsible for the alleged infringement of the GUI. Were I to reverse Judge O'Scannlain and throw the case out now, there would be no feasible way in which the Plaintiff could discover who the actual infringers were. Mr. Baker, in his very able argument, pointed out that there might be alternative remedies that Closed could pursue. It might be able to sue as patent infringers the computer manufacturers that are loading the Open Sesame operating system. It might be able to sue commercial spin-offs that appear, corresponding to Red Hat, which has commercialized the free Linux operating system. But there are literally thousands of manufacturers of computers who are potential infringers. In addition to that, it's entirely possible that infringement would occur on a large scale without any kind of corporate intermediation simply by individuals' downloading the Open operating system from the Open Sesame Users' Group Web site onto their personal computers. A person who did that would be an infringer, but it wouldn't be feasible for Closed to go after all those people.

It may turn out, as the litigation proceeds, that not only will Closed be able to identify individuals who are the responsible parties for the alleged infringement, but also that the association is not an appropriate party Defendant after all. It may be that its membership cannot be ascertained, or its membership is so heterogeneous that it would be inappropriate to try to impose legal expenses or damages on persons who might be loosely described as the members. But the issue of appropriate relief should not be determinative when the question is simply whether the case can remain in the court for development of facts. We're very far from any kind of injunctive or damages remedy. I do have concerns about how such an association can organize effectively to defend itself against a suit. But I also notice that Mr. Baker, a very distinguished, and I assume a pricey lawyer (I say this without disrespect), has been retained, perhaps by the shadowy leading group of Open Sesame users. So they have at least been able to appear in court and defend themselves effectively. Again, as the case proceeds, if individuals are identified who become appropriate additional defendants, they will be able to retain counsel as any Defendant can. As I say, the association itself may lack sufficient structure to defend effectively, but that may not be critical. It is very important, getting back to my initial point in closing this discussion of the suability issue, that persons who are doing harm for which the law normally grants redress should not be permitted to escape the clutches of the law simply by not revealing their membership, not having official members, not having a physical office, and not organizing themselves in the conventional legal forms such as partnership and corporation. They cannot, by these devices of concealment, escape legal liability.

The other two issues, the issues of jurisdiction and service, are simpler and fall into place quite rapidly. The question whether a person should be suable in a particular state or other jurisdiction—in other words is it reasonable to haul these people or this association into the courts of California?—is a question that doesn't lend itself to rules or categorical statements. It is simply a question, given that someone has caused a harm somewhere, of whether the circumstances are such as to make it reasonable to force the person to defend in what may be a remote, unfamiliar forum. That issue is considerably simplified here by the allegations of the complaint, which

charge the Defendant with willfully infringing the patents of this corporation that has its principal operations in California. I expressed concern during the argument that the allegation of willful infringement may be just a flourish in the complaint and will not be sustained by the proof. It is possible for an accidental infringement to have different implications for personal jurisdiction than a willful infringement will have. But it was the burden on Open Sesame to put Closed Corporation to its proof of willfulness if Open thought this an important consideration in determining jurisdiction. By not doing so, Open put this court in a position where I have to assume that there is at least a colorable good-faith basis for a claim that this infringement is willful. If it is willful, it means that the people who are infringing this GUI patent know they're doing it. They know they are infringing someone else's property. And they know that the property they're infringing is located—to the extent intellectual property has any physical site—in California. It seems to me that if you deliberately set about to do an act that you know is going to cause harm in a specific place, however remote it is from where you are at the moment, you can reasonably expect to be hauled into the courts of that place if your victim decides to sue.

Finally, service of process is almost a nonissue in this case. The purpose of requiring the serving of process on a Defendant is to provide him with unequivocal notification that he's being sued, so that he can take steps to defend himself and not risk a default judgment. In the old days service was accomplished by physical delivery of the complaint and summons to the Defendant. The debates over service have involved situations in which personal service, and hence actual notice, were not feasible. The question then was whether notice by publication in a newspaper, for example, would have a sufficient probability (though less than 100%) of bringing news of this suit to the Defendant that it should be permitted because of the infeasibility of actual notice. That's not the issue here. This is a case of actual notice unquestionably achieved by the only feasible means. You are dealing with people whose names you don't know, so you're obviously not going to be able to send them a registered letter, or send a process server to their home or office. What you do know is their Web site—their Web site that the leading figures in the evolution of this open operating system undoubtedly visit daily or almost daily.

So when they see on the Web site a complaint, they have actual and timely notice that they are being sued.

There is one qualification; because of hackers, jokers, and the like, what appears to be a complaint, even on proper judicial stationary, might actually be a practical joke. It could be a serious practical joke because it wouldn't be that difficult for hackers to post plausible-seeming complaints on 100 million different computers. Therefore, I think it is very important, and I believe that it was not done here despite what counsel for Closed Corporation said, that a complaint posted in this fashion contain a means of authentication. Some number, some address, that the recipient of this Web complaint can call to verify that this is a bona fide suit and not a joke. The issue of the adequacy of the particular form of complaint that was posted on the Web site is pretty academic now, as it's apparent that Open realizes this is a bona fide suit and not a joke. It might well be appropriate, however, for the District Court in the continuing litigation of this case to require Closed to supplement its complaint with information about authentication. It could require that Closed post that notice to the Web site and newsletter and send it to the e-mail addresses that it has. Three modes of Internet service were attempted here by Closed. Posting it on the Web site strikes me as adequate, but the more the better in terms of getting a notice to the Defendant.

To summarize, I am affirming Judge O'Scannlain's decision that permits this suit to continue against the Open Sesame Users' Group and against Ms. Scape Goat.[3] And I repeat that we are very far from determining the outcome of the litigation; I'm just allowing it to continue to the next stage. And the court wants to thank the very able counsel for both sides, whose illuminating presentations made it possible for me to produce this opinion with more than my usual haste!

3. Scape Goat, an individual, has not joined in this interlocutory appeal.