

AT THE CROSSROADS OF LAW & TECHNOLOGY: SECOND ANNUAL

INTRODUCTION

*Karl Manheim**

A most unusual trial was held in October, 1999 on the campus of California Institute of Technology (Caltech). Closed Corporation (Closed), a California software company, sued Open Sesame (Open), an Internet users' group, for patent infringement.¹ Closed alleged that anonymous members of Open, known only by their e-mail addresses, had collaborated to produce a computer operating system (OS) that resembled Closed's patented OS in terms of functionality and graphical interface design.

What made this case unusual was that the allegedly infringing activity occurred entirely online, i.e., in cyberspace. The developers of the Open OS were "present" in California, if at all, only by virtue of their online activities. These factors led Open to file a motion to dismiss the case for lack of jurisdiction and venue. Moreover, Closed had "served" the summons and complaint on Open and its members by e-mail because it lacked defendants' actual names and postal addresses. Open also moved to dismiss for inadequate service.

The trial judge, Hon. Dairmuid O'Scannlain,² held an evidentiary hearing at which leading Internet experts testified on issues germane to the motion. Linus Torvalds, witness for moving party

* Professor, Loyola Law School, Los Angeles. Professor Manheim is Co-Director of the Program for Law and Technology at the California Institute of Technology and Loyola Law School.

1. Closed Corp. v. Open Sesame Users' Group, (W.D. Cal. 1999) (No. CT-0001-DFO) is a hypothetical case. The briefs, trial court opinion, and reporter's transcript were published in 33 LOY. L.A. L. REV. 1033 (2000), with the appellate opinion immediately following this introduction, *infra* p. 1345. Many of the briefs are available on the internet as cited herein.

2. Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Open, testified that many popular software applications are developed using "open source" computer code.³ This is where the program instructions (code) are developed overtly, often through non-remunerated collaboration by anonymous contributors.⁴ In fact, the program Torvalds is best known for—Linux—was developed in this fashion.⁵ Programmers can collaborate by participating in an Internet users' group,⁶ as did the anonymous members of Open. In doing so, Torvalds testified, contributors do not willfully enter any particular (terrestrial) jurisdiction.⁷ Moreover, they are likely to view as a hoax any e-mail posted to the users' group purporting to be a legal document and therefore not likely to have actual notice of legal proceedings against them.

Professor Edward Felten, a key government witness in the Microsoft antitrust trial,⁸ testified on behalf of Closed. He told the court that Internet users' groups have some control over the geographic location of their membership and the destination of their downloaded materials.⁹ According to Felten, Open's failure to exclude California Internet addresses, either in membership or in delivering the Open OS, could be viewed as "purposeful." Moreover, he thought it

3. See *Summary of Expert Testimony for Linus Torvalds*, 33 LOY. L.A. L. REV. 1093, 1094 (2000), available at http://techlaw.lls.edu/atc1/open_expert.pdf [hereinafter *Torvalds*]. The principles of open source code are aptly described in *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 305 n.6 (S.D.N.Y. 2000).

4. See Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1132-33 (2000) ("The open source 'movement' is based on the idea that each recipient in a chain of distribution is bound to make public (or make available to all those in the chain) any improvements effected in the source code.").

5. See *id.* at 1132.

6. This could more accurately be called a "usenet newsgroup." See generally Conference, *The Development and Practice of Law in the Age of the Internet*, 46 AM. U. L. REV. 327, 341 & n.43 (1996) (defining newsgroups).

7. See *Torvalds*, *supra* note 3, at 2 (explaining that contributions are based on interest and expertise).

8. *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999); see *Project: Participants*, 33 LOY. L.A. L. REV. 1053 (2000), available at <http://techlaw.lls.edu/atc1/participants.html> (last visited Apr. 9, 2001) [hereinafter *Participants*].

9. See *Summary of Expert Testimony by Edward W. Felten*, 33 LOY. L.A. L. REV. 1137 (2000), available at http://techlaw.lls.edu/atc1/closed_expert.pdf.

eminently reasonable to notify usenet members of important proceedings, such as lawsuits, by the very manner in which they conducted their activities—i.e., by e-mail.

Judge O'Scannlain denied in part and granted in part Open's Motion to Dismiss.¹⁰ Individual (anonymous) members were dismissed, but he allowed the case to go forward against the users' group itself. Judge O'Scannlain reasoned that Open was analogous to an unincorporated association which could be sued wherever it maintained an "office." The office, in the case of an entity existing in cyberspace, would be any physical Internet server which hosted or mirrored its messages and Web sites. Since several servers in California carried Open's usenet messages, the entity could be sued here. The court also authorized "substituted" service on Open pursuant to California Code of Civil Procedure Section 413.30.¹¹

Open filed a timely Notice of Appeal.¹² Oral argument was held, also at Caltech, on December 9, 2000. The Court of Appeals, Hon. Richard A. Posner¹³ presiding, affirmed the District Court in all respects. The court held that Closed was entitled to proceed against Open, at least for the purpose of identifying the "actual infringers" of the patent.

It is very important . . . 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.¹⁴

The precedential effect of the holding in *Closed Corp. v. Open*

10. See *Reporter's Transcript*, 33 LOY. L.A. L. REV. 1157 (2000), available at <http://techlaw.lls.edu/atc1/order.html>.

11. See *id.*; CAL. CIV. PROC. CODE § 413.30 (West Supp. 1994).

12. Since the Order denying the motion was "interlocutory," Open needed, and obtained, discretionary permission to appeal pursuant to 28 U.S.C. § 1292(b) (1995) and FED. R. APP. P. 5.

13. Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

14. *Infra* p. 1349, *Closed Corp. v. Open Sesame Users' Group* (14th Cir. 2001).

Sesame would be profound were it not for the simple fact that the case is entirely hypothetical. While the parties and facts are modeled after real world events,¹⁵ this was a "mock trial," albeit one with prominent jurists, counsel,¹⁶ and witnesses. The bulk of the preparation and lawyering at the trial was done by Loyola Law School (Loyola) students and Caltech engineering and science students.¹⁷

The hypothetical case *Closed Corp. v. Open Sesame* was the first venture of the Program for Law and Technology at Caltech and Loyola. The program was inspired and sponsored by Dr. Henry Yuen, president and CEO of Gemstar-TV Guide International Group, Ltd., as a model for a new type of instruction designed to better prepare both law and technology students to face the legal and social implications of technological change. The aim of the program is to create a forum for dialog between the legal and scientific communities to heighten awareness about these novel legal issues.¹⁸

The "mock trial" provided a good vehicle for exploring emerging issues at the intersection of law and technology. Details about the case, including the pleadings, briefs, and trial court decision, can be found in last year's Symposium issue of the *Law Review*.¹⁹ The opinion on appeal immediately follows this Introduction.

Jurisdiction based on Internet presence—the issue in *Closed Corp. v. Open Sesame*—is an important and thorny problem.²⁰ For

15. For instance, because of the anonymity of the Internet, cases are being filed against unknown defendants. *See, e.g.*, Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. One or More Unknown Parties*, (W.D.N.C. 1999), <http://www.ftc.gov/os/1999/9905/7674451775.htm>.

16. Assisting the student advocates and arguing the appeal were Donald Baker and Terry McMahon. *See Participants, supra* note 8.

17. Students participating in the trial were: Roman Ginis, Joseph Kiniry, and Daniel Zimmerman from Caltech; Alan Heinrich, Vincent Pollmeier, Lena Smith, and David Steele from Loyola. *See id.*

18. In addition to annual "At the Crossroads" conferences, the Program sponsors speakers and curricular development at the two campuses. *See The Program for Law and Technology*, at <http://techlaw.lls.edu> (last visited April 9, 2001).

19. *See* Alan Heinrich, et al., *At the Crossroads of Law and Technology: Introduction*, 33 *LOY. L.A. L. REV.* 1035 (2000).

20. *See generally* David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367 (1996) (discussing Cyberspace's threat to the law's traditional reliance on territorial borders).

instance, in 1995 the Section on Business Law of the American Bar Association established the Committee on Cyberspace Law to respond to jurisdiction and similar problems on the Internet.²¹ The Committee delivered a draft report at the 2000 ABA convention on jurisdictional issues created by the Internet.²² The National Conference of Commissioners on Uniform State Laws (NCCUSL) has also tackled the problem with the appointment of a Study Committee.²³

However, cyberjurisdiction is not the only novel legal issue to attend the emergence of new technologies. The next "At the Crossroads" conference presented by the Program for Law & Technology will focus on "Law, Technology, and the Human Genome."

Revolutionary advances in decoding the human genome hold great promise for the future of the human race by helping us better understand, improve, and prolong life. Along the way, profound questions of law and morality will be raised; vast fortunes will be won and lost; and fundamental ideas about life and society will be challenged.

Virtually every subfield of law will be affected by modern advances in genomics. Can the genetic blueprint of DNA molecules be reduced to ownership? Can life be patented? What rights will cloned beings have? Who will have access to the vast stores of genetic information in countless databases around the globe? Can individual gene sequences legally be used to predict propensity toward crime or disease and thereby justify discriminatory treatment?

I anticipate that a future issue of the *Law Review* will contain the "decision" in a mock case involving the law of the genome. In

21. See *Committee on Cyberspace Law*, at <http://www.abanet.org/buslaw/cyber/home.html> (last visited April 9, 2001).

22. See American Bar Association, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. L. 1801 (2000), available at <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html> (providing links to the London Meeting Draft and other related documents).

23. See *The National Conference of Commissioners on Uniform State Laws: Topics under Discussion*, at <http://www.nccusl.org/topicsunderdiscussion.htm> (last visited April 9, 2001). The Study Committee will "consider private law issues important to the states arising from the Internet . . . including, among other matters, jurisdiction, privacy, and security, and to monitor federal legislative initiatives." *Id.*

following years, we may find decisions involving artificial intelligence, the law of outer space, and other exotic issues at the intersection of law and technology.

In the meantime, Judge Posner's decision in *Closed Corp. v. Open Sesame* provides a good glimpse into current problems in litigating in cyberspace.²⁴

24. A video recording of the oral argument and bench ruling is available at <http://techlaw.lls.edu/atc2/video.html> (last visited April 9, 2001).