UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Daniel Wallace,

Plaintiff,

v. Civil Complaint No. 1:05-cv-0618-JDT-TAB

Free Software

Foundation Inc.,

Defendant.

PLAINTIFF DANIEL WALLACE'S MEMORANDUM ON MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Crucial to the disposition of this matter are three questions that must be answered in the affirmative for plaintiff Daniel Wallace to prevail:

1) Has the defendant FREE SOFTWARE FOUNDATION INC. (hereinafter F.S.F.) engaged in a contract, agreement or conspiracy utilizing the GNU GENERAL PUBLIC LICENSE (hereinafter GPL).

2) Is the result of using the GPL copyright license an unreasonable restraint of trade in the market for computer programs?

3) Does the plaintiff Daniel Wallace suffer a threatened injury through the continued use of the GPL by the defendant F.S.F.?

The F.S.F. copyrighted the GPL in the year 1989. Since that date the GPL has been adopted worldwide in a large array of computer programs [Exhibit 7 Para. 14]. The GPL license contains a term that requires that a computer program must be distributed free of charge to all third parties under the GPL license terms.

The GPL establishes a new, "free" licensing model for computer programs. The free license model eschews any reward for the original expression in an author's copyrighted computer program other than cost free sharing of the code with other co-operating authors [Exhibit 7 Para. 17]. In the free model an author uses the GPL to apply the terms of his license globally to all third parties.

The polar opposite of the free license model is the "proprietary" license model. In this license model an author attempts to secure a personal reward for his original creative expression in a computer program. In the proprietary model an author applies the terms of his license in contractual privity.

The Linux operating system [Exhibit 7 Para. 13] is an example of a computer program that is becoming a major market force in the world.

The plaintiff Daniel Wallace has a B.S. degree in Physics and twenty years of experience in computer automation in industry. Since the year 2000 the plaintiff has witnessed a dramatic decline in market opportunity for proprietary computer programs as the GPL has exploded in popularity around the world [Exhibit 7 Para. 14].

Because of the GPL the competitive market for the small entrepreneur is

rapidly being foreclosed in the field of computer programs and applications.

This controversy poses a simple question: "Do potential competitors who use a license agreement that stipulates distribution of computer programs free of charge to all third parties violate antitrust law?"

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1.) The FREE SOFTWARE FOUNDATION INC. has created and copyrighted a license for copyright in computer programs known as the GNU GENERAL PUBLIC LICENSE [Exhibit 2 and Exhibit 5]. By the terms of the GPL, its purpose is to control the distribution of derivative or collective works based on an initial copyrighted computer program. [Exhibit 2 at Line 124]. The terms of the GPL require that any computer program that is in whole or in part based upon an initial computer program licensed under the GPL must be licensed at no charge to all third parties under the same GPL terms. [Exhibit 2 at Line 98].

2.) Professor Eben Moglen is pro bono General Counsel for the defendant F.S.F. [Exhibit 7 Para. 8].

3.) The Linux operating system is an example of a collective work based in part upon software copyrighted by the F.S.F and licensed under the GPL [Exhibit 7 Para. 11].

4.) The F.S.F. has licensed computer programs copyrighted by the F.S.F. under GPL terms that are included in derivative and collective works known as NOVELL SUSE LINUX PROFESSIONAL 9.3 [Exhibit 1].

5.) The F.S.F has licensed computer programs copyrighted by the

F.S.F. under GPL terms that are included in derivative and collective works known as Red Hat LINUX 9 [Exhibit 4].

6.) Novell Inc. has authored computer programs licensed by Novell Inc. under GPL terms that are included in derivative and collective works known as NOVELL SUSE LINUX PROFESSIONAL 9.3 [Exhibit 1] and has distributed the same in commercial business.

7.) Red Hat Inc. has authored computer programs licensed by Red Hat Inc. under GPL terms that are included in derivative and collective works known as Red Hat LINUX 9 [Exhibit 4] and has distributed the same in commercial business.

8.) The F.S.F. has participated in actions to enforce the GPL copyright terms [Exhibit 7 Para. 24] in various jurisdictions, including the United States District Court for the District of Massachusetts.

9.) The CD media [Exhibit 1 and Exhibit 4] offered into evidence herein were purchased by the plaintiff in Marion County, Indiana in the year 2005.

LEGAL STANDARD

The Seventh Circuit has defined the standard of review on a motion for summary judgment as follows:

"We review the district court's grant of summary judg- ment de novo, drawing all reasonable inferences from the record in the light most favorable to the non-moving party." Johnson v. Runyon, 47 F.3d 911, 917 (7th Cir. 1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 , 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A motion for summary judgment should be granted only when "the pleadings, depositions, answers to interrogatories, and ad- missions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 , 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "If no reasonable jury could find for the party opposing the motion, it must be granted." Hedberg v. In- diana Bell Tel. Co., 47 F.3d 928, 931 (7th Cir. 1995) (citing Anderson, 477 U.S. at 248). "Conclusory allegations by the party opposing the motion cannot defeat the motion." Id. The non-moving party must do more than simply "show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 , 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). *Tyler v. Runyon,* 70 F.3d 458 (7th Cir. 1995).

ARGUMENT

First, it is helpful to this analysis to note the legal definition of computer program as set forth in the Copyright Act:

"A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. sec. 101 definitions.

The Copyright Act's definition of "computer program" is more narrowly drawn than the commonly understood meaning of "software products" which often include other ancillary services such as training and maintenance that accompany the vending of computer programs.

The plaintiff Daniel Wallace has alleged an act in the restraint of trade. The Sherman Act codified in 15 U.S.C sec. 1 declares:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Three elements need be proved for a successful claim under the Sherman

Act. First a contract, combination or conspiracy must be demonstrated. Second an unreasonable restraint of trade in a relevant market must be established. Finally, an injury must be proven. *Denny's Marina, Inc. v. Renfro Prods. Inc.,* 8 F.3d 1217, 1220 (7th Cir. 1993).

In the context of 15 U.S.C. sec. 26 requests for injunctive relief, the injury may be a threatened future injury. *ZENITH CORP. v. HAZELTINE,* 395 U.S. 100 (1969). See also *Wilk v. American Medical Association,* 895 F.2d 352 (7th Cir. 1990).

There are two standards for evaluating whether an alleged restraint of trade is unreasonable. These standards are the rule of reason and the *per se* rule. When the nature of the offense is a horizontal restraint involving price-fixing the *per se* doctrine is applicable. *Denny's Marina, supra.* See also *U.S. v SOCONY-VACUUM OIL CO.,* 310 U.S. 150 (1940).

The Supreme Court has described the *per se* doctrine:

"However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable - an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210..." *NORTHERN PAC. R. CO. v. UNITED STATES,* 356 U.S. 1, 5 (1958).

Finally, a test to determine when the *per se* doctrine applies in antitrust

analysis was set forth by the by the Supreme Court in 1985:

"A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." Northwest Stationers v. Pacific Stationery, 472 U.S. 284 (1985).

See also *Wilk v. American Medical Association, supra.*

1.) CONTRACT, COMBINATION OR CONSPIRACY

It goes without saying that an intellectual property license such as the GPL is a contract:

"A license is governed by the laws of contract. See McCoy v. Mitsuboshi Cutlery, Inc., 67 F.3d 917, 920, 36 USPQ 2d 1289, 1291 (Fed. Cir. 1995) ("Whether express or implied, a license is a contract governed by ordinary principles of state contract law.")." *JAZZ PHOTO, ET AL. v ITC,* 264 F.3d 1094 (Fed. Cir. 2001).

See also *Sun Microsystems Inc. v. Microsoft Corp.,* 188 F.3d 1115 (9th Cir. 1996), *Graham v. James,* 144 F.3d 229 (2nd Cir. 1998) and *Jacob Maxwell Inc., v. Veeck,* 110 F.3d 749 (11th Cir. 1997).

It is a fact without dispute that the F.S.F. has agreed to license its copyrighted material under the GPL with large commercial distributors of the Linux operating system such as Red Hat Inc. and Novell Inc.

2.) RESTRAINT OF TRADE IN A RELEVANT MARKET

An examination of the GPL license term sec. 2(b) [Exhibit 2 at Line 98] reveals:

"You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License."

The effect of this term is such that an initial author of a computer program

licensed under the GPL extends his original limited monopoly to control the independently copyrighted works of "all third parties" who accept the license. This is a blatant misuse of copyright. *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976-79(4th Cir. 1990).

The "licensed at no charge to all third parties" provision obviously triggers the *per se* doctrine's threshold of "likely to have predominantly anticompetitive effects." *Northwest Stationers, supra.*

Plaintiff Daniel Wallace has alleged a scheme of horizontal price-fixing among competitors:

"The defendant FREE SOFTWARE FOUNDATION INC. has entered into contracts and otherwise conspired and agreed with individual software authors and commercial distributors of commodity software products such as Red Hat Inc. and Novell Inc. to artificially fix the prices charged for computer software programs..." plaintiff's *Complaint*.

The binding of all third parties' copyrights in evolving derivative computer programs, price-fixed at "no charge" is *per se* anti-competitive. This GPL established "copyright commons" [Exhibit 7 Para. 16] confers virtually unlimited power by potential horizontal competitors such as Red Hat Inc. and Novell Inc., while acting in concert with the defendant F.S.F. , to destroy the open market in proprietary computer programs.

Red Hat Inc. [Exhibit 4] and Novell Inc. [Exhibit 1] are only two of many worldwide horizontal competitors [Exhibit 7 Para. 23] who are using a non-proprietary, service oriented business model utilizing the GPL. This business model is focused upon earning revenues for maintenance and training services

involving computer programs that are distributed at no charge.

In aggregate, tens of millions of lines of computer program code using the F.S.F.'s GPL are distributed for free. Computer programs licensed "at no charge" among potential competitors that bind "all third parties" are impossible to compete with using an intellectual property model that lawfully charges for the value of an author's intellectual property.

The GPL utterly destroys the delicate balance of competing concerns involving copyright and the scope of the limited monopoly that is lawfully granted:

"As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly." *SONY CORP. v. UNIVERSAL CITY STUDIOS, INC., 464 U.S. 417 (1984).*

Although the plaintiff does not need to prove misuse of copyright, Judge Posner of the Seventh Circuit has addressed the role of misuse of copyright in the antitrust context:

"The doctrine of misuse "prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1026-27 (9th Cir. 2001); see Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 792-95 (5th Cir. 1999); Practice Management Information Corp. v. American Medical Ass'n, 121 F.3d 516, 520-21 (1997), amended, 133 F.3d 1140 (9th Cir. 1998); DSC Communications Corp. v. DGI Technologies, Inc., 81 F.3d 597, 601-02 (5th Cir. 1996); Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 976-79(4th Cir. 1990). The data in the municipalities' tax assessment databases are beyond the scope of AT's copyright. It is true that in Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 913 (7th Cir. 1996), we left open the question whether copyright misuse, unless it

rises to the level of an antitrust violation, is a defense to infringement; our earlier decision in Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1200 (7th Cir. 1987), had intimated skepticism." *Assessment Technologies of WI, LLC v. Wiredata. Inc., 350 F.3d 640 (7th Cir. 2003.*

Judge Posner's phrase "[W]e left open the question whether copyright misuse, unless it rises to the level of an antitrust violation,..." *Assessment Technologies, supra,* was referring to the occasion where the misuse of copyright spawns significant market power. Software licensed by companies as large as the IBM Corporation [Exhibit 7 Para. 23] at "no charge to all third parties" gives rise to an unbridled potential to destroy targeted segments of the proprietary computer program market.

The existing law coupled with the undisputed facts of record, establish that the use of the GPL in the open market for computer programs is an unreasonable restraint in trade.

3.) THREATENED INJURY

The plaintiff Daniel Wallace is trained in the art and science of computer programming. Over the course of the past five years the plaintiff has witnessed the demand for newly created proprietary computer programs rapidly diminish in the competitive market place.

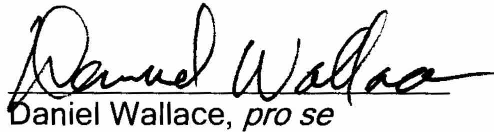
A large portion of the proprietary market for computer programs is dominated by a handful of giant corporations such as Microsoft Corporation and Oracle Corporation. The remaining market segment open to the small entrepreneur and developer is quickly being destroyed due to the explosion of GPL licensed software [Exhibit 7 para. 14] that is being distributed free of

charge.

CONCLUSION

The evidence offered by plaintiff Daniel Wallace demonstrates there exists no genuine issue as to any material fact and plaintiff Daniel Wallace is entitled to judgment as a matter of law.

WHEREFORE, plaintiff Daniel Wallace respectfully requests the Court grant summary judgment for plaintiff Daniel Wallace and issue injunctive remedy against the defendant FREE SOFTWARE FOUNDATION INC.



Dated: May 19, 2005

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Certificate of Service

A copy of the foregoing was sent by first-class U.S. mail, postage prepaid, to counsel of record:

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Dated this 19th day of May, 2005

Daniel Wallace