

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

FILED
DISTRICT COURT
INDIANAPOLIS DIVISION
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LAURA A. BRIGGS
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Daniel Wallace,

Plaintiff,

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

Free Software

Foundation Inc.,

Defendant.

PLAINTIFF'S ANSWER BRIEF TO DEFENDANTS MOTION TO DISMISS

Defendant's Rule 12(b)(6) Motion to Dismiss

The Defendant's brief begins its Preliminary Statement by asserting:

"Since it is difficult to determine from the single substantive paragraph of the Complaint precisely what Plaintiff's claim is, Defendant has resorted to Plaintiff's Motion for Summary Judgment to better understand..."; *Defendant's Brief*.

The "single substantive paragraph" surely demonstrates the Plaintiff has followed Judge Posner's advice on pleading in federal court:

"All that's required to state a claim in a complaint filed in a federal court is a short statement, in plain (that is, ordinary, nonlegalistic) English, of the legal claim. Form 9 in the forms appendix to the civil rules gives as an example, "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway"; and Rule 84 states that the forms in the forms appendix "are sufficient under the rules and are intended to indicate the simplicity and brevity of statements which the rules contemplate." The courts keep reminding plaintiffs that they don't to have to file long complaints, don't have to plead facts, don't have to plead legal theories."; *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041(7th Cir. 1999).

The Defendant is obviously asserting that the Plaintiff's claim is

ambiguous. The proper motion practice in federal court in such a circumstance would be to file a motion for a more definite statement under Rule 12(e):

"If the complaint is ambiguous or does not contain sufficient information to allow a responsive pleading to be framed, a motion under Rule 12(6)(b) is not appropriate; the proper remedy is a motion for a more definite statement under Rule 12(e)."; *Wright & Miller* 5B, sec. 1356 at 370 (citing *Swierkiewicz v. Sorema*, 534 U.S. 506).

The Defendant has incorporated the Plaintiff's Motion for Summary Judgment by reference into his BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT and thus the present motion by the Defendant should be considered as one properly falling under Rule 56 of the F.R.Civ.P. as provided for by Rule 12(b).

Accordingly the Defendant's Motion under Rule 12(b)(6) must fail.

Plaintiff's Answer to Defendant's
Motion for Summary Judgment

The Defendant next asserts in his brief:

"Completely absent from the Complaint, however, is any allegation that this promotion of competition between "open source" and "proprietary" software injures consumers. This absence of an allegation of harm to consumers is fatal to the Complaint."; *Defendant's Brief*.

If we examine the Plaintiff's Complaint we see it states in part:

"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 through the promotion and use of an adhesion contract that was created, used and promoted since at least the year 1991 by the FREE SOFTWARE FOUNDATION INC."; *Plaintiff's Complaint*

The Plaintiff has unequivocally alleged a conspiracy among commercial competitors and the present Defendant to fix the price for computer programs. This is a classic *per se* horizontal restraint of trade. In *per se* price fixing cases

the question of competitive justification (consumer benefit) is irrelevant:

"The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." *ARIZONA v. MARICOPA COUNTY MEDICAL SOCIETY, 457 U.S. 332 (1982)*

The Defendant has authored and distributed computer programs.

"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.*

The Copyright Act's definition of "computer program" defines a commodity for purposes of antitrust analysis. This definition is more narrowly drawn than the commonly accepted meaning of "software products" which often include other ancillary services such as training and maintenance that accompany the vending of computer programs.

Standard antitrust analysis applies to the intellectual property composing commodities such as computer programs:

"2.1 Standard antitrust analysis applies to intellectual property.

The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property. That is not to say that intellectual property is in all respects the same as any other form of property. Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles." *Antitrust Guidelines for the Licensing of Intellectual Property*; U.S. Department of Justice and the Federal Trade Commission (April 6, 1995).

The Plaintiff's evidence submitted with his Motion for Summary Judgment (which the Defendant has incorporated by reference) establishes without dispute that the Defendant and at least two commercial distributors of computer

programs have used the GPL [DEFENDANT'S EXHIBIT A] to license their compilation of copyrighted computer programs in the Linux operating system. The GPL license requires programs be licensed "as a whole at no charge to all third parties". This fact establishes Defendant has conspired in a naked *per se* horizontal price-fixing scheme with various commercial entities engaged in interstate commerce.

The Defendant continues to argue damages in his brief:

"Moreover, even if it were possible for Plaintiff to allege some harm to competition in the abstract, Plaintiff has not alleged antitrust injury to himself, and thus lacks standing."; *Defendant's Brief*.

Even if the Defendant's naked price-fixing scheme were not facially condemned, the Plaintiff has claimed a *plausible* future antitrust injury:

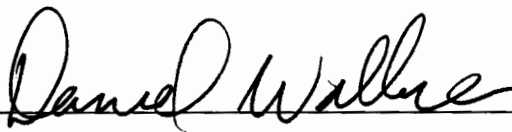
"The rapid adoption of the GNU GENERAL PUBLIC LICENSE in schemes to deflate or eliminate the free market valuation of computer programs threatens to diminish or destroy the ability of the Plaintiff to earn future revenues in the career field of computer programming."; *Plaintiff's Complaint*

The Defendant misstates the law of the Seventh Circuit. The Plaintiff needs show no *quantifiable* injury to obtain standing for injunctive relief:

"Blue Cross is clearly right with regard to the injunction. We held when this case was last before us that the jury's finding on liability for dividing up the market with its competitors must be upheld and that Blue Cross was entitled to an injunction against that practice. This holding established the law of the case, binding the district judge on remand and us on this subsequent appeal unless we have good reasons to depart from the previous decision. *Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997); *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.); *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997). We don't. Even though, as we shall see, the district judge was correct that Blue Cross has failed to come up with evidence that would authorize an award of damages for the division of markets, this does not justify withholding an injunction--rather the contrary. Inadequacy of a plaintiff's remedy at law, that is, his damages remedy, is normally (and so under section 16 of the Clayton Act, see 15 U.S.C. sec. 26, which authorizes an injunction in a private antitrust suit "when and under the same conditions" in which it would be granted by "courts of equity") a prerequisite to the entry of an injunction. *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d

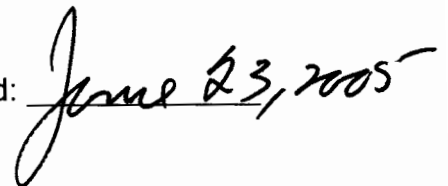
273, 274 (7th Cir. 1992). And a common reason why the damages remedy is inadequate is that the plaintiff is unable to quantify the harm that the defendant's practice has inflicted or will inflict on him. *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 230 (7th Cir. 1996); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 383 (7th Cir. 1984)."; *BLUE CROSS, ET AL. v MARSHFIELD CLINIC, ET AL.* No. 94-C-0137 (7th Cir 1998).

WHEREFORE Plaintiff Daniel Wallace requests the Court DENY Defendant FREE SOFTWARE FOUNDATION INC.'s Motion to Dismiss under Rule 12(b)(6) and DENY judgment for Defendant FREE SOFTWARE FOUNDATION INC.'s Motion for Summary Judgment pursuant to Rule 56 and Rule 12(b) on the ground that Plaintiff Daniel Wallace is entitled to judgment as a matter of law.



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Dated:



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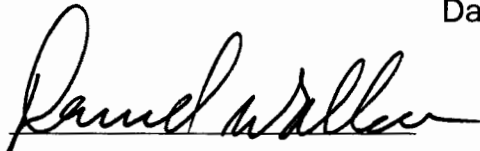
A copy of the foregoing was sent by first-class U.S. mail, postage prepaid,
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Dated this 23 day of June, 2005



Daniel Wallace