

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

FILED  
DISTRICT COURT  
05 JUN 30 AM 8:46  
LAURA D. ERISGS  
CLERK

Daniel Wallace,

Plaintiff,

v.

Civil Complaint No. 1:05-cv-0678-SEB-VSS

INTERNATIONAL BUSINESS MACHINES CORPORATION;

RED HAT INC.;

NOVELL, INC.,

Defendants.

PLAINTIFF DANIEL WALLACE'S MEMORANDUM  
ON MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiff Daniel Wallace has alleged a scheme of naked *per se* horizontal price-fixing among competitors:

"The Defendants INTERNATIONAL BUSINESS MACHINES CORPORATION, RED HAT INC. and NOVELL INC. have used or conspired to promote a copyright licensing scheme employing the GNU GENERAL PUBLIC LICENSE [H.I.] to fix the prices of computer programs." *Plaintiff's Complaint*.

Since at least the year 2002 the Defendants IBM et al. have employed a contract copyrighted and promoted by the FREE SOFTWARE FOUNDATION INC. known as the GNU GENERAL PUBLIC LICENSE (hereinafter GPL) to license collective or derivative computer programs for distribution. The GPL license contains a term that requires that an initial computer program that is

modified as a compilation or derivative work to be distributed under the same GPL license "free of charge" for all subsequent third parties to the license.

The Defendants have also promoted and sold supplementary services directly related to the use of computer programs released under GPL license terms. These supplementary services provide the profit margin and motive for distributing computer programs at no charge.

To prevail in this controversy the Plaintiff Daniel Wallace must establish that the Defendants' use of the GPL to license computer programs used in the course of commerce constitutes an unfair restraint of trade in violation of the Sherman Act 15 U.S.C. section 1.

#### STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1.) Professor Eben Moglen of Columbia University Law School is *pro bono publico* General Counsel for the FREE SOFTWARE FOUNDATION INC. Professor Moglen has been primarily responsible for all worldwide enforcement activity in defense of the GNU GENERAL PUBLIC LICENSE since 1994 [Exhibit 7 Para. 24].

2.) By the terms of the GPL license, its purpose is to control the distribution of derivative or collective works based on an initial copyrighted computer program. [Exhibit 2 at sec. 2(b)]. 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.

3.) The GNU/Linux operating system is one example of a collective "free software" work developed over the internet by Linus Torvalds in collaboration with Richard Stallman and the FREE SOFTWARE FOUNDATION INC. [Exhibit 7 Para. 13] and the Defendants IBM et al. and others [Exhibit 7 Para. 23] and is licensed under the GPL.

4.) The Defendant INTERNATIONAL BUSINESS MACHINES CORPORATION has created computer programs licensed by IBM under GPL license terms [Exhibit 7 Para. 23] that are included in derivative and collective works known as NOVELL SUSE LINUX PROFESSIONAL 9.3 [Exhibit 1] and Red Hat LINUX 9 [Exhibit 4]. The Defendant IBM Corporation assigns copyright to the FREE SOFTWARE FOUNDATION INC. in some of the programs it releases, for the purpose of empowering the FREE SOFTWARE FOUNDATION INC. to enforce the GPL against license violators. [Exhibit 7 Para. 23]

The Defendant IBM promotes and distributes the Linux operating system with new computer servers sold by IBM.

5.) The Defendant NOVELL INC. has created computer programs licensed by Novell Inc. under GPL terms [Exhibit 2] 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.

6.) The Defendant RED HAT INC. has created computer programs licensed by RED HAT INC. under GPL terms [Exhibit 5] that are included in derivative and collective works known as Red Hat LINUX 9 [Exhibit 4] and has

distributed the same in commercial business.

7.) The FREE SOFTWARE FOUNDATION INC. has created computer programs licensed by the FREE SOFTWARE FOUNDATION INC. under GPL terms that are included in derivative and collective works known as NOVELL SUSE LINUX PROFESSIONAL 9.3 [Exhibit 1] and Red Hat LINUX 9 [Exhibit 4].

8.) The Defendants IBM et al. and the FREE SOFTWARE FOUNDATION INC. all have the same non-exclusive license rights to the computer programs contained in the compilations known as NOVELL SUSE LINUX PROFESSIONAL 9.3 [Exhibit 1] and Red Hat LINUX 9 [Exhibit 4] that are licensed under the GPL license. These rights include the right to make copies, modify and distribute the program source code as long as they obey the terms of the GPL license [Exhibit 11 Para. 25 - 28].

9.) Defendant INTERNATIONAL BUSINESS MACHINES CORPORATION admits that the intellectual property in computer programs distributed under the GPL terms must be licensed free of charge even if used by potential competitors [Exhibit 10 at Para. 65 and 66] and [Exhibit 11 at Para 28].

10.) The free software movement has used programmers throughout the world since the early 1980's to create the GNU/Linux operating system and related software. GNU/Linux has displaced the capitalist production of some software despite the vaunted incentives created by ownership and exclusionary intellectual property law [Exhibit 8 footnote 1].

11.) One goal of the FREE SOFTWARE FOUNDATION INC. and use of the GPL license is to destroy a company known as the Microsoft Corporation

[Exhibit 9].

12.) The Linux distribution NOVELL SUSE LINUX PROFESSIONAL 9.3 distributed by the Defendant NOVELL INC. and the Linux distribution Red Hat LINUX 9 distributed by the Defendant Red Hat Inc. are competing commercial brands.

13.) Defendant INTERNATIONAL BUSINESS MACHINES CORPORATION has invested over one billion dollars promoting the use of the GPL licensed Linux operating system in commercial business.

14.) The Plaintiff Daniel Wallace purchased the CD media [Exhibit 1] and [Exhibit 4] offered into evidence herein in Marion County, IN during 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 judgment 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 admissions 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. Indiana 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

It should be noted that the legal definition of a computer program is incorporated into 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*.

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 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 Daniel Wallace has alleged acts in the restraint of trade among competitors in the relevant market of computer programs. The Sherman Act codified in 15 U.S.C section 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 \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court."

The Seventh Circuit has defined the elements of a claim under the

Sherman Act's section 1:

"To state a claim for relief under section 1, a plaintiff must allege either that the contract, combination, or conspiracy resulted in a *per se* violation of the Sherman Act or that it unreasonably restrained competition in a relevant market. See *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993); *Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1088 (7th Cir. 1992), cert. denied, 113 S. Ct. 2336 (1993); *Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr.*, 684 F.2d 1346, 1352 (7th Cir. 1982)." *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 967, (7th Cir. 1995);

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

"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).

See also *ARIZONA v. MARICOPA COUNTY MEDICAL SOCIETY*, 457

*U.S. 332* (1982) for an exhaustive review of the *per se* doctrine and horizontal price fixing restraints.

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) in the context of copyright.

The term 2(b) of the GPL license:

"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."

This is a reciprocal and universal "grant-back" term of the GPL license which places all who use the license commercially on an equal footing as co-licensor / co-licensee and defines a "horizontal" (in contrast to "vertical") potential competitor relationship as the term is used in antitrust law.

It is a fact without dispute that the Defendants IBM et al. and the FREE SOFTWARE FOUNDATION INC. have agreed to license their copyrighted material involving computer programs in the Linux operating system under GPL terms and that said computer programs have further been employed in the course of commerce.

2.) PER SE VIOLATION OF THE SHERMAN ACT

An examination of the GPL license term sec. 2(b) 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" to the license in any subsequent compilations or derivative computer programs.

This license (GPL) defines a new copyright regulation that is a "right against the world" (against *all* third parties who accept the license) as dictated by the original licensor. This GPL agreement is in direct contravention to 17 U.S.C. sec. 301. But see *EEOC v. Waffle House*; 534 US 279(2002), "It goes without saying that a contract cannot bind a non-party".

This term (GPL sec. 2(b)) also constitutes a blatant misuse of copyright. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); see also *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772 (5th Cir. 1999); *Practice Management Information Corp. v. American Medical Ass'n*, 121 F.3d 516 (1997), amended, 133 F.3d 1140 (9th Cir. 1998); *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597 (5th Cir. 1996); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990).

The requirement "to be licensed as a whole at no charge to all third parties" is an explicit license term that defines a fixed price for a "computer program", which is a distinct commodity composed of intellectual property. This

requirement is a naked *per se* violation of the Sherman Act's sec.1 when used by potential competitors to control the price of a commodity in the course of commerce.

The defendants have all contributed copyrighted computer programs to compilations known as Red Hat LINUX 9 and NOVELL SUSE LINUX PROFESSIONAL 9.3 that are used for commercial business purposes.

Pricing-fixing computer programs at "no charge to all third parties" has *no* pro-competitive market purpose whatsoever except to destroy non-conspiring competitors who allow their commodity computer programs to be set by unimpeded free market forces. This price-fixing policy is a patently unreasonable restraint of commerce:

"Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least, in the light of its effect on competition, for, whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."; *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927)

The naked price-fixing term foregoes any further requirement for analysis under antitrust law as to business use or resultant harm:

"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" ; *NORTHERN PAC. R. CO.*, *supra*.

### 3.) THREATENED INJURY

The Plaintiff Daniel Wallace, a trained computer programmer, has claimed

a plausible and likely future injury from a violation of antitrust law:

"This scheme is implemented nationwide in the sale and promotion of computer software products in the United States. This scheme denies the plaintiff Daniel Wallace an opportunity to earn future revenue in the field of computer programming."; *Plaintiff's Complaint*.

Quantifiable damages need not be proven for equitable relief:

"What is true and misled the district judge is the principle that there is no tort without an injury. E.g., *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997); *Rozenfeld v. Medical Protective Co.*, 73 F.3d 154, 156 (7th Cir. 1996). A private suit under the antitrust laws is a suit seeking relief against a statutory tort, and the principle that there is no tort without an injury is applicable to it. See Clayton Act, sec. 4, 15 U.S.C. sec. 15(a). But all that this implies, so far as equitable relief is concerned, is that a plaintiff has to prove that he is likely to be harmed by the defendant's wrongful conduct unless that conduct is enjoined. This is clear from the text of the Clayton Act, which, evoking traditional principles of equity, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969), requires proof only of "threatened loss or damage." Clayton Act, sec. 16, 15 U.S.C. sec. 26 (emphasis added); see *California v. American Stores Co.*, 495 U.S. 271, 282 n. 8 (1990); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 844 (7th Cir. 1978). ."; *BLUE CROSS, ET AL. v MARSHFIELD CLINIC, ET AL.*; No. 94-C-0137-C (7th Cir. 1998).

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, including operating systems, rapidly being destroyed in the competitive market place. The remaining market segment open to the small entrepreneur and developer is quickly vanishing due to the explosion of GPL licensed software that is being distributed free of charge by potential competitors IBM et al.

### CONCLUSION

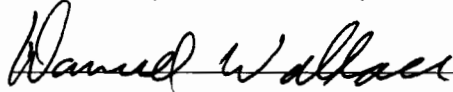
The evidence offered by Plaintiff Daniel Wallace demonstrates there exists no genuine issue as to any material fact and Plaintiff Daniel Wallace is entitled to judgment as a matter of law.

WHEREFORE, Plaintiff Daniel Wallace respectfully requests the Court

grant summary judgment for him and issue injunctive relief against the

Defendants INTERNATIONAL BUSINESS MACHINES CORPORATION, RED

HAT INC., and NOVELL, INC.

 \_\_\_\_\_

Dated: June 30, 2005

Daniel Wallace, *pro se*  
P.O. Box 572  
New Palestine, IN 46163  
317-861-641