

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

FILED
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SOUTHERN DISTRICT
OF INDIANA
LAURENCE LIGGS

Daniel Wallace,

Plaintiff,

v.

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

INTERNATIONAL BUSINESS MACHINES CORPORATION;

RED HAT INC.;

NOVELL, INC.,

Defendants.

PLAINTIFF'S ANSWER BRIEF TO
DEFENDANT INTERNATIONAL BUSINESS
MACHINES CORPORATION'S MOTION TO DISMISS

Plaintiff Daniel Wallace appears *pro persona* and files the following Answer Brief pursuant to Local Rule 7.1.

PRELIMINARY STATEMENT

On June 30th, 2005 at approximately 9:00 A.M. Plaintiff Daniel Wallace filed a Motion for Summary Judgment in the above captioned matter. Plaintiff incorporates by reference into Plaintiff's Answer Brief his exhibits, the pleadings and other documents on file with the Court, and all matters of which the Court may take judicial notice.

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

SCANNED

Defendant IBM's brief begins by asserting :

"Plaintiff's two-page complaint fails to satisfy even the most elementary standards of pleading in federal court. From the little that plaintiff did plead, however, it is evident that he does not have standing to bring an antitrust suit, cannot demonstrate antitrust injury, failed to adequately allege a combination or conspiracy and, under the rule of reason, cannot show any unreasonable restraint of trade or anticompetitive effect in a relevant market. The complaint must therefore be dismissed under Rule 12(b)(6)."

Judge Posner of the Seventh Circuit has ruled on notice 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 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. On May 28, 2005 Defendant IBM requested a thirty-day extension to file an answer under Local Rule 6.1. Whereupon Plaintiff Daniel Wallace expressed via e-mail that he had no objection to the requested extension and stated he would be filing a Motion for Summary Judgment about July 1st. The courteous response and standard 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(b)(6) 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).

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

VAGUENESS

The Defendant IBM's brief asserts in the INTRODUCTION:

"Because the complaint is so vague, we must look also to the License attached to the complaint for additional details about plaintiff's allegation."

Much of the vagueness in this case is of the Defendant's own making through his conspiratorial agreement which is the GPL license.

The Supreme Court in referring to patents, opined in 1927:

"No formal granting of a license is necessary in order to give it effect. Any language used by the owner of the patent or any conduct on his part exhibited to another from which that other may properly infer that the owner consents to his use of the patent in making or using it, or selling it, upon which the other acts, constitutes a license, and a defense to an action for a tort. Whether this constitutes a gratuitous license, or one for a reasonable compensation, must, of course, depend upon the circumstances; but the relation between the parties thereafter in respect of any suit brought must be held to be contractual, and not an unlawful invasion of the rights of the owner." ; *DE FOREST RADIO TEL. & TEL. CO. v. UNITED STATES*, 273 U.S. 236 (1927)

This holding is re-affirmed in current case law:

"A license is governed by the laws of contract. See *McCoy v. Mitsubishi 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).

This contract principle is applicable to copyrights. See *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).

So when we look to the license term referenced in the Plaintiff's Complaint we see an unfolding explanation for the complaint of "vagueness":

"2(b) 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 GPL license is a generic adhesion contract. The term 2(b) above applies to "any work" and is an utterly blatant misuse of copyright in an attempt to contractually control the independent contributions of all third parties under the license. The term "all third parties" is a scheme to establish a "right against the world" -- all persons *not* in contractual privity:

"Rights "equivalent to any of the exclusive rights within the general scope of copyright" are rights established by law -- rights that restrict the options of persons who are strangers to the author. Copyright law forbids duplication, public performance, and so on, unless the person wishing to copy or perform the work gets permission; silence means a ban on copying. A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create "exclusive rights."; *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)

This is an attempt to reformulate copyright law in direct violation of 17 U.S.C. sec. 301 (preemption). See also *EEOC v. Waffle House*; 534 US 279(2002), "It goes without saying that a contract cannot bind a non-party".

The license phrase "[A]s a whole at no charge to all third parties under the terms of this License" attempts to extend the control of the original licensor to *any future* derivative or compilation involving the original work as authored by any third party. This certainly exemplifies the doctrine of misuse of copyright:

"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); *Assessment Technologies of WI, LLC v. Wiredata, Inc.*, 350 F.3d 640 (7th Cir. 2003).

This blatant misuse of copyright rises to the level of an antitrust violation.

Due to the general construction of the license agreement that the Defendant IBM uses, it is nearly impossible to decipher what the GPL actually is or means -- some kind of contract that doesn't require privity that establishes a new copyright law deemed "copyleft" [Exhibit 7 Para. 16] -- all in defiance of Congress:

"The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection."; *H.R. Rep. No.94-1476*

The defendant IBM has officially described [Exhibit 11 at Para. 27] the GPL terms in a very obfuscated manner:

"The Linux developers' public agreement to apply GPL terms expresses in a binding legal form the conscious public covenant that defines the open-source community -- a covenant that SCO itself supported as a Linux company for many years."

Apparently the GPL agreement is some kind of legally binding "conscious public covenant" -- perhaps a pseudo public trust of intellectual property price-fixed at "no charge" to be used against competitors who refuse to adopt the GPL agreement.

The Defendant IBM is well aware of the copyrighted code which it has released under terms of the claimed conspiratorial agreement (GPL) in the referenced computer program (operating system) market [Plaintiff's Exhibit 1, Exhibit 4 and Exhibit 11 at B. IBM's Contributions to Linux] as well as the identity of the alleged co-conspiritors.

Therefore Defendant IBM's claims of vagueness fail.

MODE OF ANALYSIS FOR ANTITRUST PURPOSES

The Defendant IBM claims the mode of analysis for competitors should be a rule of reason approach on vertical alignment of competitors. This is simply wrong with respect to the facts and the applicable law.

Competitors using the GPL agreement are horizontal with respect to market position. The Defendant IBM has officially claimed [Exhibit 11 at Para. 23 - 27] that all contributors to a computer program who contribute any source code to that GPL'd program are on equal footing with respect to the licensing and distribution rights in that program.

The Defendants INTERNATIONAL BUSINESS MACHINES CORPORATION, NOVELL INC, and RED HAT INC. are all contributors and licensees to the Linux distributions at hand [Exhibit 1 and Exhibit 4]. Co-equal competing licensors to intellectual property are by definition horizontal competitors on the same distribution level in the market. There is no "supplier - customer" relationship among competitors who possess equal non-exclusive distribution rights to the same intellectual property in a computer operating system such as Linux.

The GPL fixes the minimum price of intellectual property at zero for the cartel of competitors who elect to abide by its terms. The *per se* fixing of minimum prices by horizontal competitors is considered the gravest possible violation under the Sherman Act's sec. 1.

Therefore Defendant IBM's claims concerning mode of analysis for antitrust purposes must fail.

STANDING AND INJURY

Plaintiff Daniel Wallace has testified concerning his formal education and employment experience. He has testified that he has invested in researching and developing a marketable compact computer operating system to be used for scientific and numerical applications [Exhibit 12] that would compete in the same relevant market with the price-fixed Linux distributions in focus.

The Plaintiff has established likely future harm from *per se* antitrust violation and 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).

Plaintiff has alleged a *per se* violation of antitrust law. Upon a showing of *per se* violation, antitrust injury is established without further inquiry:

"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).

Under 15 U.S.C. sec. 26 the facts alleged are sufficient to establish standing and antitrust injury for purposes of equitable relief.

WHEREFORE, Plaintiff Daniel Wallace requests the Court DENY Defendant INTERNATIONAL BUSINESS MACHINES CORPORATION Motion to Dismiss pursuant to Rule 12(b)(6) and enter judgment in favor of Plaintiff

Daniel Wallace.

Dated this 1st day of July, 2005.



Daniel Wallace, pro se

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