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Is free software criminal?

Open source does not violate antitrust laws, court says after quick look

BY [W. MICHAEL G. OSBORNE](#), AFFLECK GREENE ORR LLP.

The open source movement has led to the development of many useful applications, including the popular browser Firefox and the operating system Linux. But is it against the law to give software away for free?

In a recent decision, the US Court of Appeals for the Seventh Circuit held that open source software does not violate US antitrust laws that prohibit anti-competitive conspiracies and predatory pricing.¹

Linux is an operating system for personal computers and servers based on Unix, an operating system first developed in the 1960s by AT&T. Linux was initially developed by Linus Torvalds and is now maintained by a large open source community. Contrary to popular belief, Linux is copyrighted. Anyone can use Linux or make derivative works based on Linux pursuant to the GNU General Public License (GPL). The GPL forbids anyone from charging for Linux or for any revisions or improvements. The court noted the paradox: "Copyright law, usually the basis of limiting reproduction in order to collect a fee, ensures that open-source software remains free: any attempt to sell a derivative work will violate the copyright laws".

Daniel Wallace wants to compete with Linux but claims that he cannot because Linux is free. He sued, claiming that providers of Linux like IBM, Red Hat, and Novell conspired to eliminate competition by offering Linux for free.

Judge Easterbrook wrote for the court. He applied the test for predatory pricing, noting that the concern is the recoupment period when the predator, having driven the target from the market, charges monopoly prices. He stated:

When monopoly does not ensue, low prices remain – and the goal of antitrust law is to use rivalry to keep prices low for consumers' benefit. Employing antitrust law to drive prices up would turn the Sherman Act on its head.

The fact that Linux will be forever free means that its owners can never charge monopoly prices for it, Easterbrook J. noted. Recoupment, an essential element of predatory pricing, is impossible.

Easterbrook J. also disagreed that Linux was likely to achieve a monopoly. He noted that more people pay for software like Microsoft Windows and Office, than use their free competitors, Linux and Open Office.

Easterbrook J. rejected Wallace's contention that the Linux GPL is a conspiracy in restraint of trade. Rather, because it facilitates production of new derivative works that would not arise through unilateral action, it is not unlawful.

Would the same result obtain in Canada? Probably, but the answer is not clear. Canada's *Competition Act* contains an express predatory pricing provision which makes it a criminal offence to sell products at unreasonably low prices, having the effect of substantially lessening competition or eliminating a competitor.²

Past cases have held that giving products away for free in a commercial context constitutes a "sale", and that free prices may be unreasonably low, but are not necessarily so.³ Moreover, while Canadian courts have adverted to recoupment as part of the theory of predatory pricing, recoupment has yet to

be articulated as a required element of predatory pricing. Absence of recoupment is thus not necessarily fatal to a predatory pricing claim in Canada, unlike in the US.

However, the fact that products for which consumers must pay, like Microsoft Windows and

Microsoft Office, have larger market share than competitors that are offered for free would suggest that open source products do not pose a threat either to competition or competitors.



For more information contact:

W. Michael G. Osborne, Affleck Greene Orr LLP
Tel: 416-360-5919
Email: mosborne@agolaw.com

¹ *Wallace v. International Business Machines Corporation*, 467 F.3d 1104 (7th Cir., 2006)

² *Competition Act*, R.S.C. 1980 c. C-34, s. 50.

³ *Culhane v. ATP Aero Training Products Inc.*, [2004] F.C.J. No. 669; *R. v. Hoffman LaRoche* (1980) 28 O.R. (2d) 164 (H.C.J.)