

Chapter 5 - Computer Code as Speech

FlyTunes is a popular online music retailer specializing in the sale of digital media files. The service sells a significant number of digital audio files, which are available to download via the Internet and are distributed as “.mp3” files. Mp3 files are compressed digital audio files that allow for fast and easy transfer via the Internet. FlyTunes .mp3 files are protected by a digital rights management (DRM) feature, which limits the number of computers and portable digital media players the purchaser can use to access the individual files. The DRM allows the purchaser to listen to the .mp3 on up to five authorized personal computers and any compatible portable digital music players the purchaser owns, but will deny access to any unauthorized computer and some models of digital media players.

Roger Jordan is a computer programmer who posted a program named “FlySwatter” on his blog. Jordan claimed that FlySwatter convert any .mp3 file purchased from FlyTunes so that is not subject to DRM limitation. Lack of DRM allows the user to copy the file as many times as she wishes and to access the file from an unlimited number of computers or digital media players that support the .mp3 file format, contrary to the purpose of the FlyTunes DRM. It also allows the user to digitally transfer the files to others that have not purchased the file from FlyTunes.

FlyTunes sued to enjoin Jordan from posting FlySwatter on his blog, claiming that it violated the Digital Millennium Copyright Act (DMCA), 17 U.S.C § 1201 *et seq.* Specifically, FlyTunes claimed that FlySwatter violated 17 U.S.C. § 1201(a)(2), which prohibits a person from offering technology that is primarily designed to circumvent a technological measure, such as DRM, that controls access to copyrighted works. Jordan claimed that the computer code he used to write the FlySwatter program is protected under First Amendment principles as protected speech, and therefore he can leave the program on his blog.

Should computer code be considered “speech” for First Amendment purposes? Is there an intent to communicate a message and an audience that understands that message as in *Spence*? Is *Spence* the appropriate test to use or are there other reasons to consider this speech even absent intent/audience understanding?

Assuming it is speech, is FlyTunes seeking to constrain the program because of the content? What level of scrutiny should the court apply, intermediate or strict scrutiny?

For more discussion of this issue see *Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001).