



December 3, 2008

Ian Ramage
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
BY FAX & EMAIL

Dear Mr. Ramage,

I represent Mr. Sam Odio and Bluwiki. I write to respond to your allegations (made in emails to Mr. Odio on November 10 and 13, 2008) that certain materials posted at bluwiki.com constitute “information designed to circumvent Apple’s FairPlay digital rights management system” and that the dissemination of the information violates the Digital Millennium Copyright Act (DMCA). We have reviewed the information you referenced, and have concluded that your allegations are baseless.

The information posted at the URLs you referenced appear to be related to the iTunesDB file included on all Apple iPod portable media players. In particular, the posts relate to recent changes made by Apple that make current models of the iPhone and iPod Touch incompatible with third party media management software, such as Winamp, Songbird, and a variety of software designed for Linux and other open source operating systems.

The information posted on the wiki pages does not appear to violate the anti-circumvention provisions of the DMCA for at least five reasons.

First, as your emails acknowledge, the wiki pages in question include only “information,” which is to say discussions conducted via text. There is nothing on those pages that could constitute a “technology, product, service, device, component, or part thereof,” falling within the scope of the DMCA’s anti-circumvention provisions. *See* 17 U.S.C. § 1201(a)(2). While the pages appear to include snippets of illustrative computer code, those expressions fall far short of anything that could come within the scope of the DMCA’s ban. In any event, computer code used for expressive purposes has been repeatedly recognized as speech entitled to the protections of the First Amendment. *See, e.g., Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000); *Bernstein v. U.S. Dept. of State*, 974 F. Supp. 1288 (N.D. Cal. 1997).

Second, even assuming *arguendo* that the information in question did fall within the scope of the DMCA, the information is intended to afford iPod owners access to the iTunesDB files on their own devices. These files are authored by each individual in the course of assembling the playlists that define which files are copied from their computer to their iPod. To the extent these files are copyrightable at all, that copyright would

reside with the iPod owner. Accordingly, under the DMCA, iPod owners would be entitled to authorize circumvention of protection measures in order to access their own copyrighted works.

Third, the technical measure being discussed on the Bluwiki pages does not appear to be one that “effectively controls access” to the iTunesDB files within the meaning of 17 U.S.C. § 1201(a)(3)(B). The iPod stores the iTunesDB file in an unencrypted format and can readily be copied and read by other software applications. The only “technical measure” that “protects” the iTunesDB file is a checksum hash that interferes with the ability to write to the iTunesDB file in a manner that permits the iPod owner to “sync” his device to his music library using software other than Apple’s own iTunes application. Insofar as this design decision by Apple leaves the contents of the iTunesDB file freely readable, the checksum hash is not an access-control measure protected by § 1201(a). *See Lexmark Int’l v. Static Controls Components*, 387 F.3d 522, 547 (6th Cir. 2004) (DMCA does not apply “where the access-control measure left the literal code or text of the computer program or data freely readable.”).

Fourth, the information contained on the Bluwiki pages appears to be “for the purpose of enabling interoperability of an independently created computer program with other programs,” and therefore protected by the reverse engineering exemption to the DMCA’s anti-circumvention provisions. *See* 17 U.S.C. § 1201(f). Enabling iPods to interoperate with “independently created computer programs” (like gtkpod, Winamp, and Songbird) that compete with Apple’s iTunes software would appear to be precisely what the statutory reverse engineering exception was intended to protect.

Fifth, judicial precedents interpreting and applying the DMCA’s anti-circumvention provisions have made it clear that circumvention does not fall within the reach of the statute unless it has some nexus with copyright infringement. *See Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307 (Fed.Cir.2005); *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004). Here, it is difficult to see how efforts to understand the mechanism by which third party applications can “sync” media files to an iPod could possibly foster copyright infringement. The iTunesDB file, to the extent it is copyrighted at all, has no independent economic value. It appears that the individuals that authored the Bluwiki pages are interested in modifying the file to facilitate the creation of interoperable software that can assist the owner of the iPod with her own personal media management needs. Nothing about the iTunesDB file protects any of the media files stored on the iPod, all of which may be freely copied from the iPod in a myriad of ways that involve no circumvention of the iTunesDB checksum hash.

In summary, nothing in the Bluwiki pages that you identified in your November 10 and 13 emails could be construed to violate the DMCA. If you have additional information that we have overlooked, please let us know.

Bluwiki is a public wiki, on which individuals can post information on a variety of topics. Although he administers the site overall, Mr. Odio was not involved in authoring the materials located at the URLs you identified. Mr. Odio, however, takes the free speech

rights of Bluwiki's users seriously. Accordingly, in the absence of further evidence in support of your allegations, Bluwiki intends to restore the wiki pages in question in ten business days.

Nothing contained in this letter constitutes an express or implied waiver of any rights, remedies or defenses of Mr. Odio or Bluwiki.

Best regards,

A handwritten signature in black ink, appearing to read 'F. von Lohmann', with a long horizontal flourish extending to the right.

Fred von Lohmann, Esq.
Senior Intellectual Property Attorney