

I am writing in reply to the comment made by Bernard R. Sorkin regarding section 1201(a)(1) of the Digital Millennium Copyright Act. I found his reasoning to be highly suspect on many of the points he raised.

His metaphor on page 1 comparing unauthorized use of a system used to access copyrighted material to stealing a book is absolutely specious. He fails to acknowledge that many of the persons who would be circumventing access controls will already have a license to access the work in a non-infringing way. My metaphor for access control is the photograph changer device. This is a mechanical device that, when a lever is pulled, changes the photo being displayed in a picture frame on the front of the device. It is conceivable that a copyright holder might make available a collection of photographs contained in the device, selling it as a complete package. Now suppose a member of the public purchased this device legally, obtaining all rights under fair use. If they do not like the arrangement of photographs, they may take apart the device and re-arrange them. Furthermore, they may decide to remove the photographs from the device entirely and cut them up for use in a collage. Both of these are non-infringing, I think we can agree. However, if the copyrighted works are digitized photographs, and the picture changing device is a piece of software, both of these uses become illegal. In order to remove the contents of the pictures, one would have to violate section 1201(1)(a). Reverse-engineering the storage mechanism would be required to use all the rights granted under fair use.

Looking at the clause in this perspective makes Mr. Sorkin's statement in the last paragraph on the page that "the public would have continued access to engage in non-infringing uses of copyrighted works" at best questionable, and at worst and obvious falsehood.

I must therefore also object to Mr. Sorkin's claim in the final paragraph of page two that "technological and legal measures are intended to protect the copyrighted work against unauthorized uses. Anyone wanting to make 'fair use' of a copyrighted work need only follow the same steps as he or she would in the absence of technological protections." As noted above, access to the work in its underlying digital form is required to make fair use of a work. The essential problem with Mr. Sorkin's position is that he wants to equate unauthorized access with illegal access, and the two concepts are different and independent. It might be possible to use the access system provided by the copyright holder to make infringing use of the copyrighted work, for example printing out 500 copies of an electronic book and distributing them at a profit. This might be authorized by the access system, but would not be illegal. As noted above, there are cases where access to the underlying data (we assume it to be unauthorized) must not be illegal in order to have fair use.

I would like to refute Mr. Sorkin's claim on page four, response number four that he is "aware of no works or classe of works that have, because of the implementation of technical protection measures, become unavailable to persons who desire to be lawful users." I personally have lawfully purchased five DVD movies on disc in the past year, to watch on my fiancée's lawfully purchased DVD player. One of these discs was the movie "The Matrix", which was unavailable on VHS for some time after its release on DVD. When I am not at my fiancée's house, from time to time I still want to watch these lawfully obtained copyrighted works. I do not myself own a DVD player, and yet desire access to the works that I may lawfully view. I do own a VCR, but as I noted the work in question was not

available in a form that I could view on the VCR. I do own a computer, but I do not have the Windows or Macintosh operating systems installed on it. Therefore, I do not have access to an authorized player, at least so far as I am aware at this time. In short, without circumvention of the access controls, I would have no way to view the content of the content which I purchased a license to view. It is, in direct contradiction to Mr. Sorkin's statement, unavailable to me, a person who desires to be a lawful user. I would further state that DVD movies are an easily defined class of works, and that they are in general unavailable to those who desire to be lawful users. It may be that Mr. Sorkin is unaware of this class of works, but if he is, he should be regarded as so ill-informed as to be dismissable out of hand. His claim of being unaware is especially notable in light of his many references to DVD movies.

In short, Mr. Sorkin fallaciously tries to equate unauthorized use and illegal use in an attempt to restrict lawful owners from making fair use of the licenses they own for copyrighted works. I humbly request that you recognize the difference and reject Mr. Sorkin's claims that unauthorized use must be made illegal.

Kind Regards,

(signed)

Walter I Nissen III

1937 4th St. #3
Livermore, CA 94550
925-456-8723
Walter_Nissen@hmc.edu