

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

FILED

SEP 11 2006

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SONY COMPUTER ENTERTAINMENT AMERICA,  
INC., a Delaware corporation,

Plaintiff,

v.

DIVINEO, INC., et al.,

Defendants.

---

No. C 04-4200 CW

ORDER GRANTING  
PLAINTIFF'S  
MOTION FOR  
SUMMARY  
ADJUDICATION AND  
APPLICATION FOR  
DEFAULT JUDGMENT  
ON DIGITAL  
MILLENNIUM  
COPYRIGHT ACT  
CLAIMS

Plaintiff Sony Computer Entertainment America, Inc., moves for summary adjudication of its Digital Millennium Copyright Act (DMCA) claim against pro se Defendant Frédéric Legault. Mr. Legault opposes the motion.<sup>1</sup> Plaintiff separately applies for default judgment against Defendants Divineo, Inc., Divineo U.K., Divineo SARL and Max Louarn (collectively, the defaulting Defendants). The defaulting Defendants have not opposed Plaintiff's application for

---

<sup>1</sup>Mr. Legault has been notified of the requirements for opposing a motion for summary judgment. See June 29, 2006 Clerk's Notice (attaching Order Providing Notice to Pro Se Defendant of Requirements for Opposing Motion for Summary Judgment).

1 default judgment. The matters were taken under submission on the  
2 papers. Having considered the papers filed by Plaintiff and Mr.  
3 Legault, the Court grants in part Plaintiff's motion for summary  
4 adjudication of the DMCA claim against Mr. Legault and grants  
5 Plaintiff's application with respect to its DMCA claims against the  
6 defaulting Defendants.

#### 7 BACKGROUND

8 The following facts are undisputed, unless otherwise noted.

9 Plaintiff, a wholly owned subsidiary of Sony Computer  
10 Entertainment, Inc., a Japanese corporation, is responsible for  
11 marketing and distributing PlayStation® and PlayStation® 2 computer  
12 entertainment systems (the PlayStation systems) in North America.  
13 Jessop Decl. ¶ 2. Plaintiff is the registered copyright holder of  
14 at least 130 copyrighted computer game programs that are compatible  
15 with the PlayStation systems. Id.; MacDonald ¶ 32. One way in  
16 which Plaintiff protects this copyrighted material is an  
17 authentication process that occurs "whenever a software disc boots  
18 up on a PlayStation system." Jessop Decl. ¶ 4. Only if the  
19 PlayStation system verifies that the inserted disc is authentic  
20 will the user be allowed access to the material on it. Id. ¶ 5.  
21 If a user burns a copy of a copyrighted PlayStation game, a unique  
22 code that is part of every authentic disc will not be copied, thus  
23 preventing the user from playing the copy on the PlayStation  
24 systems. Id. ¶ 6.

25 In this lawsuit, Plaintiff accuses Defendants of trafficking  
26 in devices, including HDLoader, modification chips (also known as  
27 "mod chips") and others (referred to collectively as "the  
28

1 devices"), which allow users to circumvent this authentication  
2 technology. The HDLoader is a software circumvention device that  
3 "permits a user to make an unauthorized copy of PlayStation-  
4 compatible software (i.e., video games) onto a separate hard drive  
5 connected to the PlayStation system." Jessop Decl. ¶ 10. Jerry  
6 Jessop, Sony's Director of Hardware Engineering, declares, based on  
7 his experience with the PlayStation system and testing of the  
8 HDLoader software, that the "primary function and purpose of an  
9 HDLoader is to bypass the technological protections in PlayStation  
10 systems that SCEA [Sony] has implemented to protect copyrighted  
11 works, including its own copyrighted works." Id. ¶ 14. Mod chips  
12 are computer chips that, when wired to a PlayStation console,  
13 circumvent the authentication system and allow the system to play  
14 unauthorized software. Id. ¶ 15. The "primary function" of mod  
15 chips (including the Duo, Magic, Ghost and Neo chips) is to bypass  
16 the copyright protections afforded by PlayStation's technological  
17 measures. Id. ¶ 18. Finally, Mr. Jessop declares that devices  
18 known as "slide cards, 'Swap Magic,' and boot discs" allow a user  
19 to boot up a PlayStation console and perform a disc swap without  
20 triggering the software and hardware mechanisms within the  
21 PlayStation system that initiate the authentication sequence; these  
22 devices have the "sole function" of circumventing Sony's  
23 authentication process. Id. ¶ 19.

24 Mr. Legault is the sole shareholder and president of Divineo,  
25 Inc. (hereinafter Divineo), a Canadian corporation that sells video  
26 game products through a website at the divineo.com domain name.  
27 Def. Legault's Answer ¶¶ 7, 10; MacDonald Decl., Ex. 4, Def.

28

1 Divineo's Resp. to Pl.'s Interrogs No. 17. Divineo SARL is a  
2 French corporation that also promotes, markets and sells certain  
3 video game products. Mr. Louarn is its officer and founder.  
4 Legault Decl. ¶ 1. As part of his business relationship with Mr.  
5 Louarn, Mr. Legault "managed retail sales from the www.divineo.com  
6 Web site for Canada and for all countries which did not have  
7 Divineo stores." Legault Decl. ¶ 2. One of those countries is the  
8 United States. However, Mr. Legault and Divineo admit that on  
9 "rare" occasions they also handled wholesale orders at the  
10 direction of Divineo SARL. MacDonald Decl., Ex. 4, Def.'s Resp. to  
11 Pl.'s First Set of Interrogs. No. 2.

12 The divineo.com website has offered for sale the accused  
13 devices, including the HDLoader, the Duo, Magic and Neo mod chips,  
14 and slide cards and Swap Magic. MacDonald Decl., Ex. 24,  
15 Divineo.com Print-Outs (visited September 30, 2004). Mr. Legault  
16 describes his products as "chips to specialized clients who had  
17 more technical knowledge than the average consumer and who wanted  
18 to modify their video games consoles to make them as similar as  
19 possible to a computer." Legault Decl. ¶ 3. However, he admits  
20 that the HDLoader product "targeted the mainstream market."  
21 Legault Decl. ¶ 4. According to Plaintiff's attorney, Angus  
22 MacDonald, the divineo.com website advertised mod chips as recently  
23 as April 1, 2006, but it has not done so since then. MacDonald  
24 Decl. ¶ 28. Mr. Legault explains that Divineo told Plaintiff in  
25 March, 2006 that "it would stop selling the litigious [sic]  
26 products hoping this would show Sony its good faith." Legault  
27 Decl. ¶ 9.

1 Plaintiff submits what Mr. MacDonald declares to be a "true  
2 and correct copy of a summary of Divineo Inc.'s sales of  
3 circumvention devices into the United States from the fourth  
4 quarter of 2003 through the second quarter of 2005, as produced by  
5 Divineo Inc. during discovery." MacDonald Decl. ¶ 26, Ex. 25.  
6 This summary document shows retail sales of 7,772 devices by  
7 Divineo between November, 2003 and June, 2005.<sup>2</sup> Id. Ex. 25.

8 Plaintiff also presents some evidence of wholesale sales of  
9 the devices. According to invoices submitted by Mr. MacDonald, Mr.  
10 Louarn and Divineo U.K. shipped 400 HDLoaders to former Defendant  
11 and California resident Chau Ngo on July 19, June 29 and June 2,  
12 2004, and 620 devices to Ohio resident Steven Filipiak between  
13 October 1, 2003 and June 24, 2004. MacDonald Decl., Exs. 21 and  
14 22. Former defendant Chau Ngo declares that he placed a wholesale  
15 order for 100 HDLoaders at divineo.com. Mr. Ngo states that he  
16 primarily communicated with an individual who identified himself as  
17 Max Louarn, but that toward "the end of my business dealings with  
18 Divineo.com," he also "had email communications with an individual  
19 identified as Frederic Legault," including an exchange in which he  
20 returned 200 HDLoaders to Mr. Legault for a refund. MacDonald  
21 Decl., Ex. 5, Ngo Decl. ¶ 7, 12. Mr. Ngo forwarded to Plaintiff's  
22 attorney a September 20, 2004 email purportedly from "Divineo  
23 Wholesale" to Mr. Ngo stating, in part, "we forwarded your request  
24

---

25 <sup>2</sup>Plaintiff also submits Mr. Legault's Federal Express account  
26 information, showing that he has paid the shipping company a total  
27 of \$1.06 million since his account was created on January 9, 2001.  
28 MacDonald Decl., Ex. 27. However, this evidence is of little  
probative value because it does not show what portion of that total  
can be attributed to shipment of the alleged circumvention devices.

1 to frederic@divineo.com, he is the manager of divineo.com[.] We do  
2 not sell hdloader any more ourselves."<sup>3</sup> MacDonald Decl., Ex. 26.  
3 Mr. Ngo also forwarded to Mr. MacDonald a September 21, 2004 email  
4 purportedly from "Divineo (Fred) [mailto: frederic@divineo.com]"  
5 with the subject "Re: Divineo USA Wholesale inquiry," instructing  
6 Mr. Ngo to return unusable HDLoader software and "[d]o a good  
7 packing, I need them in good condition, to re-sell them." Id. Mr.  
8 Legault somewhat obliquely denies that he did business with Mr.  
9 Ngo, declaring

10 no sale was made for Ngo and no payment was received from this  
11 company. Ngo can prove that it paid Divineo UK and that all  
12 business relationships it had were directly with Max  
13 Louarn/Divineo SARL/UK.

14 Legault Decl. ¶ 12.

15 Although he criticizes Mr. Jessop as a Sony insider, Mr.  
16 Legault presents no evidence that contradicts Mr. Jessop's  
17 testimony that the primary function of HDLoader and mod chips, and  
18 the sole function of slide cards, Swap Magic and boot discs, is to  
19 circumvent the authentication process of the PlayStation systems.  
20 Instead, Mr. Legault offers testimony regarding ways that these  
21 devices may be used with the PlayStation systems that do not  
22 involve infringement of Plaintiff's copyrighted works. For  
23 instance, Mr. Legault is aware of "more than 150 types of homemade  
24 software (practical and games) on Internet for Playstation 2 and  
25 for PSP," such as a reprogrammed version of the classic "Space

---

26 <sup>3</sup>This and other statements purportedly made by Mr. Louarn or  
27 Mr. Legault to Mr. Ngo constitute hearsay, and therefore the Court  
28 cannot consider them to prove the truth of the matters asserted  
therein.

1 Invaders" game. Legault Decl. ¶ 14. He also declares that  
2 software developers may wish to test their own games by using  
3 Divineo's products, in combination with PlayStation consoles, as a  
4 less expensive alternative to purchasing a specialized Sony console  
5 that will run any game. Legault Decl. ¶ 16. He submits the  
6 HDLoader instruction manual, which touts the product as a way to  
7 reduce game loading times, because PlayStation 2 can read hard  
8 drive data more quickly than data on CDs or DVDs, and as a way to  
9 "make gaming more convenient" by allowing users to store games on a  
10 hard disk drive, "eliminating the need to change discs each time  
11 you wish to play a different game." Legault Decl., Ex. L., E-1.  
12 Mr. Legault also offers a "legal notice" by Divineo, warning users  
13 of its website that they were responsible for the legality of their  
14 own use of website material. Legault Decl., Ex. G.

15 On October 4, 2004, Plaintiff filed suit against Divineo and  
16 three California purchasers of Divineo products. Shortly after  
17 Divineo was served, Plaintiff sought a stipulation, through  
18 Divineo's then-counsel, that Divineo and Mr. Legault would cease  
19 selling circumvention devices during the pendency of the action.  
20 MacDonald Decl. ¶ 7. According to Mr. MacDonald, Divineo and Mr.  
21 Legault refused to agree to the proposed stipulation; however, Mr.  
22 Legault did agree to stop selling HDLoader software in February,  
23 2005. Id. Mr. Legault denies that he refused to agree to cease  
24 selling the devices, claiming, "With a simple letter of default,  
25 without making any admission whatsoever and only to avoid legal  
26 proceedings, Frédéric Legault would have stopped selling the  
27 products specified in Sony's procedures." Legault Decl. ¶ 5.

1 Plaintiff also initiated proceedings in French court against  
2 Mr. Louarn and Divineo SARL in summer, 2004. MacDonald Decl. ¶ 10.  
3 According to an August 5, 2004 order of the Commercial Court of  
4 Paris, Divineo SARL and Mr. Louarn withdrew all reference to  
5 HDLoader software from their website and were to "irrevocably  
6 undertake to cease selling, in any way, directly or indirectly, the  
7 HDLoader software and making reference whatsoever to this  
8 software." MacDonald Decl., Ex. 7, Commercial Court of Paris,  
9 Interim Order of Thursday, Aug. 5, 2004 (English Translation) at 3.

10 On September 21, 2004, Mr. Louarn<sup>4</sup> and Divineo SARL signed an  
11 "Undertaking" whereby they agreed, in exchange for Plaintiff not  
12 taking action against them for past infringement, that

13 we will not, and will procure that our respective group  
14 companies, agents and resellers will not, manufacture,  
15 replicate, copy, order, offer for sale, dispose of (by sale or  
16 otherwise), distribute to the public, or part with possession  
17 in any other way, of HDLoader, HDAdvance or any other product  
18 or component that (individually or with other products or  
19 components) facilitates the removal or circumvention of the  
20 copy-protection features contained in your consoles and games  
21 (the Products). For the avoidance of doubt, in pursuance of  
22 this undertaking, we shall immediately ensure that all  
23 references to the Products, including their offer for sale,  
24 are removed from all websites under our control or the control  
25 of our group companies, agents and resellers.

26 MacDonald Decl., Ex. 8. However, Mr. Legault declares that he  
27 never actually saw or read the agreement until the present summary  
28 judgment proceedings, and that Mr. Louarn assured him that the  
agreement "did not affect Divineo Canada." Legault Decl. ¶ 4.

Plaintiff filed an amended complaint naming Mr. Legault and  
the rest of the defaulting Defendants on June 3, 2005. Plaintiff

---

<sup>4</sup>In its brief, Plaintiff erroneously states that it was Mr.  
Legault who signed the undertaking.

1 alleges Defendants' sale of circumvention devices violates the  
2 DMCA, 17 U.S.C. § 1201 et seq., the federal Copyright Act, 17  
3 U.S.C. § 101 et seq., the Lanham Act, 15 U.S.C. § 1125 and  
4 California's unfair competition law, California Business &  
5 Professions Code § 17200 et seq.

6 Mr. Legault and Divineo<sup>5</sup> answered the amended complaint on  
7 September 12, 2005. In their answer, Mr. Legault and Divineo  
8 acknowledged the Court's personal jurisdiction over them and  
9 admitted that "mod chips" may be configured by consumers to allow a  
10 copied disc to be played on the PlayStation systems. Answer ¶ 37.  
11 However, they denied that this was the "primary" use of mod chips.

12 In response to Plaintiff's first set of interrogatories,  
13 Divineo and Mr. Legault stated that they "did not and do not sell  
14 [circumvention devices] to resellers or wholesalers, do not  
15 maintain inventory sufficient to sell to resellers or wholesalers,  
16 and limit sales to only retail sales other than on rare occasions  
17 when specifically directed by Divineo S.A.R.L." MacDonald Decl.,  
18 Ex. 4, Def.'s Resp. to Pl.'s First Set of Interrogs. No. 2. Mr.  
19 Legault concedes that he did not respond fully to Plaintiff's  
20 initial requests for discovery, but says that this was because of  
21 Plaintiff's own refusal to negotiate with Divineo as promised, and  
22

---

23 <sup>5</sup>Divineo's counsel has since withdrawn, and because Divineo, a  
24 corporate defendant, no longer appears in court through counsel, it  
25 is in default. See March 29, 2006 Order Relieving Sideman &  
26 Bancroft LLP and Sutherland Asbill & Brennan LLP as Attorneys of  
27 Record. The Court warned the parties that although Mr. Legault  
28 could represent himself in this action, he could not represent  
Divineo, and Divineo could not represent itself. The Court gave  
Divineo four weeks to make an appearance through counsel, but it  
did not do so.

1 due to "Canadian laws being what they are." Legault Decl. ¶ 8.  
2 Mr. Legault attaches to his declaration copies of Canada's Personal  
3 Information Protection and Electronic Documents Act and Québec's  
4 Act Respecting the Protection of Personal Information in the  
5 Private Section, R.S.Q. chapter P-39-1. Legault Decl., Ex. C.

6 Arguing that Divineo and Mr. Legault's initial discovery  
7 responses were inadequate, Plaintiff served a second set of  
8 interrogatories, a second set of document requests and a first set  
9 of requests for admission on February 8, 2006. MacDonald Decl.,  
10 Exs. 16, 17 and 18. Neither Divineo nor Mr. Legault responded to  
11 these discovery requests by the March 10, 2006 deadline, and they  
12 did not seek an extension of the deadline. Plaintiff also served  
13 deposition notices on Divineo and Mr. Legault; the depositions were  
14 stayed, at Mr. Legault's request, in order allow Divineo and Mr.  
15 Legault to hire new counsel, but they did not do so. MacDonald  
16 Decl. ¶ 21.

17 Mr. Legault complains generally that he has only been able to  
18 communicate with Plaintiff through its counsel, and that he does  
19 not speak fluent English. Legault Decl. ¶ 6. Mr. Legault is not  
20 entitled to communicate directly with Plaintiff when it is  
21 represented by counsel. He also has not shown any specific reason  
22 why his lack of fluency in English has impaired his former  
23 attorney's representation of him, or that it has impaired his  
24 representation of himself.

25 Plaintiff objects to several of the statements in Mr.  
26 Legault's declaration on grounds of hearsay, relevance and  
27 reliability, and to all of his exhibits on the grounds that they  
28

1 lack foundation or have not been properly authenticated. To the  
2 extent the Court relies on Mr. Legault's statements to prove the  
3 truth of the matters asserted, Plaintiff's objections are  
4 overruled; otherwise, Plaintiff's objections are denied as moot.

5 LEGAL STANDARD

6 Summary judgment is properly granted when no genuine and  
7 disputed issues of material fact remain, and when, viewing the  
8 evidence most favorably to the non-moving party, the movant is  
9 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
10 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
11 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
12 1987).

13 The moving party bears the burden of showing that there is no  
14 material factual dispute. Therefore, the court must regard as true  
15 the opposing party's evidence, if supported by affidavits or other  
16 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815  
17 F.2d at 1289. The court must draw all reasonable inferences in  
18 favor of the party against whom summary judgment is sought.  
19 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
20 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d  
21 1551, 1558 (9th Cir. 1991).

22 Material facts which would preclude entry of summary judgment  
23 are those which, under applicable substantive law, may affect the  
24 outcome of the case. The substantive law will identify which facts  
25 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
26 (1986).

27 Where the moving party does not bear the burden of proof on an  
28

1 issue at trial, the moving party may discharge its burden of  
2 production by either of two methods. Nissan Fire & Marine Ins.  
3 Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir.  
4 2000).

5 The moving party may produce evidence negating an  
6 essential element of the nonmoving party's case, or,  
7 after suitable discovery, the moving party may show that  
8 the nonmoving party does not have enough evidence of an  
9 essential element of its claim or defense to carry its  
10 ultimate burden of persuasion at trial.

11 Id.

12 If the moving party discharges its burden by showing an  
13 absence of evidence to support an essential element of a claim or  
14 defense, it is not required to produce evidence showing the absence  
15 of a material fact on such issues, or to support its motion with  
16 evidence negating the non-moving party's claim. Id.; see also  
17 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.  
18 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the  
19 moving party shows an absence of evidence to support the non-moving  
20 party's case, the burden then shifts to the non-moving party to  
21 produce "specific evidence, through affidavits or admissible  
22 discovery material, to show that the dispute exists." Bhan, 929  
23 F.2d at 1409.

24 If the moving party discharges its burden by negating an  
25 essential element of the non-moving party's claim or defense, it  
26 must produce affirmative evidence of such negation. Nissan, 210  
27 F.3d at 1105. If the moving party produces such evidence, the  
28 burden then shifts to the non-moving party to produce specific  
evidence to show that a dispute of material fact exists. Id.

1 If the moving party does not meet its initial burden of  
2 production by either method, the non-moving party is under no  
3 obligation to offer any evidence in support of its opposition. Id.  
4 This is true even though the non-moving party bears the ultimate  
5 burden of persuasion at trial. Id. at 1107.

6 Where the moving party bears the burden of proof on an issue  
7 at trial, it must, in order to discharge its burden of showing that  
8 no genuine issue of material fact remains, make a prima facie  
9 showing in support of its position on that issue. UA Local 343 v.  
10 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That  
11 is, the moving party must present evidence that, if uncontroverted  
12 at trial, would entitle it to prevail on that issue. Id.; see also  
13 Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th  
14 Cir. 1991). Once it has done so, the non-moving party must set  
15 forth specific facts controverting the moving party's prima facie  
16 case. UA Local 343, 48 F.3d at 1471. The non-moving party's  
17 "burden of contradicting [the moving party's] evidence is not  
18 negligible." Id. This standard does not change merely because  
19 resolution of the relevant issue is "highly fact specific." Id.

## 20 DISCUSSION

### 21 I. Mr. Legault's DMCA Liability

#### 22 A. Applicable Law

23 Enacted on October 28, 1998, the DCMA implements two earlier  
24 World Intellectual Property Organization treaties. The DMCA  
25 prohibits the circumvention of a technological measure that  
26 effectively controls access to a work protected under this title.  
27 17 U.S.C. § 1201(a) (1) (A). Section 1201(a) (2) provides,

1 No person shall manufacture, import, offer to the public,  
2 provide, or otherwise traffic in any technology, product,  
service, device, component, or part thereof, that--

- 3 (A) is primarily designed or produced for the purpose of  
circumventing a technological measure that effectively  
4 controls access to a work protected under this title;  
(B) has only limited commercially significant purpose or  
5 use other than to circumvent a technological measure that  
effectively controls access to a work protected under  
6 this title; or  
(C) is marketed by that person or another acting in  
7 concert with that person with that person's knowledge for  
use in circumventing a technological measure that  
8 effectively controls access to a work protected under  
this title.

9 Section 1201(b) (1) similarly prohibits the trafficking of devices  
10 primarily designed or produced for the purpose of circumventing  
11 "protection afforded by a technological measure that effectively  
12 protects a right of a copyright owner under this title in a work or  
13 a portion thereof." To "circumvent protection afforded by a  
14 technological measure" is defined to mean "avoiding, bypassing,  
15 removing, deactivating, or otherwise impairing a technological  
16 measure." Id. § 1201(b) (2) (A). A technological measure  
17 "effectively protects a right of a copyright owner" if, "in the  
18 ordinary course of its operation," it "prevents, restricts, or  
19 otherwise limits the exercise of a right of a copyright owner under  
20 this title." Id. § 1201(b) (2) (B).

21 Plaintiff has made a prima facie showing of evidence in  
22 support of its position that Mr. Legault violated the DMCA by  
23 trafficking in devices that are primarily designed or produced for  
24 the purpose of circumventing the PlayStation authentication system  
25 which otherwise controls access to software played on the system,  
26 including Plaintiff's own copyrighted PlayStation games.

27 None of Mr. Legault's evidence is sufficient to raise a  
28

1 dispute regarding Mr. Jessop's statements that the "primary" or  
2 "sole" function of the accused Divineo devices is to circumvent  
3 Plaintiff's authentication system. The conclusory assertion in  
4 Divineo's response to Plaintiff's request for admission denying  
5 that "'mod chips' are designed primarily to circumvent  
6 technological measures" does not constitute evidence sufficient to  
7 withstand summary judgment in the face of Mr. Jessop's testimony to  
8 the contrary. Mr. Legault has shown evidence that the products he  
9 sold may be used in a manner that does not involve accessing copies  
10 of Plaintiff's copyrighted works or that makes fair use of such  
11 works. For instance, users of mod chips could use them to ensure  
12 the interoperability of an independently created computer program,  
13 protected by DMCA's "reverse engineering" exception. § 1201(f).  
14 The Court also takes as true Mr. Legault's assertions in his signed  
15 opposition that use of a mod chip may be the only way to play  
16 legally purchased, imported games on a United States PlayStation  
17 console. However, downstream customers' lawful or fair use of  
18 circumvention devices does not relieve Mr. Legault from liability  
19 for trafficking in such devices under the DMCA. See 321 Studios v.  
20 Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1097 (N.D.  
21 Cal. 2004) (holding that downstream customers' uses are not  
22 relevant to determining defendant's liability under DMCA); United  
23 States v. Elcom, Ltd., 203 F. Supp. 2d 1111, 1120 (N.D. Cal. 2002)  
24 (noting that Congress banned only trafficking in and marketing of  
25 devices designed to circumvent use restriction technology, not the  
26 act of circumvention). The fact that users of mod chips must be  
27 technologically sophisticated is not evidence that the purpose of

28

1 the mod chips is not circumvention. Finally, Divineo's "legal  
2 notice" to its customers is not relevant to its own liability under  
3 the DMCA.

4 Mr. Legault argues that the PlayStation authentication process  
5 is not a "technological measure" within the meaning of the DMCA  
6 because it does not effectively protect against persons who use  
7 devices such as HDLoader to store games on a hard drive. The fact  
8 that circumvention devices may be widely available does not mean  
9 that a technological measure is not, as the DMCA provides,  
10 effectively protecting the rights of copyright owners "in the  
11 ordinary course of its operation." A New York district court  
12 concluded that the construction of the statute urged by Mr. Legault

13 would limit the application of the statute to access control  
14 measures that thwart circumvention, but withhold protection  
15 from those measures that can be circumvented. In other words,  
16 defendants would have the Court construe the statute to offer  
17 protection where none is needed but to withhold protection  
18 precisely where protection is essential.

19 Universal Studios v. Reimerdes, 111 F. Supp. 2d 294, 318 (S.D. N.Y.  
20 2000); see also 321 Studios, 307 F. Supp. 2d at 1095 (comparing  
21 defendant's similar argument to the claim that a deadbolt is  
22 ineffective because skeleton keys are readily available on the  
23 black market).

24 Mr. Legault argues that Mr. Jessop and Mr. Ngo are not  
25 objective witnesses because the former is a long-time Sony  
26 employee, and the latter is cooperating with Plaintiff in order to  
27 avoid his own liability. The fact that Plaintiff's witnesses may  
28 be biased does not render their otherwise uncontradicted statements  
inadmissible, and does not overcome Plaintiff's motion for summary

1 adjudication.

2       The Court agrees that Plaintiff's briefs at times obscure the  
3 difference between Mr. Legault and Mr. Louarn, Divineo SARL and  
4 Divineo U.K. However, the few documents produced by Divineo and  
5 Mr. Legault, namely the summary of Divineo's sales of circumvention  
6 devices into the United States from the fourth quarter of 2003  
7 through the second quarter of 2005, are sufficient to establish  
8 Divineo and Mr. Legault's liability.

9       Mr. Legault's other evidence relates to irrelevant accusations  
10 against Plaintiff involving unrelated matters, such as news  
11 articles covering criticism of and legal action against Sony BMG  
12 Music Entertainment's use of antipiracy technology in music CDs.  
13 See Legault Decl., Ex. H. This evidence does not establish a  
14 dispute of fact as to Mr. Legault's liability under the DMCA.

15 II. Minimum Statutory Award

16       The DMCA provides,

17       At any time before final judgment is entered, a complaining  
18 party may elect to recover an award of statutory damages for  
19 each violation of section 1201 in the sum of no less than \$200  
20 or more than \$2,500 per act of circumvention, device, product,  
component, offer, or performance of service, as the court  
considers just.

21       17 U.S.C. § 1203(c)(3)(A). Plaintiff has elected to pursue  
22 statutory damages in this case.

23       Section 1203(c)(5)(A) further provides that a court may reduce  
24 the award of damages "in any case in which the violator sustains  
25 the burden of proving, and the court finds, that the violator was  
26 not aware and had no reason to believe that its acts constituted a  
27 violation." Although Mr. Legault declares that he was not aware

28

1 that the undertaking between Mr. Louarn and Plaintiff applied to  
2 him, this does not amount to a claim that he had no reason to  
3 believe that his acts were in violation of the DMCA. For the  
4 reasons discussed in Section III below, the Court finds that Mr.  
5 Legault's sales were in fact willful, at least since Plaintiff's  
6 November, 2004 filing of this lawsuit against Divineo.

7 In determining the number of violations, the Court finds that  
8 a dispute of fact exists as to whether any of Mr. Ngo's wholesale  
9 purchases can be attributed to Mr. Legault. The evidence Sony  
10 offers for the Ngo sale is mostly hearsay, and Mr. Legault has  
11 denied selling devices to Mr. Ngo. If Plaintiff wishes to increase  
12 the statutory damages available to it by proving at trial that Mr.  
13 Legault committed additional violations of the DMCA, it may do so.

14 Instead, the Court looks only to the undisputed evidence of  
15 Mr. Legault and Divineo's retail sales. This shows that Divineo  
16 sold 7,772 devices between November, 2003 and June, 2005. Mr.  
17 MacDonald estimates that Divineo and Mr. Legault likely sold an  
18 additional 3,890 devices between July, 2005 and March 31, 2006,  
19 assuming that sales held constant at an average of 389 devices per  
20 month. Mr. Legault persuasively argues that this assumption is  
21 unfair, because the average is artificially increased by the strong  
22 sales of the "mainstream" HDLoader device, which Divineo ceased  
23 selling at the beginning of the first quarter of 2005. However, he  
24 does not suggest an alternative calculation, or explain his failure  
25 to provide more recent sales data in response to Plaintiff's second  
26 set of discovery requests.

27 The Court finds that a reasonable average estimate for the  
28

1 last ten months is 224 devices (the average sold per month during  
2 the second quarter of 2005, the last quarter for which data is  
3 available). Therefore, the Court finds that Mr. Legault and  
4 Divineo sold approximately 10,012 circumvention devices. Plaintiff  
5 is thus entitled to a minimum statutory award of \$2,002,400.00.

6 III. Enhancement of Minimum Statutory Award

7 Plaintiff asks the Court to exercise its discretion to enhance  
8 the statutory award against Mr. Legault to \$800 per violation on  
9 the grounds that (1) he failed to respond fully in discovery;  
10 (2) his violations of the DMCA were willful; and (3) his conduct  
11 likely caused even greater harm to Plaintiff and other software  
12 publishers.

13 The Court agrees that, based on the record before it, Mr.  
14 Legault has failed to respond fully in discovery. This is made  
15 particularly clear by his failure to produce any records relating  
16 to those "rare" occasions when he admittedly engaged in wholesale  
17 sales. Due to Mr. Legault's pro se status, however, the Court will  
18 not enhance fees on the basis of his discovery failures.

19 As evidence of his good faith, Mr. Legault points to his  
20 production of certain sales invoices and his decision to stop  
21 selling the HDLoader in early 2005. The production of the invoices  
22 was necessary to comply with Plaintiff's discovery requests, and  
23 thus is not evidence of good faith. Although Mr. Legault's  
24 decision to stop selling the HDLoader was sensible, he offers no  
25 credible explanation for his continued trafficking in other  
26 circumvention devices after that point. Therefore, the Court will  
27 enhance the statutory award to \$800 per violation for all sales

1 after the first quarter of 2005 (an estimated 2,913 devices),  
2 bringing the total statutory award to which Plaintiff is entitled  
3 to \$3,750,200.00. See Sony Computer Entertainment America, Inc.,  
4 v. Filipiak, 406 F. Supp. 2d 1068, 1075 (N.D. Cal. 2005) (awarding  
5 enhanced statutory damages of \$800 per circumvention device in  
6 related DMCA case).

7 The Court declines to enhance the statutory awards on the  
8 basis of the alleged greater harms cause by Mr. Legault's acts;  
9 Plaintiff does not show that this harm goes beyond the expected  
10 effects of violations of the DMCA. The \$3.75 million damages award  
11 is an adequate sanction for Mr. Legault's conduct.

#### 12 IV. Attorneys' Fees, Costs and Prejudgment Interest

13 The DMCA authorizes a court, "in its discretion," to allow  
14 recovery of costs and to award "reasonable attorney's fees" to the  
15 prevailing party. 17 U.S.C. § 1203(b)(4), (5). The Court agrees  
16 that an award of costs and attorneys' fees is appropriate here,  
17 especially in light of Mr. Legault and Divineo's willful  
18 violations.

#### 19 V. Defaulting Defendants

20 With respect to the remaining defaulting Defendants, Divineo  
21 U.K., Divineo SARL and Max Louarn, Plaintiff has also established a  
22 prima facie case for liability under the DMCA.

23 Divineo U.K., Divineo SARL and Max Louarn never provided any  
24 discovery in this case. However, Plaintiff has obtained documents  
25 showing the importation and sales of 1020 devices by Divineo U.K.  
26 and Mr. Louarn to Mr. Ngo and Mr. Filipiak. In addition, Plaintiff  
27 has shown evidence that Max Louarn and Divineo SARL knew of, and  
28

1 worked in concert with, Mr. Legault and Divineo. Therefore, the  
2 remaining defaulting Defendants are responsible for an estimated  
3 11,032 violations of the DMCA with respect to sales of devices to  
4 the United States. Accordingly, the minimum statutory damages for  
5 which Divineo U.K., Divineo SARL and Max Louarn are responsible is  
6 \$2,206,400.00. With respect to the approximately 5,975 sales that  
7 took place after Mr. Louarn and Divineo SARL signed the September  
8 21, 2004 "Undertaking," the Court finds that the sales were  
9 willful. Therefore, the Court will enhance the statutory award to  
10 \$800 per violation for those sales, bringing the total amount of  
11 statutory damages to \$5,791,400.00.

12 Although Plaintiff moved for default judgment on all of its  
13 claims against the defaulting Defendants, its papers address only  
14 its claims under the DMCA. Therefore, the Court denies Plaintiff's  
15 application for default judgment on its federal copyright, Lanham  
16 Act and California State law claims, and dismisses these claims for  
17 failure to prosecute.

18 CONCLUSION

19 For the foregoing reasons, the Court GRANTS Plaintiff's motion  
20 for summary adjudication of its DMCA claims against Mr. Legault  
21 (Docket No. 85) and GRANTS Plaintiff's application for default  
22 judgment with respect to its DMCA claims against defaulting  
23 Defendants Divineo, Divineo U.K., Divineo SARL and Mr. Louarn  
24 (Docket No. 83). Plaintiff's remaining claims against the  
25 defaulting Defendants are dismissed. The Court finds that  
26 Plaintiff is entitled to \$3,750,200.00 in statutory damages from  
27 Mr. Legault and Divineo, jointly and severally, and to  
28

1 \$5,791,400.00 in statutory damages from Divineo U.K., Divineo SARL  
2 and Mr. Louarn, jointly and severally. Plaintiff shall recover of  
3 Defendants its costs and a reasonable attorneys' fee in connection  
4 with its DMCA claims. Defendants shall be jointly and severally  
5 liable for attorneys' fees and costs.

6 The claims and issues remaining for trial are Plaintiff's  
7 federal copyright, Lanham Act and California State law claims  
8 claims against Mr. Legault, and Mr. Legault and Divineo's liability  
9 for additional damages arising from alleged wholesale sales. If  
10 Plaintiff does not wish to pursue these remaining claims and  
11 issues, it may request that the Court dismiss the remaining claims,  
12 in which case the Clerk will enter judgment in Plaintiff's favor on  
13 the DMCA claims against all Defendants. If Plaintiff chooses not  
14 to pursue its remaining claims at trial, it should notify the Court  
15 of its decision and submit an application for attorneys' fees and  
16 costs within ten days of the date of this order. If Plaintiff does  
17 so, a case management conference will not be scheduled.

18 Pursuant to 17 U.S.C. § 1203(b)(1), the Court further orders  
19 that all Defendants, and their agents, attorneys, employees, and  
20 all other persons in active concert or participation with them who  
21 receive notice of this order, shall be permanently enjoined and  
22 restrained from:

- 23 1. Offering for sale, selling, providing, distributing,  
24 exporting, importing, or shipping, into the United States or  
25 to customers located in the United States, directly or  
26 indirectly, all devices that circumvent the PlayStation  
27 systems' technological security measures ("circumvention  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

devices"); and  
2. Offering for sale, selling, providing, distributing, exporting, importing, or shipping, to any persons or other entities that Defendants know, or have reasons to know, have shipped, sold, distributed, provided, or exported at any time any circumvention devices to customers located in the United States.

For three years from the date of entry of final judgment, the Court shall retain jurisdiction for the purpose of modifying or interpreting this order, the enforcement thereof or the punishment of any violations thereof. See 17 U.S.C. § 1203(c)(4) (providing that courts may award triple damages upon finding that a person violated § 1201 or § 1202 within three years after entry of final judgment).

IT IS SO ORDERED.

Dated: **SEP 11 2006**

  
CLAUDIA WILKEN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

SONY COMPUTER ENTERTAINMENT  
AMERICA, INC. et al,

Plaintiff,

v.

N2-ELECTRONICS.COM et al,

Defendant.

---

Case Number: CV04-04200 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 11, 2006, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Angus M. MacDonald  
Townsend & Townsend & Crew LLP  
Two Embarcadero Center  
Eighth Floor  
San Francisco, CA 94111-3834

Frederic Legault  
c/o: Divineo, Inc.  
64011-1372 St. Jacques  
Quebec, QC G2E 6B1

Jennifer Y. Liu  
Sony Computer Entertainment America Inc.  
919 East Hillsdale Boulevard  
2nd Floor  
Foster City, CA 94404

Dated: September 11, 2006

Richard W. Wicking, Clerk  
By: Sheilah Cahill, Deputy Clerk