

Before the

**United States Copyright Office
Library of Congress**

In the Matter of)
)
Exemption to Prohibition on) Docket No. RM 2008-08
Circumvention of Copyright Protection Systems)
For Access Control Technologies)

COMMENTS OF

**KARTEMQUIN EDUCATIONAL FILMS, INC.
INTERNATIONAL DOCUMENTARY ASSOCIATION
FILM INDEPENDENT
INDEPENDENT FEATURE PROJECT
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE
UNIVERSITY FILM AND VIDEO ASSOCIATION
ROBERT BAHAR
KIRBY DICK
ARTHUR DONG
JEFFREY LEVY-HINTE
DAVID NOVACK
MORGAN SPURLOCK**

ADDRESSING PROPOSED CLASS #11B

Submitted For:

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International Documentary Association
Film Independent
Independent Feature Project
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I. PROPOSED CLASS ADDRESSED

Class #11B: Motion pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System technology when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107.

II. SUMMARY

Last December, Kartemquin Educational Films, Inc. (“Kartemquin”) and the International Documentary Association (“IDA”) requested an exemption to the Digital Millennium Copyright Act’s (“DMCA”) prohibition on the circumvention of technological protection measures to remedy the prohibition’s adverse impact on fair uses of material and use of public domain works by documentary filmmakers (“Initial Comment”).¹ Kartemquin and IDA, now joined by Film Independent, Independent Feature Project, National Alliance for Media Arts and Culture, University Film and Video Association, Robert Bahar, Kirby Dick, Arthur Dong, Jeffrey Levy-Hinte, David Novack and Morgan Spurlock, submit this Supplemental Comment pursuant to the Copyright Office’s December 29, 2008 Notice of Proposed Rulemaking² to renew their request for an exemption and notify the Copyright Office of new developments that further demonstrate the importance of and need for an exemption for documentary filmmakers. First, there has been an outpouring of support from the documentary filmmaking community for the proposed exemption. Four major organizations of filmmakers and six award-winning documentary filmmakers have recognized the urgent need for this exemption and now join in this request, because they understand the importance of fair use and public domain works in the documentary filmmaking process. In addition, in December it was reported that the last major VHS distributor has stopped selling VHS tapes, further demonstrating that VHS is not a viable alternative to DVD for filmmakers making fair use of copyrighted material or use of works in the public domain. Both of these developments underscore the urgent need for this exemption; documentary filmmakers across the nation concur that the DMCA’s prohibition on circumvention of technological protection measures (“TPMs”) is having a substantial adverse effect on documentary film and that the requested exemption provides an adequate remedy.

¹ *Comment of Kartemquin Educational Films and the International Documentary Association*, 1 (2008), <http://www.copyright.gov/1201/2008/comments/kartemquin-ida.pdf> (hereinafter “Initial Comment”).

² Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 249, 79425.

III. DISCUSSION

A. Since Kartemquin Educational Films and IDA Filed Their Initial Comment, Several Film Organizations and Individual Documentary Filmmakers Have Recognized the Need for an Exemption and Now Join in the Request for an Exemption

Since Kartemquin and IDA filed their Initial Comment proposing a class of works for exemption just two months ago, there has been an outpouring of support from organizations of filmmakers, and from individual documentary filmmakers, nationwide. These organizations and filmmakers strongly agree that without this exemption, documentary filmmakers are effectively unable to make fair use of works or use public domain works in their documentaries because of the DMCA's prohibition on circumvention. The DMCA's prohibition prevents them from making fair use of works that are protected by Content Scramble System ("CSS") technology, the encryption technology present on nearly all DVDs, or from obtaining public domain materials that are bundled with copyrighted material on DVDs protected by CSS. The following organizations of filmmakers and individual documentary filmmakers have therefore endorsed the class of works proposed by Kartemquin and IDA, and join in their request for an exemption³:

- Film Independent
- Independent Feature Project (IFP)
- National Alliance for Media Arts and Culture (NAMAC)
- University Film and Video Association (UFVA)
- Robert Bahar
- Kirby Dick
- Arthur Dong
- Jeffrey Levy-Hinte
- David Novack
- Morgan Spurlock

The membership of each of these organizations, which collectively numbers thousands of filmmakers, includes documentary filmmakers in significant part. These organizations educate the documentary filmmaking community through seminars, conferences and workshops; they provide financial support for documentary filmmakers in the form of production grants and awards; and, through film festivals and awards ceremonies, they provide vital avenues by which the public can learn about and view documentary films. The documentary filmmakers who have joined in this request for an exemption have decades of collective experience in this field and know firsthand how essential fair use and the availability of public domain works is to documentary filmmaking. For more information on these organizations and filmmakers, please see "About the New Commenters" attached hereto as Appendix C.

³ See Appendix A, "Statement of Film Independent, Independent Feature Project, National Alliance for Media Arts and Culture (NAMAC), Robert Bahar, Kirby Dick, Arthur Dong, Jeffrey Levy-Hinte, David Novack, and Morgan Spurlock" and Appendix B, "Statement of University Film and Video Association."

The organizations and filmmakers listed above have joined in this request for an exemption because they understand the immense importance that fair use and the use of public domain works play in documentary filmmaking, and they are deeply concerned about the adverse impact that the DMCA's prohibition on the circumvention of TPMs is having on filmmakers' ability to make fair use of materials and to use public domain works.

Since the inception of the documentary form, countless films have been made that recall historic events, make a cultural critique or provide social commentary, expose hidden truths, or serve educational purposes; and the doctrine of fair use and the availability of public domain works have been necessary in order to do so. In fact, without the fair use doctrine, many important documentary films simply could not have been made.

For example, *This Film Is Not Yet Rated*, a recent exposé of the MPAA ratings system, would have been impossible to make without fair use. The documentary is, by its very nature, critical of the entertainment industry. Because all of the major studios have restrictions in their license agreements that prevent a filmmaker from using excerpts of their films in ways that are derogatory or critical of the entertainment industry, the film depended on the fair use doctrine for the inclusion of approximately 150 clips.

Likewise, the documentary *Smoke and Mirrors: A History of Denial* explores how feature films use actors to promote smoking. Here, too, the filmmakers were prohibited from licensing clips due to the content of the documentary, and thus relied on fair use to make their film.

The documentary *Bigger Stronger Faster**, which explores the use of steroids and its effect on American culture, also could not have been made but for the fair use doctrine. The film discusses various individuals who have taken steroids, including Sylvester Stallone and Arnold Schwarzenegger; but public figures are often very reluctant to grant licenses to be discussed or portrayed regarding subject matter such as this. Without fair use, the creation of a film such as this could have been prevented by various individuals, corporations and organizations simply because they did not approve of the content.

Each of these films plays an important role in society through its critique, commentary or exposé of some aspect of our culture,⁴ but without fair use, none of them could even have been made. Documentary film has faced this reality since the form was developed, and it is why documentary film is an exemplar of the type of activity for which the fair use doctrine was developed.⁵

The DMCA's prohibition on circumvention of TPMs is slowly suffocating documentary film because it is crippling documentary filmmakers' ability to make fair use of copyrighted works and to use public domain works in their films. Documentary films often depend on the fair use of works or public domain material on CSS-protected DVDs. As discussed in the Initial

⁴ For more discussion on, and examples of, the importance of documentary films and their effect on public discourse, please see P. AUFDERHEIDE, DOCUMENTARY FILM: A VERY SHORT INTRODUCTION 5-9 (2007).

⁵ As discussed in the Initial Comment at page 13, the socially productive uses that documentary films make parallel the purposes of criticism, comment, news reporting, teaching, scholarship and research identified in Sections 107 and 1201(a)(1)(C)(iii) of the Copyright Act.

Comment⁶ and below in Section III, because of the DMCA's prohibition on circumvention of CSS and because no practicable alternatives to circumvention exist, the prohibition effectively renders documentary filmmakers unable to use footage in the public domain or to make fair use of copyrighted material.

The Commenters, as copyright holders themselves, seek only to strike a balance between copyright protection and preserving noninfringing uses in documentary film, and that is why they request this exemption. The class of works proposed for exemption complies with the guidelines set forth in the Register of Copyright's 2006 Recommendation⁷ and in its October 2008 Notice of Inquiry,⁸ which provide a viable means by which to fashion a class that is neither too narrow nor too broad to remedy the adverse effects of the prohibition. The proposed class is a narrow and focused subset of a Section 102 category of authorship—motion pictures and other audiovisual works—which is tailored to apply only to a specific set of non-infringing uses—fair use and the use of public domain works—and a discrete and identifiable set of users. Because the proposed exemption is narrowly tailored, it limits any adverse consequences that might result from the exemption while alleviating a substantial adverse effect on documentary filmmaking. The proposed exemption presents minimal risk to copyright holders; there is no evidence of any increase in piracy as a result of previous exemptions, and under the proposed exemption rightsholders would enjoy the full panoply of remedies against any infringing activity.

B. A New Development Further Emphasizes That Documentary Filmmakers Have No Practicable Alternatives to Circumvention of CSS on DVDs Where They Need to Make Fair Use of Copyrighted Material or to Use Public Domain Works

Since Kartemquin and IDA filed their Initial Comment last December, it was reported that the last major VHS supplier, Distribution Video Audio, Inc. ("DV&A"), has ended its VHS distribution business. This new development further substantiates the need for an exemption for the requested class of works, and as a front-page article in *The Los Angeles Times* reported on December 22,⁹ it signals the end of the VHS market, which has withered away as DVD has become the default distribution format for motion pictures and other audiovisual works. Ryan Kugler, president and co-owner of DV&A, has submitted a statement, attached to this Supplemental Comment as Appendix D, that describes in detail the death of the VHS market and its replacement by a robust market for DVDs.¹⁰ In light of this development, it has become more difficult to acquire VHS tapes, and documentary filmmakers who seek to obtain material from VHS as an alternative to circumventing the CSS on DVDs will have an exceedingly difficult time doing so.

⁶ *Comment of Kartemquin Educational Films and the International Documentary Association*, 5-7 (2008), <http://www.copyright.gov/1201/2008/comments/kartemquin-ida.pdf>.

⁷ *Recommendation of the Register of Copyrights*, 16-17 (2006), http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

⁸ *Notice of Inquiry*, 73 Fed. Reg. 194, 58073-79 (Oct. 6, 2008), <http://www.copyright.gov/fedreg/2008/73fr58073.pdf>.

⁹ See Geoff Boucher, *VHS Era Is Winding Down*, L.A. TIMES, Dec. 22, 2008, at A1, attached hereto as Appendix E.

¹⁰ See "Statement of Ryan Kugler, President and Co-owner of Distribution Video Audio, Inc.," attached hereto as Appendix D.

In any event, as discussed in the Initial Comment, even if VHS were readily available, it is still not a viable alternative to material obtained from DVDs.¹¹ The analog transfer method is not a viable alternative to circumvention because it results in footage that is either of very poor quality or does not meet the detailed technical standards imposed by broadcasters. These technical standards are so extensive – reportedly containing “hundreds of criteria”¹² – and so strict that independent companies are often hired that specialize in the technical evaluation of films and other works submitted for broadcast.¹³ As discussed in the Initial Comment,¹⁴ television broadcast is one of the primary avenues by which documentary filmmakers exhibit their work and by which the public is able to view documentaries; the DMCA’s prohibition on circumvention severely restricts this important avenue or in some cases closes it off entirely.

The organizations and filmmakers that have joined in Kartemquin and IDA’s request for an exemption recognize that where documentary filmmakers seek to make fair use of motion pictures and other audiovisual works, or to use public domain works, no practicable alternative to DVDs exists; the material obtained from VHS or via analog transfer is either too degraded or technically unsuitable for documentary filmmaking.

IV. CONCLUSION

Documentary film, which is so important to our society and is an exemplar of the type of activity for which the fair use doctrine was developed, is under siege because of the DMCA’s prohibition on circumvention. That is why documentary filmmakers nationwide have recognized the need for this exemption and join in this request.

For the reasons set forth in this Supplemental Comment and in the Initial Comment, Kartemquin Educational Films, the Independent Documentary Association, Film Independent, Independent Feature Project, the National Alliance for Media Arts and Culture, the University Film and Video Association, Robert Bahar, Kirby Dick, Arthur Dong, Jeffrey Levy-Hinte, David Novack, and Morgan Spurlock respectfully urge that the request for an exemption for the proposed class of works be granted.

The Commenters look forward to providing further information and to answering any questions about their request at a hearing before the Copyright Office in this rulemaking proceeding.

¹¹ *Comment of Kartemquin Educational Films and the International Documentary Association*, 5-7 (2008), <http://www.copyright.gov/1201/2008/comments/kartemquin-ida.pdf>.

¹² *Pillar to Post > Services > Technical Evaluation*, http://pillarvid.com/services/technical_evaluation.html.

¹³ For example, Pillar to Post, LLC performs technical evaluations for PBS, assessing whether a submitted work meets PBS’s requirements for image quality and other technical specifications. Pillar to Post claims on its website that PBS’s specifications “have historically been some of the toughest to meet” and states that all of their technicians undergo “rigorous training.” Id.

¹⁴ *Comment of Kartemquin Educational Films and the International Documentary Association*, 5 (2008), <http://www.copyright.gov/1201/2008/comments/kartemquin-ida.pdf>.

APPENDIX A

**Statement of Film Independent, Independent Feature Project,
National Alliance for Media Arts and Culture,
Robert Bahar, Kirby Dick, Arthur Dong,
Jeffrey Levy-Hinte, David Novack, and Morgan Spurlock**

We, the undersigned organizations and individuals, join the request of Kartemquin Educational Films, Inc. and the International Documentary Association for an exemption to the Digital Millennium Copyright Act's prohibition on circumvention of technological protection measures that would permit certain documentary filmmakers to access motion pictures and other audiovisual works on Digital Versatile Discs ("DVDs"), in order to make fair use of such works or to obtain public domain works, under limited circumstances.¹

The undersigned organizations support documentary film by providing resources to, and supporting the work of, countless documentary filmmakers through financial support, advocacy, and education. Through workshops, seminars, conferences, festivals, grants, and mentorships, we have assisted all levels of documentary filmmakers in the creation of their films. A significant portion of our membership comprises documentary filmmakers.

The undersigned individuals are veteran, award-winning documentary filmmakers who understand the unique challenges of documentary filmmaking and the importance of documentary film in our society. Because we have created and been part of a wide array of documentary films that educate, report on current or historical events, and provide commentary and criticism, we understand the value that documentary films provide to our society.

As documentary filmmakers and organizations whose membership comprises documentary filmmakers in significant part, we know that documentary filmmakers must be able to make fair use of copyrighted materials and to use public domain materials. These materials are not always easy to obtain—the copyright owner may not be willing to license the use for an affordable price or, in many cases, the copyright owner may not be willing to authorize the use at all. For these reasons, the doctrine of fair use is critically important to documentary filmmaking, and without it many documentary films could not be made.

Unfortunately, the DMCA's prohibition on the circumvention of technological protection

¹ The proposed class of works, Class #11B, is as follows:

Motion pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System technology when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107.

measures is crippling documentary filmmakers' ability to make fair use of works and to use public domain materials. DVD has replaced VHS as the default media distribution format of our time, but virtually all DVDs are encrypted using Content Scramble System technology ("CSS"). Because none of the analog alternatives to the circumvention of CSS are viable for documentary filmmaking, documentary filmmakers cannot make fair use of copyrighted material or use public domain works, and are prevented from making certain points in their films or from making their films at all. Ultimately, it is the public that is harmed: when these documentary films cannot be made, the public is deprived of the socially productive purposes that documentary films serve.

As copyright holders ourselves, we rely on and respect copyright, and seek only to balance the interests of copyright holders with the interest in preserving these noninfringing uses in documentary film. Without an exemption to the DMCA that permits documentary filmmakers to use public domain works and make fair use of material on CSS-protected DVDs, documentary filmmaking and the important purposes it serves will remain severely compromised. We therefore seek only a very narrowly-tailored exemption that would balance the interests of copyright holders with the interest in preserving noninfringing uses in documentary film.

For these reasons, we join in the request of Kartemquin Educational Films, Inc. and the International Documentary Association for an exemption that would permit certain documentary filmmakers to make fair use of materials on DVDs and to obtain public domain materials from DVDs under limited circumstances, as set forth in the December 2, 2008 Comment of Kartemquin Educational Films and IDA.² We strongly urge that the exemption be granted.

Film Independent

Independent Feature Project

National Alliance for Media Arts and Culture

Kirby Dick

Arthur Dong

Robert Bahar

Jeffrey Levy-Hinte

David Novack

Morgan Spurlock

² Id.

APPENDIX B

Statement of Diane Carson, President, University Film and Video Association



UNIVERSITY
FILM&VIDEO
ASSOCIATION

United States Copyright Office Library of Congress

Re: The Matter of the Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies
Docket No. RM 2008-08

The Board of Directors and Officers of the University Film and Video Association (UFVA), an international, professional organization of film teachers and practitioners founded in 1946, strongly supports the DMCA exemption for documentary filmmaking. UFVA represents 913 members and 127 film schools representing the major film programs in higher education in the U.S.

UFVA was an original endorser of and recommends to its members the Documentary Filmmakers' Statement of Best Practices in Fair Use (http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/) published by the Center for Social Media at American University. The Statement is provided in hard copy to all incoming members. It is also posted on our website, as is syllabus language on fair use. We regularly devote sessions at our annual conference to the principles and limitations of fair use, and UFVA has a Fair Use Working Group.

As media practitioners, our members have a vested interest in the strong protection of intellectual property. At the same time, as makers we are fully aware that creative choice and freedom of expression depend on reasonable access to existing culture. Moreover, because we are committed to teaching both to the industry standard and best practices within the law, our members teach the students at our colleges and universities the principles and limitations of fair use, as well as their ownership rights.

We understand the crucial importance of the marketplace of ideas and the educational need for documentary filmmakers and film students to access DVD material. For many works, DVD is the only way for our members or their students to access the material. There is no videocassette available for most recent films, and when a videotape copy is available, the quality is much degraded from DVD quality. This is of crucial significance to film students and teachers, who strive for the best possible production values, and who have many valid reasons for using

copyrighted material other than the nature of the subject matter within it. For that reason, the DMCA exemption is crucial to documentary film students.

Our members model and teach responsible use of the fair use doctrine, knowing that balance in copyright is crucial to maintain the spectrum of rights that they and their students will need as producers of new material.

The many documentary filmmakers who are members of UFVA need this DMCA exemption, and therefore UFVA strongly urges this exemption to the DMCA be granted.

Diane Carson
President, University Film and Video Association
January 24, 2009

APPENDIX C

About the New Commenters

Film Independent:

Film Independent is a non-profit organization dedicated to helping independent filmmakers get their films made, building the audience for independent film, and increasing diversity in the film industry. It provides its member base of roughly 5,000 with over 250 hours of film education programming and many other resources, including equipment rentals and preview screenings. Film Independent also produces two premier events: the Independent Spirit Awards in February and the Los Angeles Film Festival in June. Feature-length and short documentary films are a central focus of both events. In addition, Film Independent offers fellowship and grant opportunities that serve to honor the work of emerging filmmakers and increase diversity in the film industry. Every year, Film Independent raises over \$240,000 in grant funding to support these filmmakers, and in 2008 Film Independent and HBO announced the inaugural HBO Documentary Films Fellowship, which awards a \$10,000 production grant to an exceptional documentary filmmaker.

Independent Feature Project (IFP):

After debuting with a program in the 1979 New York Film Festival, the nonprofit IFP has evolved into the nation's oldest and largest organization of independent filmmakers, and also the premier advocate for them. Currently, IFP represents a network of 10,000 filmmakers in New York City and around the world. Through its workshops, seminars, conferences, mentorships, and Filmmaker Magazine, IFP schools its members in the art, technology, and business of independent filmmaking. Since its start, IFP has supported the production of 7,000 films and provided resources to more than 20,000 filmmakers. Through IFP's prestigious Independent Filmmaker Lab, first-time directors of dramatic features and feature-length documentaries take part in three-day intensive workshops that focus on preparing the films for the festival circuit. IFP fosters the development of 200 feature and documentary films each year.

National Alliance for Media Arts and Culture (NAMAC):

NAMAC is a nonprofit association whose membership comprises a diverse mix of organizations and individuals dedicated to a common goal: the support and advocacy of independent film, video, audio and online/multimedia arts. NAMAC was founded in 1980 by an eclectic group of media arts centers that realized they could strengthen their social and cultural impact by working as a united force. Their membership includes many documentary filmmaking organizations such as Documentary Educational Resources and the Center for Independent Documentary. Through its alliance, NAMAC is an important resource for the documentary filmmaking organizations and its documentary filmmaker members.

University Film and Video Association (UFVA):

Founded in 1947 as the University Film Producers Association, the UFVA has developed into an organization of over 900 professionals and over 125 institutions involved in the production and study of film (including documentary film), video, new media, and other media arts. The UFVA is an international organization where media production and writing meets the history, theory and criticism of the media. The UFVA educates its members about fair use in documentary filmmaking and promotes an understanding of and respect for the intellectual property of all artists. Additionally, the UFVA has an organized documentary filmmakers interest group that meets at the UFVA conferences to discuss issues and keep up-to-date on legal requirements. The UFVA members are image-makers and artists, teachers and students, archivists and distributors, college departments, libraries, and manufacturers.

Robert Bahar:

Robert Bahar is an Emmy-award winning documentary filmmaker and he is the Director and Co-Founder of Doculink.org, an online community of over 2000 documentary filmmakers. He is producer/co-writer of the documentary *Made in L.A.*, which aired on PBS' POV series in 2007. The film has screened at over 60 film festivals, and it won a rare Special Mention of the Jury at Valladolid (Seminci) in Spain, a Henry Hampton Award from the Council on Foundations, and a SIGNIS Award in Mexico. It was nominated for an Imagen Award, an Alma Award, IDA's Pare Lorentz Award, and won a 2008 Emmy Award. Bahar previously produced and directed the award-winning documentary *Laid to Waste*, which aired on Philadelphia PBS stations. He has also line-produced and production-managed films, including ITVS/PBS's *Diary of a City Priest*, which premiered at Sundance, and *Pittsburgh*, which premiered at Tribeca. He has served on the Board of Directors of the International Documentary Association, and he holds an M.F.A. from The Peter Stark Program at the University of Southern California.

Kirby Dick:

Kirby Dick is an Academy-Award nominated documentary filmmaker. He is also the co-founder of Chain Camera Pictures, a production company that makes documentary films. In 2004, he directed *Twist of Faith*, which received an Oscar nomination for Best Documentary. He is also the writer and director of the 2006 documentary, *This Film is Not Yet Rated*.

Arthur Dong:

Arthur Dong is an Academy Award-nominated Chinese American documentary filmmaker. His work combines the art of the visual medium with an investigation of social issues, examining topics such as Asian American history and identity, and gay oppression. He received a BA in film from San Francisco State University in 1982 and completed the Director's Fellowship program at American Film Institute Center for Advanced Film Studies in 1985. He is a member of the Academy of Motion Picture Arts and Sciences where he served on the Documentary

Branch's Board of Governors from 2002-2006. Currently he serves on the National Film Preservation Board. He is also a member of the Academy of Television Arts & Sciences, and served on the Film Independent (formerly IFP/West) Board of Directors from 2000-2003.

Jeffrey Levy-Hinte:

Jeffrey Levy-Hinte founded New York-based Antidote Films in 2000. Antidote Films is a production company that has produced several award-winning documentary and narrative films, including *Mysterious Skin*, *Thirteen*, *Laurel Canyon*, and *Chain*. He and Antidote most recently produced *Roman Polanski: Wanted and Desired*, a documentary directed by Marina Zenovich. Nominated for the Grand Jury Prize and winner of the Documentary Editing Award at the 2008 Sundance Film Festival, the film was released domestically by HBO and internationally through The Weinstein Company. He has also produced such documentary films as *The Dungeon Masters*, which premiered at the 2008 Toronto Film Festival, *Bomb It!*, which premiered at the 2007 Tribeca Film Festival, and *Ghosts of Attica*, which won the Dupont-Columbia Award for Excellence in Journalism in 2001. Additionally, he directed and produced the documentary *Soul Power*, which premiered at the 2008 Toronto Film Festival.

David Novack:

David Novack, has been a producer, post supervisor, and associate producer for a number of documentary films and television series, including the historical documentary, "Songs of Odessa," the acclaimed Showtime/United Nations series, "What's Going On" and two episodes of PBS/WGBH's "Frontline." Mr. Novack wrote, produced and directed the feature documentary "Burning the Future: Coal in America," which opened in theaters, has aired on The Sundance Channel and has screened and earned awards at numerous festivals in the U.S. and in Europe. In 2008, "Burning the Future" earned the prestigious IDA Pare Lorentz award for Social documentary filmmaking. Most recently, Mr. Novack produced "Kimjongilia," a documentary about North Korean refugees that premiered at the 2009 Sundance Film Festival. Mr. Novack has written for 4 Kids Entertainment and BNN/Camera Planet. In audio post, Mr. Novack has enjoyed a successful career as a re-recording mixer/sound designer, recently adding a major new opera by Roger Waters to his credits. Mr. Novack received a Bachelors of Science in Engineering from the University of Pennsylvania, and a degree in music from Berklee College of Music.

Morgan Spurlock:

Morgan Spurlock is an Academy Award-nominated American documentary filmmaker, television producer and screenwriter best known for the documentary film *Super Size Me*, in which he demonstrated the health effects of McDonalds food by eating nothing but McDonalds three times a day, every day, for 30 days. He was also the writer and director of the documentary *Where in the World is Osama Bin Laden*, which premiered at the Sundance Film Festival in 2008. He is currently working on the documentary *Freakonomics*.

APPENDIX D

Statement of Ryan Kugler, President and Co-Owner of Distribution Video Audio, Inc.

January 30, 2009

To Whom It May Concern:

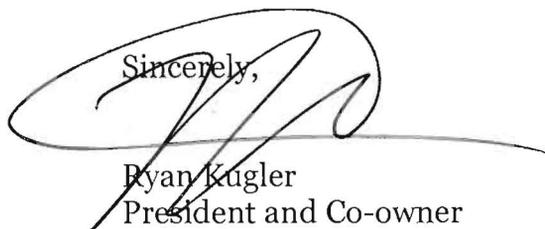
My name is Ryan Kugler, and I am president and co-owner of Distribution Video Audio, Inc. ("DV&A"), a family-owned and-operated distribution company specializing in the entertainment industry. DV&A began its business in 1988 by selling used VHS tapes for new store openings to video rental chains such as Hollywood Video and Blockbuster Video. Since then, in order to keep up with emerging technologies and other trends in the entertainment industry, DV&A has expanded its business to cover a wider variety of products, including DVDs, audio CDs, video games, books, toys and other consumer products.

The market for VHS has largely disappeared; it has been replaced by the market for DVDs, which have become the standard medium for home video. VHS has been an integral part of DV&A's business since its inception. However, DV&A, the last major supplier of VHS, made its last shipment of VHS tapes this past October. Only a few retail outlets still sell VHS tapes, and once those outlets exhaust their stock of tapes that DV&A sold to them, it is unclear whether they will continue to sell VHS.

Technology moves quickly – consumers and the entertainment industry must keep pace. While VHS revolutionized the way consumers watched film and television in the 1980s, the demand for VHS has declined sharply since DVDs were introduced to the buying public in the 1997. And just as DVD replaced VHS, the Blu-ray format will eventually replace the DVD as the default media format. For now, however, DVD remains the standard medium for video.

Because of the growing scarcity of VHS tapes, it is my understanding that it is extremely difficult for consumers to find most films, television shows and other audiovisual works on VHS.

Sincerely,



Ryan Kugler
President and Co-owner
Distribution Video Audio, Inc.

APPENDIX E

Geoff Butcher, *VHS Era is Winding Down*, L.A. TIMES, Dec. 22, 2008, at A1

VHS era is winding down

The last big supplier of the tapes is ditching the format, ending the long fade-out of a product that ushered in the home theater.

GEOFF BOUCHER

Pop culture is finally hitting the eject button on the VHS tape, the once ubiquitous home video format that will finish this month as a creaky ghost of Christmas past.

After three decades of steady if unspectacular service, the spinning wheels of the home entertainment stalwart are slowing to a halt at retail outlets. On a crisp Friday morning in October, the final truckload of VHS tapes rolled out of a Palm Harbor, Fla., warehouse run by Ryan J. Kugler, the last major supplier of the tapes.

"It's dead, this is it, this is the last Christmas, without a doubt," said Kugler, 34, a Burbank businessman. "I was the last one buying VHS and the last one selling it, and I'm done. Anything left in warehouse we'll just give away or throw away."

Dumped in a humid Florida landfill? It's an ignominious end for the innovative product that redefined film-watching in America and spawned an entire sector led by new household names like Blockbuster and West Coast Video. Those chains gave up on VHS a few years ago but not Kugler, who casually describes himself as "a bottom feeder" with a specialization in "distressed inventory."

Kugler is president and co-owner of Distribution Video Audio Inc., a company that pulls in annual revenue of \$20 million with a proud nickel-and-dime approach to fading and faded pop culture. Whether it's unwanted "Speed Racer" ball caps, unsold Danielle Steel novels or unappreciated David Hasselhoff albums,

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No rewinding the videotape era

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Kugler's company pays penalties and sells for dimes. If the firm had a motto, it would be "Buy low, sell low."

"It's true, one man's trash is another man's gold," Kugler said. "But we are not the graveyard. I'm like a heart surgeon — we keep things alive longer. Or maybe we're more like the convalescence home right before the graveyard."

The last major Hollywood movie to be released on VHS was "A History of Violence" in 2006. By that point major retailers such as Best Buy and Wal-Mart were already well on their way to erasing all the VHS tapes from their shelves so the valuable real estate could go to the sleeker and smaller DVDs and, in more recent seasons, the latest upstart, Blu-ray discs. Kugler ended up buying back as much VHS inventory as he could from retailers, distributors and studios; he then sold more than 4 million VHS videotapes over the last two years.

Those tapes went to bargain-basement chains such as Dollar Tree, Dollar General and Family Dollar, and Kugler's network of mom-and-pop clients and regional outlets, such as the Gabriel Bros. Stores in West Virginia or the Five Below chain in Pennsylvania. If you bought a Clint Eastwood movie at the Flying J Truck Stop in Saginaw, Mich., or a "Care Bears" tape at one of the H.E. Butts Grocery stores in Texas, Kugler's company probably put it there. He also sells to public libraries, military bases and cruise ships, although those clients now all pretty much want DVDs.

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recent hits could be rented and watched at home.

"It was a sea change," says Leonard Maltin, the film critic and author who has written stacks of books to meet the consumer need for video recommendations. "Hollywood thought it would hurt movie ticket sales, but it didn't deter people from going to movies; in fact, it only increased their appetite for entertainment. Hollywood also thought it

wasn't catching up on any missed must-see TV, whether it was "Days of Our Lives" or "Monday Night Football." Hollywood found that movies also enjoyed a second opening weekend, as viewers throughout the country made Friday night trips to the rental store for new releases.

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Amoeba no longer buys VHS from distributors such as Distribution Video Audio. But customers bring in tapes every day to trade and sell. "We actually sell maybe 200 a day, almost all of them between \$1 to \$3," Henderson said. "Almost the same amount comes in as goes out."

A lot of those are the classic or foreign films that are not available on DVD, such as "The Merchant of Venice" and "The Godfather Part II."

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lot and soaking it all in. While watching the cast at work on "Planes, Trains and Automobiles," he decided he wanted to become a filmmaker, soon, the kid who was always underfoot on the "Cheers" set even coaxed Ted Danson to appear in a two-minute film he made. But life took Kugler on a less glamorous path. He started working at Distribution Video Audio in 1991 and in short order took the company to new heights by negotiating directly with studios to buy their overrun inventory.

The approach led the company beyond VHS, and soon Kugler's warehouses were filling up with CDs, books and merchandise like "CSI: Crime Scene Investigation" wristwatches and "America's Next Top Model" T-shirts.

A casual observer might wonder how much shelf life those sorts of products could possibly have, but Kugler has moved hard to the Internet and says the "scavenger culture" mentality and sites such as Half.com, Amazon Marketplace and eBay have made it easier than ever to match narrow-niche and oddball customers with the products they want — especially when it's priced to go at \$2 or \$3.

With some things, though, even Kugler the great salvager can't find a buyer no matter how low he goes. He took a loss on 50,000 copies of "Yo-Yo Man," a Smothers Brothers instructional video for the

gain; basement chains such as Dollar Tree, Dollar General and Family Dollar; and Kugler's network of mom-and-pop clients and regional outlets, such as the Gabriel Bros. Stores in West Virginia or the Five Below chain in Pennsylvania. If you bought a Clint Eastwood movie at the Flying J Truck Stop in Saginaw, Mich., or a "Care Bears" tape at one of the H.E. Butts Grocery stores in Texas, Kugler's company probably put it there. He also sells to public libraries, military bases and cruise ships, although those clients now all pretty much want DVDs.

Kugler estimates that 2 million tapes are still sitting on shelves of his clients' stores across the country, but they are the last analog soldiers in the lost battle against the digital invasion. "I'm not sure a lot of people are going to miss VHS," he said, "but it's been good to us."

If you rewind back to the 1980s, VHS represented a remarkable turning point for the American consumer. For the first time, Hollywood's classics and its

recent hits could be rented and watched at home. "It was a sea change," says Leonard Maltin, the film critic and author who has written stacks of books to meet the consumer need for video recommendations. "Hollywood thought it would hurt movie ticket sales, but it didn't deter people from going to movies; in fact, it only increased their appetite for entertainment. Hollywood also thought it would just be a rental market, but then when someone had the idea of lowering the prices, the people wanted to own movies. They wanted libraries at home, and suddenly VHS was a huge part of our lives."

The format was easy to use (although fast-forwarding and rewinding to any particular spot was the worst new-tech irritant since the telephone busy signal) and, of course, the videocassette recorder and blank VHS tapes made it possible to catch up on any missed must-see TV, whether it was "Days of Our Lives" or "Monday Night Football." Hollywood found that movies also enjoyed a second opening weekend, as viewers throughout the country made Friday night trips to the rental store for new releases.

"I think in some ways it even pulled families together, if that doesn't sound too corny, because renting movies became such a part of the weekend," says Jim Henderson, one of the owners of Amoeba Music, the 45,000-square-foot merchant in Hollywood that sells pop culture in just about every format imaginable, including VHS. "It was also a great thing for film fans. You could educate yourself and go back to the well again and again. We're used to choice now, but that was the first time fans could watch what they wanted when they wanted."

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A lot of those are the classic or foreign films that are not available on DVD, such as "The Magnificent Ambersons" or Gregory Nava's "El Norte," or vintage music videos by punk bands or new wave pioneers such as Black Flag or Siouxsie and the Banshees. Some older customers simply don't want to switch to DVD, others just like the bargain-basement price of the tapes.

But, Henderson said, unlike with vinyl records, no one seems to cling to VHS for romantic reasons. "DVDs replaced VHS really fast compared to other format changes through the years," Henderson said. "VHS took too long to rewind, they were boxy and cumbersome, the picture was kind of flawed. The tape inside was delicate and just didn't hold up. DVD just blew it away."

It's true, the VHS tape never really had a chance once the DVD arrived in the late 1990s with all its shiny allure—higher quality image, nimbler navigation and all that extra content. After a robust run at the center of pop culture, VHS rentals were eclipsed by DVD in 2003. By the end of 2005, DVD sales were more than \$22 billion and VHS was slumping badly but still viable enough to pull in \$1.5 billion. Next year, that won't be the case.

Just before Halloween, JVC, the company that introduced



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mat in 1977 in the United States, announced that it would no longer make stand-alone videocassette recorders. The electronic manufacturer still produces hybrid VHS-DVD players, but it's not clear how long that will last.

For a format that made Hollywood so much money, VHS leaves behind a shallow footprint in the movies themselves. There was "The Ring," a 2002 horror movie and the 2005 sequel, about a mysterious VHS tape that brings death to whoever watches it, but that's a sad valentine. This year Jack Black and Mos Def starred in "Be Kind Rewind," a loopy comedy that finds its center at a VHS rental store that is holding out against the DVD era, but the rebellion didn't go beyond the script—the movie is available for rent or purchase on DVD and Blu-ray, but it was never released on VHS.

The format was also name-checked in "The 40-Year-Old Virgin," the 2005 hit film that stars an unloved salesman at an electronics store, and even he has no room in his heart for the underdog format. "It's a dead technology," he explains to a customer. "It's like buying an eight-track player."

Kugler is one of the rare people who can stir up some nostalgia for the black, boxy tapes. His father bought Distribution Video Audio in 1988 and carved out a niche as an inventory supplier for the video rental stores that were popping up everywhere. His young son was interested in a different end of the entertainment business; the younger Kugler spent many afternoons in his teen years sneaking onto

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With some things, though, even Kugler the great salvager can't find a buyer no matter how low he goes. He took a loss on 50,000 copies of "Yo-Yo Man," a Smothers Brothers instructional video for the stringed toy. "I'm not sure what I was thinking on that one," Kugler said. And then there is that stash of VHS tapes that couldn't even earn a spot on the last shipment out of his warehouse: a few thousand copies of "The Man With the Screaming Brain," a 2005 horror movie about a mad scientist, a pugillar tycoon, a cab driver and some cranial misadventures. "That one," Kugler said, "will be buried with us."

The majority of his firm's business today is with big box retailers including Target, Wal-Mart, K-Mart and Sears, where the company sets up displays of its discounted DVDs, such as "Superman Returns" and "Proof of Life," which are often priced at \$10 or less. Plenty of customers see that price as an invitation to build up their DVD collections. But Kugler, with a sly smile, offered a warning to consumers thinking of putting up shelving to handle their burgeoning libraries.

"The DVD will be obsolete in three or four years, no doubt about it. Everything will be Blu-ray," Kugler said, anticipating the next resident at his pop culture retirement home. "The days of the DVD are numbered. And that is good news for me."

So Happy Holidays & from the Abergel Institute!

We wish
to thank all of our patients
and wish everyone
a healthy, safe holiday season