

*Before the*  
**United States Copyright Office**  
**Library of Congress**

**In the matter of exemption to prohibition on circumvention  
of copyright protection systems for access control technologies**  
**Docket No. RM 2008-08**

**Comment of VAMP Productions**

*Submitted by:*  
Theodora Michaels  
General Partner, VAMP Productions  
c/o Hevedburg Music  
47-01 Greenpoint Avenue, PMB #199  
Sunnyside, NY 11104

Pursuant to the Notice of Proposed Rulemaking published in the *Federal Register* on December 29, 2008, VAMP Productions respectfully submits this comment partially supporting and partially opposing the following proposed 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.**

We object to the following portion of the proposed class:

**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**

We support the proposed class, modified 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 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.**

## **I. The Commenting Party**

VAMP Productions is a small, privately-held film production company. We produced the award-winning documentary "Vampira: The Movie," which incorporates public-domain audiovisual material including excerpts from the film "Plan 9 From Outer Space." We have other documentaries in production and post-production.

VAMP Productions' general partner Kevin Sean Michaels is a member of local filmmakers' groups, but we cannot tell from the comment submitted by Kartemquin Educational Films, Inc. and the International Documentary Association (herein jointly "Kartemquin") whether these would qualify as "an organization of filmmakers" under the proposed class.

## **II. Argument in support of the proposed class, modified as above:**

We hereby confirm the accuracy of Kartemquin's descriptions regarding the importance of fair use and public domain footage to documentary filmmakers, and the occasional difficulty in finding high-quality versions of source material which are not protected by Content Scramble System technology ("CSS"). We also confirm that an inability to use the highest-quality source material has a significant negative affect on the quality and marketability of the finished documentary. It would benefit filmmakers, distributors, and the public if filmmakers were permitted to use the best-quality version of any particular source material, without regard to CSS.

## **III. Argument in opposition to the above-excerpted portion of the proposed class:**

We object to the suggestion that the proposed class only apply to a 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," for three reasons:

### **1. It is unclear what would constitute a qualifying "organization of filmmakers."**

Kartemquin's comment does not define "an organization of filmmakers." There are innumerable entities which might fall into this category, from local to national and international; from formal, dues-paying organizations to informal groups; and those that have face-to-face meetings and those that exist solely online.

Filmmakers have enough difficulty in determining whether a particular clip is in the public domain or whether its use will be found to be fair use. To add the additional hurdle of determining whether a group to which the filmmaker belongs is a qualifying "organization of filmmakers" is unnecessary and burdensome.

### **2. There is no factual support for requiring that the filmmaker "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."**

Kartemquin has not cited, and we are not aware of, any studies establishing that filmmakers who are members of "an organization of filmmakers" (however defined) or "enrolled in a film program or film production course at a post-secondary educational institution" are categorically more "likely to be well-informed about how to make fair use of copyrighted materials and how to identify public domain works."<sup>1</sup> Although Kartemquin cites its own laudable efforts to educate its members in this regard,<sup>2</sup> it would be unwarranted for the Copyright Office to assume that those who have not had the benefit of such instruction are necessarily less learned in these matters. Filmmakers can and do avail themselves of other opportunities to learn about fair use and the public domain, including self-study, consultation with counsel, and taking courses that do not require membership in a group or enrollment in a post-secondary educational institution.

VAMP Productions general partner Theodora Michaels has been working in the entertainment industry for over twenty years, for the past ten as an attorney. In producing films, general partner Kevin Sean Michaels has relied on her counsel regarding fair use and the public domain. We consider ourselves "well-informed about how to make fair use of copyrighted materials and how to identify public domain works" despite the fact that neither of us is "enrolled in a film program or film production course at a post-secondary educational institution" or possibly (depending upon the intended definition) members of "an organization of filmmakers."

### **3. Restricting the class to a particular set of users is outside the scope of this rulemaking.**

The Copyright Office has stated that "The purpose of this rulemaking proceeding is to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention."<sup>3</sup> Kartemquin has properly suggested a class of works, and improperly suggested a class of users. The scope of this rulemaking does not extend to designating classes of users (based upon their educational status, group affiliation, or otherwise).

In this respect, we are in agreement with the Electronic Frontier Foundation: "the Librarian must be mindful of the fact that Congress has entrusted the courts with the task of adjudicating the scope of fair use . . . The Librarian should therefore exercise caution lest this judicial prerogative be displaced by these rulemakings."<sup>4</sup> It would be just such a displacement for a "class of works" to be so defined as to exclude some potential users based upon an unsupported prior assumption that they are not well-informed about the laws regarding fair use and the public domain.

## **IV. Conclusion**

For the reasons set forth above, VAMP Productions respectfully requests that the proposed exemption be approved, as modified, for the 2009 - 2012 period.

---

1. Comment of Kartemquin at 10

2. *Ibid.*, footnote 31.

3. Notice of Inquiry, 73 Fed. Reg. 194, 58073 (Oct. 6, 2008).

4. Comment of the Electronic Frontier Foundation at 3.