

BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS, Washington, D.C.

In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies	Docket No. 2014-07
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NEW MEDIA RIGHTS RESPONSES TO POST-HEARING
QUESTIONS REGARDING PROPOSED CLASS 6

New Media Rights submits the following comments in response to the Post-Hearing Question submitted to Class 6 Witnesses on the Exemption to the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies¹. In its Notice, the Copyright Office seeks comments on the following question:

During the hearing, various participants described differences between documentary and other categories of films. For example, the written submissions and hearing discussion for this class have referenced various terms such as documentary, documentary-like, narrative, non-narrative, non-fiction, fictional, scripted, biopic, “inspired by,” imaginative, and “totally fiction.” Please provide information regarding any commonly accepted delineations or definitions of various relevant genres of film, with illustrative examples. If available, please include supporting documentation, including “best practices” statements and statements from E&O insurers and others, to demonstrate industry practice or convention in this regard.

I. Commenting Party

New Media Rights (NMR) is an independently funded program of California Western School of Law. NMR provides expertise and advocacy on media, communications, and Internet law as it applies to independent creators and Internet users. NMR offers pro bono legal services to creators including artists, filmmakers, podcasters, citizen journalists, bloggers, open source software projects, as well as non-profit organizations. Further information regarding NMR’s mission and activities can be obtained at <http://www.newmediarights.org>.

II. Comments

A. Delineating between genres of film for the purpose of an exemption to Title 17, Section 1201(a)(1) of the United States Code unnecessarily complicates the law and undermines the purpose of fair use.

We recognize the difficulty in distinguishing the multiple genre-descriptions used throughout the record. This difficulty illustrates our earlier statements on the record² that requiring an analysis into the genre of a film for the purposes of an exemption to Title 17, Section 1201(a)(1) of the United States Code unnecessarily complicates the law³. In reality, the lines separating documentary, documentary-like, non-fiction, fictional, scripted, biopic, “inspired by,” imaginative, and “totally fiction” are frequently blurred, and at times the distinction between genre descriptions are not easily made. There is no central authority of film genres, no universally agreed upon definition for any of these descriptors, and the subject is one of contention among academics and audiences alike. The difficulty in distinguishing between genres suggests that the

¹ Letter from Register of Copyrights to USCO Class 6 Witnesses (June 3, 2015).

² *Sixth Triennial 1201 Rulemaking Hearings, Proposed Classes: 19,20,23,6*. 49-50,56(2015) (statement of Art Neill, New Media Rights).

³ Comment of New Media Rights, Docket No. 2014-07 at 13.

Copyright Office should avoid using imprecise genre distinctions as a regulatory tool, and instead rely on the type of medium-based regulation that is common in copyright law. .

1. Copyright traditionally does not attempt to distinguish between genres, instead relying on medium to classify Works of Visual Arts, Performing Arts, Sound Recording or Written Works. The DMCA Anti-circumvention exemptions should rely on medium, not genre.

United States copyright law has traditionally focused on the medium and mode of transmission of the copyrighted work. Medium is a more reliable distinction than genre. Relying on medium to narrow this exemption, rather than genre, would allow the Copyright Office to craft an exemption that is sufficiently narrow, but much clearer for the stakeholders it affects. Section 102 breaks down copyrightable works into literary works, musical works (including *any* accompanying words;) dramatic works (including *any* accompanying music;) pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.⁴ Further, copyright law, particularly sections 109-122, establishes exceptions to default copyright law, that are decidedly medium specific, including broadcast, jukeboxes, and streaming services. For example, individuals are permitted to make their own sound recording cover of existing musical compositions if they comply with section 115, but they aren't restricted from covering certain types of music. Requiring artists to conform to a genre restriction would result in a preference towards certain types of artistic expression. It also creates confusion for copyright holders interested in when anti-circumvention exemptions will apply. Fortunately, the Copyright Office can avoid these issues by relying on a medium based exemption for filmmakers.

Aesthetically and stylistically, film as an art form has changed dramatically throughout its history. Providing a succinct, complete definition of the terms for which the copyright office has requested definitions, or any genre related term is difficult. Many academics agree that documentaries, for instance, instill a sense of epistophilia (a desire to know) and, unlike other films, generally make a claim to truthfulness⁵. The word "documentary" has its root word *document*, from the Latin *docere*, "to teach."⁶

Frequently, but not always, documentaries are grounded in real life, and make a claim to tell us something worth knowing about⁷. However, the difficulty in providing precise definitions illustrates the need to distinguish based on medium rather than genre. The courts have also offered their own definitions of documentary. For instance, in *Psenicska v. Twentieth Century Fox Film Corporation*, the Second Circuit defined documentary film as film that "comprises interviews with real people and depictions of real events that are intended to provide a factual record or report."⁸

The DVD CCA and the AACS LA both separate film into two categories: either a film is a documentary, or it is entertainment⁹; or the variation, either a film is a documentary, or fiction.¹⁰ In truth, these categories are not mutually exclusive, and documentaries intended as entertainment and that have fictional elements are not a rare occurrence. Box office successes, ranging from *Fahrenheit 9/11* (2004) to *Citizenfour* (2014) clearly show that documentaries can

⁴ 17 U.S.C. § 102.

⁵ Nichols, *supra* note 3, at 40.

⁶ *Id.*

⁷ Patricia Aufderheide, *Documentary Film: A Very Short Introduction* 5 (2007)

⁸ 409 F. App'x 368, 370 (2d Cir. 2009).

⁹ Comment of The DVD Copy Control Association ("DVD CCA") (hereinafter "DVD CCA Comment"), Docket No. 2014-07 at 4,5.

¹⁰ Comment of The Advanced Access Content System Licensing Administrator LLC ("AACS LA") (hereinafter "AACS Comment"), Docket No. 2014-07 at 5,6.

be incredibly entertaining, as well as commercially successful. Likewise, films such as *Apollo 13*, *Selma*, and *Flight 93* illustrate the interplay that “fictional/entertainment” films have with documentary techniques.¹¹ That said, occasionally films claim to be documentaries, become commercial successes, and are found to be primarily “fictional,” (or at the very least, non-factual or inaccurate) as was the case with the commercially successful, but critically panned *Kony 2012*.¹² Cy Kuckenbaker, filmmaker, professor of film studies at San Diego City College, and New Media Rights advisory board member, has argued that “In fact, a documentary is more accurately described as a vehicle for *rhetoric* that has a focus on social reality, but beyond that, there’s no guarantee that anything presented in [a film claimed to be a] a documentary is fundamentally ‘true’ or even ‘fact based.’”¹³

Kuckenbaker specifically cites multiple films, such as *Exit Through the Gift Shop* and *The Act of Killing*, which consciously subvert traditional assumptions about genre and their relation to fact and fiction.¹⁴ He points out that, in fact, an entire sub-genre has developed which relies on upturning those assumptions. “This type of film, which invites the audience to consciously examine and question its relationship to the film, is described as using the reflexive mode of documentary.”¹⁵

The distinction between film genres is also a challenge because filmmakers across genres of filmmaking borrow many techniques and conventions from each other. As Patricia Aufderheide has noted, “most documentary filmmakers consider themselves storytellers, not journalists.”¹⁶ This opinion is echoed by Bill Nichols, who has said that, “Documentaries adopt no fixed inventory of techniques, address no one set of issues, display no single set of forms or styles. Not all documentaries exhibit a single set of shared characteristics.”¹⁷ While it is true that documentaries frequently employ such techniques as Voice-of-God commentary, interviews, location sound recording, and newsreels; the same can be said of non-documentary films such as *Selma*, *Schindler’s List*, and *Apollo 13*. An exemption based on medium, rather than genre, would avoid unnecessary confusion for creators and copyright holders alike, and align Section 1201 with the vast majority of copyright law.

2. Given that the limited proposed exemption only applies to cases in which fair use is being asserted, delineating between genres is a complicated, unnecessary step.

Opponents have argued that an exemption which disregards genre would be overly broad.¹⁸ In fact, the proposed exemption sought in class 6 is narrow, and seeks to avoid the confusion created by regulations based on genre, reconciling the exemption with the already well-established fair use analysis and with the rest of U.S. Copyright law. The proposed exemption would *only* apply to filmmaking uses of motion pictures that properly employ fair use. Any use found to be infringing would be unable to claim the proposed exemption to section 1201. The DVD CCA¹⁹ and the AACS LA²⁰, in their initial comments, both base a substantial portion of their argument upon the assertion that “Documentary Filmmaking *May Be* Insufficiently Transformative and Found to Infringe” and that “Filmmaking for Entertainment Purposes, including Fictional

¹¹ Email Interview with Cy Kuckenbaker, (June 24, 2015),

¹² *Id.*

¹³ *Id.*

¹⁴ Kuckenbaker, *supra* note 14.

¹⁵ *Id.*

¹⁶ Aufderheide, *supra* note 7.

¹⁷ Nichols, *supra* note 3, at 21.

¹⁸ DVD CA comment at 19.

¹⁹ *Id.* at 4, 5.

²⁰ AACS LA comment at 5, 6, stating “Documentary Films, Even Those that Involve Criticism and Comment, Do Not Qualify for Fair Use *Unless They Are More Transformative than Providing Mere Factual or Historic References*” and “Entertainment Film Uses of Clips from Other Films *May Not Qualify for Fair Use.*”

Filmmaking Must Be Transformative.” (and, respectively, for the DVD CCA “Entertainment Film Uses of Clips from Other Films *May Not Qualify* for Fair Use”).²¹ Implicitly, these statements acknowledge that there *are* cases of documentary and non-documentary films alike, which *do* qualify as fair use. Furthermore, in their testimony to the Copyright Office the representative of the RIAA, the MPAA and the ESA, while responding to a question about the difference between fictional versus narrative film, acknowledged that, “Right now, the way it's set up, in our view, it's hard to distinguish between them and it's hard to know whether a non-commercial video, for example, consumes all of educational videos or whether a documentary film consumes educational uses.”²²

The record specifically references multiple non-documentary films of this type, properly claiming fair use, including *Midnight in Paris* (decided in 2013 to be Fair Use), as well as *The Pursuit of Loneliness*, and *I Was There*.²³ Retaining the current genre requirement would have a chilling effect on other filmmakers seeking to innovate and create expression, who may be straddling that line between fact and fiction, and is an unnecessary step, given the established fair use law.

III. Conclusion

In practice, distinguishing the terms the Copyright Office requests be defined raises a complicated and evolving discussion about film genres. The differences between genre related terms, and in particular, terms such as documentary, documentary-like, narrative, non-narrative, non-fiction, fictional, scripted, biopic, “inspired by,” imaginative, and “totally fiction” are subtle, blurred lines, often intentionally made unclear by filmmakers in order to achieve the intended purpose of the film. The implications of choosing an imperfect term as the crux of the proposed exemption to Section 1201 of the U.S. Code injects unnecessary confusion into the law for all stakeholders, and places arbitrary creative restrictions on filmmakers. The result will be a chilling effect on filmmakers wanting to innovate and create, and can only serve to inhibit creators and audiences alike. The International Documentary Association, et. al. has provided direct examples in the record of the DMCA’s anti-circumvention provisions adding confusion to the question of “How do I use this appropriately and responsibly,” and how the narrower, genre based exemption has already had a chilling effect on filmmakers.²⁴ “At a time where filmmakers should feel empowered to create new expression through a more widespread understanding of fair use, they are instead fearful of rights holder intimidation and criminal liability. The result is an adverse effect on fair use and free expression.”²⁵ As this limited proposed exemption applies only to cases in which fair use is properly claimed, NMR would stress that, while we recognize the difficulty in distinguishing the multiple terms cited in the record, structuring the law around those distinctions can only serve to add to the confusion, and would present an unnecessary step in the already well established fair use analysis.

Sincerely,



Art Neill & Emory Roane
New Media Rights

²² *Sixth Triennial 1201 Rulemaking Hearings, Proposed Classes: 19,20,23,6*. 63, (2015) (statement of J. Matthew Williams, representing Entertainment Software Association, Motion Picture Association of America, and Recording Industry of America).

²³ Comment of The International Documentary Association (“IDA”)(hereinafter “IDA Comment”), Docket No. 2014-07 at 36, (Appendix C).

²⁴ IDA comment at 4,5.

²⁵ *Id.*