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VIA E-MAIL ONLY (2015ADMAT@LOC.GOV)

Jacqueline C. Charlesworth
General Counsel and Associate Register of
Copyrights
U.S. Copyright Office
Library of Congress
101 Independence Ave SE
Washington, DC 20559-6000

**Re: Docket No. 2014-7, Exemptions to Prohibition Against Circumvention of
Technological Protection Measures Protecting Copyrighted Works, Class 6**

Dear Ms. Charlesworth:

On behalf of the Joint Creators and Copyright Owners, I am pleased to provide this response to your letter of June 3, 2015 regarding Proposed Class 6 – Audiovisual works – derivative uses – filmmaking uses.¹ You asked 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.”

Our view is that the exemption should continue only to apply to documentary filmmakers. As I stated at the hearing in Los Angeles, we believe that in most circumstances the distinction between a documentary film and a fictional film will be self-evident. However, given that there might be some gray areas, it would be helpful to include a definition of “documentary” in the regulations or in the Recommendation of the Register of Copyrights.

¹ Although Twentieth Century Fox Home Entertainment appreciates receiving the post-hearing letter addressed to Simon Swart, who testified at the Los Angeles hearing, it defers to this response letter submitted on behalf of the Joint Creators and Copyright Owners.

At the hearing, I offered a definition that I found on Wikipedia and which is attributed to the Oxford English Dictionary:

“A documentary film is a nonfictional motion picture intended to document some aspect of reality, primarily for the purposes of instruction or maintaining a historical record.”

We continue to believe that this definition is helpful. Other dictionaries also contain discerning definitions, however. Random House Webster’s Unabridged Dictionary (2d ed.) includes the following:

“*Motion pictures* ... based on or recreating an actual event, era, life story, etc., that purports to be factually accurate and that contains no fictional elements.”

The American Heritage Dictionary of the English Language (3d ed.) also provides an insightful definition:

“A work, such as a film or television program, presenting political, social, or historical subject matter in a factual and informative manner and often consisting of actual news films or interviews accompanied by narration.”

These definitions, which rest in part on “fiction” and “primary purpose,” help to distinguish between, for example, true documentaries and those partly fictional films known as “docudramas” or “bio-pics” which, although based partly on historical facts, contain fictional dramatic elements and, although partly educational, are created primarily for entertainment purposes. Given that some of the definitions of “documentary” include the word “fiction,” it might be helpful to define that term in the regulations or Recommendation. However, again, we believe that usually people will “know it when they see it.” I mentioned the definition of “fiction” from Wikipedia at the hearing, and we continue to believe that it could be useful.

“Fiction is content ... that is made from imagination, in addition to, or rather than, from history or fact. ... Fiction constitutes an act of creative invention, so that faithfulness to reality is not typically expected; in other words, fiction is not assumed to present only characters who are actual people or descriptions that are factually true.”

Similarly, the American Heritage Dictionary defines fiction as follows:


“A ... work whose content is produced by the imagination and is not necessarily based on fact.”

While the definitions quoted above derive from standard dictionaries rather than from sources dedicated to analyzing distinctions between genres of film, using “plain language” definitions in regulations is preferable, in our view. We also are interested to see any definitions that the proponents of the exemption proffer in response to your letter, as well as any fair use

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“best practices” that they submit and that apply to fictional filmmakers. We would be happy to comment on any definitions or other information submitted to the Office for consideration.

Respectfully submitted,


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MITCHELL SILBERBERG & KNUPP LLP