

June 29, 2015

Ms. Jacqueline C. Charlesworth
General Counsel and Associate Register of Copyrights
United States Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

Re: June 3, 2015 questions posed to Class 6 witnesses in the § 1201 rulemaking proceeding

Dear Ms. Charlesworth:

Thank you for your question of June 3, 2015. We write to provide the definition of documentary films and to address your request for commonly accepted delineations of various genres of films.

We urge the Copyright Office to follow the definition of documentary films widely used by federal courts, as any departure from this definition would be dangerous and would require examining nearly one hundred years of options.¹ 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.”² A number of cases follow the same principles when characterizing films as documentaries.³

Another method to define documentary films is through the Supreme Court’s proposed plain meaning rule,⁴ in which dictionary definitions provide guidance as to a term’s commonly accepted meaning.⁵ For the term “documentary,” the *Psenicska v. Twentieth Century Fox Film Corporation* definition uses the same language as the definition of documentary in the Oxford Dictionary.⁶ Thus, the plain meaning rule leads us to the same definition for documentary as quoted above.

Examples of documentary films include *Waiting for “Superman”* and the 2014 Oscar winner for Best Documentary Feature *20 Feet from Stardom*. *Waiting for “Superman”* comprises interviews with real people and depictions of real events to provide a factual record of the American public

¹ See Dirk Eitzen, *When Is a Documentary?: Documentary as a Mode of Reception*, 35 CINEMA JOURNAL 81, 81-82 (1995), http://www.columbia.edu/itc/film/gaines/documentary_tradition/Eitzen.pdf (describing how John Grierson coined the term documentary in the 1920s as “the creative treatment of actuality”).

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

³ See, e.g., *Citizens United v. FEC*, 130 S.Ct. 876, 887, 890 (2010) (describing *Hillary: The Movie* as a documentary as it comprises interviews with real people and depictions of real events through historical footage to provide a factual report on Hillary Clinton); *Bogie v. Rosenberg*, 705 F.3d 603, 607, 614 (7th Cir. 2013) (describing *Joan Rivers: A Piece of Work* as a documentary as it comprises interviews with Joan Rivers and depictions of real events to provide a factual report on Joan Rivers); *Chevron Corp. v. Berlinger*, 629 F.3d 297, 303 (2d Cir. 2011) (describing *Crude* as a documentary as it comprises interviews with real people and depictions of real events to provide a factual record of the Lago Agrio Litigation in Ecuador); *Davis v. Costa-Gavras*, 654 F. Supp. 653, 658 (S.D.N.Y. 1987) (describing a documentary as a “film of real people and real events”).

⁴ See *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (proposing the plain meaning rule).

⁵ See *Milner v. Dep’t of the Navy*, 562 U.S. 562, 569 (2011) (utilizing dictionary definitions to determine the plain meaning of personnel).

⁶ See OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/documentary (defining documentary as a film that uses “pictures or interviews with people involved in real events to provide a factual record or report”).

school system.⁷ *20 Feet from Stardom* comprises interviews with musicians and depictions of real events to provide a factual record of the lives of backup singers.⁸

With respect to the inclusion of narrative filmmaking in the proposed Class 6 exception, we stand by our initial comment, reply comment, and hearing testimony in strongly urging the Copyright Office to allow an exemption for all filmmakers.⁹ However, should the Register decide to recommend a narrower scope, we urge her to recommend an exemption covering “films that portray real events.”

“Films that portray real events” is a fitting definition for four main reasons. First, it is easily understood in plain English. Second, it is not susceptible to creative interpretation. Third, it avoids existing labels that are commonly used in a variety of ways so that they have lost any objective meaning. Fourth, the term is not likely to be co-opted by marketing mavens and advertising executives that might create confusion about its real meaning.

First, “films that portray real events” is in plain English and therefore easy to comprehend. In keeping with the widely lauded plain meaning rule,¹⁰ dictionary definitions of each word within the phrase are simple.¹¹

Second, “films that portray real events” is not subject to creative interpretation due to the term’s accessibility. Any person could think of a variety of films that fit this category. Examples include *Welcome to New York*, *Cesar Chavez*, and *Experimenter*.

Welcome to New York is based on the Dominique Strauss-Kahn affair in which French politician Strauss-Kahn was accused of sexually assaulting a hotel maid.¹² Although the film’s characters have fictional names, it is clear from the similar plotline that the film chronicles the Strauss-Kahn scandal. Pursuant to fair use, the film used real-life press conference footage of the maid’s attorney after *New York v. Strauss-Kahn* was dropped. Under the first fair use factor,¹³ the use of this clip is highly transformative because it compares the fictionalized portrayal in *Welcome to New York* to the actual Strauss-Kahn affair instead of using the footage for its original newsworthiness value:

⁷ IMDB.COM, <http://www.imdb.com/title/tt1566648/>.

⁸ IMDB.COM, <http://www.imdb.com/title/tt2396566/>.

⁹ *Comment of the International Documentary Association et al.*, 1, 5-7 (Feb. 6, 2014), http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_IDA_Class06.pdf; *Reply Comment of the International Documentary Association et al.*, 1, 2-3 (May 1, 2015), http://copyright.gov/1201/2015/reply-comments-050115/class%206/ReplyComments_LongForm_IDAEtAl_Class06.pdf.

¹⁰ See *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (explaining that the most persuasive evidence of a term’s meaning is the plain meaning); *Crooks v. Harrelson*, 282 U.S. 55, 61 (1930) (stating that a court must first look at plain meaning); *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 253-54 (1929) (stating that the majority of cases look at plain meaning, and cases that go beyond plain meaning “are of rare occurrence and exceptional character”).

¹¹ See OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/film (defining film as a “motion picture”); OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/portray (defining portray as “depict (someone or something) in a work of art”); OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/real (defining real as “actually existing as a thing or occurring in fact; not imagined or supposed”); OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/event (defining event as “a thing that happens”).

¹² WIKIPEDIA, [https://en.wikipedia.org/wiki/Welcome_to_New_York_\(2014_film\)](https://en.wikipedia.org/wiki/Welcome_to_New_York_(2014_film)).

¹³ 17 U.S.C. § 107 (2012).

the use of the clip documented the accuracy of the way the story is being told by the filmmaker. Under the third factor, the film uses less than a minute of the twenty-minutes of press footage.¹⁴ Under the fourth factor, the use of less than a minute of footage does not undercut the market for the original. The film was insured and released with no claims received.

Cesar Chavez tells the story of grassroots organizer Cesar Chavez leading the struggle of California migrant farm workers for better working conditions.¹⁵ It was insured by an E&O policy with a fair use endorsement for the use of footage of workers enduring difficult conditions as well as strikes and protests led by Chavez and the United Farm Workers, and news clips of political figures of the time.¹⁶ As referenced in our reply comment, these clips present a clear case of fair use under the four factor analysis set forth in the Copyright Act.¹⁷

Experimenter is about the life of Stanley Milgram, a psychologist who conducted a series of controversial experiments during the 1960s in which subjects believed they were delivering electric shocks to another person.¹⁸ It was well-established through Milgram's interviews and writings that he was influenced by the television show *Candid Camera*. Milgram wrote about the similarities between social psychology – and in particular, his obedience experiments – and Allen Funt's popular show in that both captured people's immediate reactions to the disruption of social rules to reveal candid snapshots of human behavior. *Experimenter* portrays Milgram watching a short clip from *Candid Camera* to illustrate this real-life influence. Under the first factor, the use is transformative because the clip depicts how the show inspired Milgram's experiments instead of being used for its entertainment value. Under the third factor, the film uses a few seconds of the thirty-minute show.¹⁹ Under the fourth factor, these few seconds do not undercut the market for the show.

Third, the phrase “films that portray real events” is preferable to definitions such as “biopic” and films “based on a true story,” which are used interchangeably and have lost utility as an important legal or cultural identifier. The terms “biopic” and “based on a true story” are so commonly used for films that highly embroider the truth as to render the phrase useless. As a recent example, the *New York Times* describes the summer movies *Love & Mercy*, *Gloria*, and *Noble* as a “biography,” “biodrama,” and a “true story,” respectively.²⁰ The *Los Angeles Times* also describes ten summer movies as “biopic[s]” or “biographical drama[s].”²¹ There is no guarantee that any of these loose

¹⁴ See YOUTUBE.COM, <https://www.youtube.com/watch?v=cQ5QanQtCd8> (showing that the press conference is twenty minutes).

¹⁵ E.g., Hector Tobar, *Two Versions of Cesar Chavez come to light in new film, book*, L.A. TIMES (Mar. 22, 2014), <http://www.latimes.com/entertainment/movies/moviesnow/la-et-mn-cesar-chavez-20140322-story.html>; IMDB.COM, <http://www.imdb.com/title/tt1621046/>.

¹⁶ *Reply Comment of the International Documentary Association et al.*, 1, 5-6 (May 1, 2015), http://copyright.gov/1201/2015/reply-comments-050115/class%206/ReplyComments_LongForm_IDAEtAl_Class06.pdf.

¹⁷ *Id.* at 6.

¹⁸ IMDB.COM, <http://www.imdb.com/title/tt3726704/>.

¹⁹ See WIKIPEDIA.COM, http://en.wikipedia.org/wiki/Candid_Camera (showing that *Candid Camera* is a thirty-minute show).

²⁰ Anita Gates, *Summer 2015 Movie Releases: A Look at What's Coming*, N.Y. TIMES (May 1, 2015), <http://www.nytimes.com/2015/05/03/movies/summer-2015-movie-releases-a-look-at-whats-coming.html>.

²¹ See *Summer Sneaks 2015: The List*, L.A. TIMES (Apr. 24, 2015), <http://www.latimes.com/entertainment/movies/la-et-mn-ca-sneaks-list-20150426-story.html> (describing *Noble*, *Saint*

descriptive terms have any commonly accepted meaning. For example, *Noble* is described as a “true story” by the *New York Times* but a “biopic” by the *Los Angeles Times*.²² Last year, *American Sniper* was described as a “biopic” by *Entertainment Weekly* and the *New York Times* but also a “true story” by *Bustle*.²³ In 2000, *The Hurricane* was described as a “biopic” by Roger Ebert but a film “based on the true story” of Rubin Carter by the *New York Times*.²⁴ Moviegoers also utilize the terms synonymously, and many question the viability of these terms when “biopics” and films “based on a true story” are highly fictionalized.²⁵ Even though some might perceive an industry standard for “biopics” or films “based on a true story,” it is clear that there is no such actual standard.

Fourth, “films that portray real events” is not likely to be utilized by marketing and advertising executives, whereas “biopic” and films “based on a true story” are utilized frequently in promotional materials, which would tend to void the terms of any legal application. There is no regulation for the use of these terms in the marketplace since the MPAA has stated that it “do[es] not determine whether a film is designated to be ‘based on true events’ – that is the purview of the producer or distributor of the film.”²⁶ One advertising example is *The Hurricane* trailer, which describes the film as “based on a true story” by placing these words under the title.²⁷ The poster for *The Hurricane* describes the film as “based on the inspirational true story of a champion.”²⁸

Laurent, In the Name of My Daughter, Marie’s Story, Gloria, Love & Mercy, United Passions, The Pardon, The Pilgrim: The Best Story of Paulo Coelho, and Straight Outta Compton as “biopic” or “biographical drama”).

²² Compare Anita Gates, *Summer 2015 Movie Releases: A Look at What’s Coming*, N.Y. TIMES (May 1, 2015), <http://www.nytimes.com/2015/05/03/movies/summer-2015-movie-releases-a-look-at-whats-coming.html>, with *Summer Sneaks 2015: The List*, L.A. TIMES (Apr. 24, 2015), <http://www.latimes.com/entertainment/movies/la-et-mn-ca-sneaks-list-20150426-story.html>.

²³ Compare Maitri Mehta, *Is ‘American Sniper’ Based On A True Story? Bradley Cooper Brings Navy SEAL Chris Kyle Back to Life on Screen*, BUSTLE (Dec. 30, 2014), <http://www.bustle.com/articles/56161-is-american-sniper-based-on-a-true-story-bradley-cooper-brings-navy-seal-chris-kyle-back>, with A.O. Scott, *American Sniper* (2014), N.Y. TIMES, <http://www.nytimes.com/movies/movie/477251/American-Sniper/overview>, and Erin Strecker, *Bradley Cooper moving forward with ‘American Sniper’ biopic*, ENTERTAINMENT WEEKLY (Feb. 8, 2013, 11:36 AM), <http://www.ew.com/article/2013/02/08/bradley-cooper-american-sniper-chris-kyle-biopic>.

²⁴ Compare Roger Ebert, *The Hurricane*, ROGEREBERT.COM (Jan. 7, 2000), <http://www.rogerebert.com/reviews/the-hurricane-2000>, with Selwyn Raab, *Separating Truth from Fiction in ‘The Hurricane’*, N.Y. TIMES (Dec. 28, 1999), <http://www.nytimes.com/1999/12/28/movies/separating-truth-from-fiction-in-the-hurricane.html>.

²⁵ See e.g., Cory Franklin, *History According to Hollywood*, N.Y. TIMES (Feb. 22, 2013), <http://www.nytimes.com/2013/02/23/opinion/History-According-to-Hollywood.html> (questioning how much truth is in “based on a true story” films like *Zero Dark Thirty*, *Lincoln*, and *Argo*); Cord Jefferson, *‘Based on a True Story’ Is a Rotten Lie I Hope You Never Believe*, GAWKER (Aug. 31, 2012, 4:15 PM), <http://gawker.com/5939683/based-on-a-true-story-is-a-rotten-lie-i-hope-you-never-believe> (questioning how much truth is in “based on a true story” horror films); Victoria Uwumarogie, *Based on a True Story: How Accurate Were These Sports Biopics We Love?*, MADAME NOIR (Apr. 23, 2014), <http://madamenoire.com/409452/sports-biopics-love/> (using “biopics” and “based on a true story” synonymously and questioning how much truth is in “based on a true story” sport films); liamscott8172, IMDB.COM (Sept. 3, 2012), <http://www.imdb.com/list/ls008135019/> (using the terms “biopics” and “based on a true story” synonymously in a user’s list of “My favourite biopics/based on a true story movies”).

²⁶ Cord Jefferson, *‘Based on a True Story’ Is a Rotten Lie I Hope You Never Believe*, GAWKER (Aug. 31, 2012, 4:15 PM), <http://gawker.com/5939683/based-on-a-true-story-is-a-rotten-lie-i-hope-you-never-believe>.

²⁷ YOUTUBE.COM, <https://www.youtube.com/watch?v=YTzvLMUfwB8>.

²⁸ IMPAWARDS, <http://www.impawards.com/1999/hurricane.html>.

Some viewers questioned how appropriate the marketing was for *The Hurricane*.²⁹ More recently, the *Argo* trailer describes the film as “based on a true story” and as “based on a declassified true story” by placing these words under the title.³⁰ However, the third act of the movie arguably contains some fictionalization.³¹ Last year, *The Imitation Game* trailer describes the film as “based on a true story,” and the poster places the words “based on the incredibly true story” under the title.³² Various news outlets have questioned the extent to which it is actually based on a true story.³³ For example, Alan Turing covers up for a Soviet Spy in the film, and many feel this is offensive to Turing’s memory.³⁴

For these reasons, while the most appropriate exemption would include all filmmakers, the most appropriate way for the Copyright Office to narrow the definition would be to use the phrase “films that portray real events.”

Thank you for providing us with the opportunity to respond. Please let us know if you have any other questions.

Respectfully submitted,



Michael C. Donaldson and Christopher Perez
Donaldson & Callif, LLP



Jack I. Lerner
UCI Intellectual Property,
Arts, and Technology Clinic

²⁹ See Selwyn Raab, *Separating Truth from Fiction in ‘The Hurricane’*, N.Y. TIMES (Dec. 28, 1999), <http://www.nytimes.com/1999/12/28/movies/separating-truth-from-fiction-in-the-hurricane.html> (“Whatever its intentions, ‘The Hurricane’ falls into the category of history contorted for dramatic effect”).

³⁰ YOUTUBE.COM, <https://www.youtube.com/watch?v=w918Eh3fj0>.

³¹ E.g., David Edelstein, ‘Argo’: *Too Good To Be True, Because It Isn’t*, NPR (Oct. 12, 2012, 10:55 AM), <http://www.npr.org/2012/10/12/162785168/argo-too-good-to-be-true-because-it-isnt>; David Haglund, *How Accurate Is Argo?*, SLATE.COM (Oct. 12, 2012, 4:03 PM),

http://www.slate.com/blogs/browbeat/2012/10/12/argo_true_story_the_facts_and_fiction_behind_the_ben_affleck_movie.html; Sandy Schaefer, ‘Argo’: *The Movie Vs. The True Story*, SCREENRANT (Oct. 15, 2012),

<http://screenrant.com/argo-movie-facts-fiction-true-story-differences/>.

³² CINEPLEX, <http://www.cineplex.com/Movie/the-imitation-game>; YOUTUBE.COM, <https://www.youtube.com/watch?v=S5CjKEFb-sM>.

³³ E.g., L.V. Anderson, *How Accurate Is The Imitation Game?*, SLATE.COM (Dec. 3, 2014, 9:26 AM), http://www.slate.com/blogs/browbeat/2014/12/03/the_imitation_game_fact_vs_fiction_how_true_the_new_movie_is_to_alan_turing.html; Andrew Grant, ‘The Imitation Game’ *entertains at the expense of accuracy*, SCIENCE NEWS (Dec. 30, 2014, 7:45 AM), <https://www.sciencenews.org/article/%E2%80%98imitation-game%E2%80%99-entertains-expense-accuracy>; Alex von Tunzelmann, *The Imitation Game: inventing a new slander to insult Alan Turing*, THE GUARDIAN (Nov. 20, 2014, 5:54 PM), <http://www.theguardian.com/film/2014/nov/20/the-imitation-game-invents-new-slander-to-insult-alan-turing-reel-history>.

³⁴ E.g., Andrew Grant, ‘The Imitation Game’ *entertains at the expense of accuracy*, SCIENCE NEWS (Dec. 30, 2014, 7:45 AM), <https://www.sciencenews.org/article/%E2%80%98imitation-game%E2%80%99-entertains-expense-accuracy>; Alex von Tunzelmann, *The Imitation Game: inventing a new slander to insult Alan Turing*, THE GUARDIAN (Nov. 20, 2014, 5:54 PM), <http://www.theguardian.com/film/2014/nov/20/the-imitation-game-invents-new-slander-to-insult-alan-turing-reel-history>.