Digital Commons @ LMU and LLS

Loyola Marymount University and Loyola Law School
Digital Commons at Loyola Marymount University and Loyola Law School

Loyola of Los Angeles Entertainment Law Review | Law Reviews

5-15-2013

Artistic License or Breach of Contract? Creator Liability for Deceptive or "Defective" Documentary Films and Television Programs

Kimberlianne Podlas
University of North Carolina, Greensboro

Recommended Citation
Kimberlianne Podlas, *Artistic License or Breach of Contract? Creator Liability for Deceptive or "Defective" Documentary Films and Television Programs*, 33 Loy. L.A. Ent. L. Rev. 67 (2013).
Available at: http://digitalcommons.lmu.edu/elr/vol33/iss1/3

This Article is brought to you for free and open access by the Law Reviews at Digital Commons at Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons at Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

ARTISTIC LICENSE OR BREACH OF CONTRACT?

CREATOR LIABILITY FOR DECEPTIVE OR "DEFECTIVE" DOCUMENTARY FILMS AND TELEVISION PROGRAMS

*Kimberlianne Podlas**

With the explosion of the documentary form, documentaries have increasingly integrated the storytelling strategies, production techniques, and performative aspects of scripted television drama. While the news and entertainment industry may regard these as matters of aesthetics, ethics, or artistic expression, a number of recent lawsuits suggest that audiences perceive them as deceptions with legal ramifications. This Article defines and analyzes the term "documentary" from a legal perspective, and identifies the point at which a documentary's use of fabricated materials, selective editing, producer-controlled situations, and other "documentary deceptions" implicate legal liability. Ultimately, this Article concludes that while a "documentary" does not promise truth, when the term is used in the context of a contract, it does promise that the work is comprised of documentary evidence chronicling actual facts, events, processes, or people. A work that substantially deviates from this standard may amount to breach of contract or breach of warranty. Conversely, if a work is deceptive in some respect, it does not produce legal liability. Instead, that deception either precludes the work from meeting the objective definition of "documentary" or renders the work "defective."

---

* Associate Professor, Department of Media Studies, University of North Carolina, Greensboro; JD, cum laude, S.U.N.Y. at Buffalo, School of Law (1991); BA, magna cum laude, S.U.N.Y. at Buffalo (1988). Thank you to Sean Montgomery for his help in editing this article.

I. INTRODUCTION

The resurgence of the documentary's popularity[1] has led to an unprecedented change to the genre.[2] The genre and its aesthetic have expanded beyond the traditional boundaries of informational films and news reporting, to become a mainstay of primetime television and a popular narrative device in fictional works.[3] During this modern advancement, documentaries have increasingly integrated the storytelling strategies, production techniques, and performative aspects of scripted drama.[4] Although the artifice inherent in these constructive practices is often apparent, some are so seamlessly integrated into documentaries that they are unrecognized by the audience.[5] While the news and entertainment industries may regard such techniques as matters of aesthetics, ethics, or artistic expression,[6] audiences may perceive them differently.[7] As a number of recent lawsuits demonstrate, audience members are demanding legal ramifications for these documentary deceptions."[8]

---

1. Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 109–11 (2005) (detailing the expansion and resurgence of documentary film and television).

2. *See* Laurie Oullette & Susan Murray, *Introduction*, *in* REALITY TV: REMAKING TELEVISION CULTURE 2 (Susan Murray & Laurie Ouellette eds., 2004); *see generally* Silbey, *supra* note 1 (explaining the development of documentary film).

3. Silbey, *supra* note 1 (describing the use of documentary techniques in contemporary film and television).

4. *See* JASON MITTELL, TELEVISION AND AMERICAN CULTURE 233 (2010); Richard Corliss, *Reeler than Real*, TIME, Oct. 11, 2010, at 64; *see also* JONATHAN BIGNELL, AN INTRODUCTION TO TELEVISION STUDIES 199 (2004).

5. *See generally* Silbey, *supra* note 1, at 145–50 (explaining how narrative tone and voice can blur the line between documentary and fiction).

6. *See generally Professor Documents the Documentary's Rise to Popularity*, NEWSWISE (Feb. 15, 2008, 4:00 PM), http://www.newswise.com/articles/professor-documents-the-documentarys-rise-to-popularity (explaining that the artistic elements utilized in documentary, such as "editing, photography and sound editing" are also utilized in fiction and are equally as important) (internal quotations omitted).

7. *See* Charlie Keil, *Steel Engines and Cardboard Rockets: The Status of Fiction and Nonfiction in Early Cinema*, *in* F IS FOR PHONY: FAKE DOCUMENTARY AND TRUTH'S UNDOING 40 (Alexandra Juhasz & Jesse Lerner eds., 2006) ("[M]ost films, fictional or not, possess a narrative structure, and that we can distinguish fiction films from nonfiction by the means of presentation rather than by content."); *see generally Professor Documents the Documentary's Rise to Popularity*, *supra* note 6.

8. *See infra* Part VII.

While the documentary genre has existed for more than a century,[9] this legal issue of what will colloquially be referred to as "documentary deception" has only recently emerged. It can be traced to recent accusations involving a handful of high-profile works, such as the documentary *Catfish*,[10] Joaquin Phoenix's *Late Show With David Letterman* appearance in conjunction with the fake documentary *I'm Still Here*,[11] and James Frey's memoir, *A Million Little Pieces*.[12] Prior to these highly publicized complaints, documentarians had little reason to believe that anything more than backlash or negative publicity would result from the audience's perceptions of the truthfulness of their works.[13] Today, however, a creator or producer of a documentary must be aware that such allegations of deception may not only deal a fatal blow to an otherwise worthy project, but may also result in a class-action lawsuit (hereinafter "audience claims").

This Article considers the legal liability that can arise from "deceptive"[14] or "defective" documentary works. Part II provides a brief history of documentary films. Parts III and IV then define the essential, but elusive, components of a documentary. To contextualize this issue, Part V provides a deep analysis of the three most recent allegations of deception. Part VI identifies the points at which artistic experimentation and producer prerogative cross the threshold of deception, and thus invite lawsuits based on breach of contract. These points include using fabricated materials,

---

9. Silbey, *supra* note 1, at 110; *see generally* Keil, *supra* note 7, at 39–44 (tracing the history of film and the development of documentary forms).

10. *See* Eriq Gardner, *Exclusive: New Lawsuit Seeks to Expose Truth Behind 'Catfish'*, THE HOLLYWOOD REPORTER (Dec. 3, 2010, 10:17 AM), http://www.hollywoodreporter.com/blogs/thr-esq/lawsuit-seeks-expose-truth-catfish-55969.

11. *See* Tim Teeman, *Joaquin Phoenix Apologizes to David Letterman*, THE TIMES (Sept. 24, 2010, 12:24 AM), http://cma.staging-thetimes.co.uk/tto/arts/tv-radio/article2737566.ece.

12. *See* Samantha J. Katze, *A Million Little Maybes: The James Frye Scandal and Statements on a Book Cover or Jacket as Commercial Speech*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 207, 210 (2006).

13. *Cf.* Stacey A. Hyman, *The James Frey Scandal: A Million Frivolous Lawsuits*, 17 SETON HALL J. SPORTS & ENT. L. 211, 232–34 (2007) (outlining previous unsuccessful legal claims alleging that "non-fictional" literary works were fictionalized).

14. This article uses the term "deceptive" rather than "lie" or "fraudulent" because it is broader and does not imply scienter. *See* ROD L. EVANS, THE ARTFUL NUANCE 65 (2009) ("Deceptive describes whatever has the power to mislead . . . . "); *see also* Saul Levmore, *A Theory of Deception and Then of Common Law Categories*, 85 TEX. L. REV. 1359, 1361–62 (2007) (describing deception and fraud, and asserting that each inhabits a different doctrinal area of law). This article does not consider instances where a documentary is the mechanism by which one disseminates false or defamatory information.

selective editing, and producer-controlled situations. Part VIII then discusses breach of contract and breach of warranty as the legal remedies for the deception. Ultimately, Part VIII concludes that, under limited circumstances, particular deceptions can amount to a breach of contract or render a work "defective" under a breach of warranty claim. The monetary damages resulting from such breaches would be limited to the contract price paid for the work, which seems minimal, but when these are consolidated into class-action lawsuits, the economic costs could be significant.

II. THE DEVELOPMENT OF THE DOCUMENTARY GENRE

Documentary films are regarded as film's oldest[15] and most respected genre.[16] They are direct descendants of the turn of the century actuality films[17] that were dedicated to the contemporaneous recording of actual events.[18] Although actuality films provided a realistic experience of everyday life,[19] filmmakers soon realized that these short films documenting mundane events could not maintain audience attention or generate repeat viewing.[20] To better engage audiences, filmmakers began

15. Silbey, *supra* note 1, at 143.

16. *Id.* at 143–44 (listing the reasons this genre is respected); *see also* Craig Hight & Jane Roscoe, *Forgotten Silver: A New Zealand Television Hoax and Its Audience*, *in* F IS FOR PHONY: FAKE DOCUMENTARY AND TRUTH'S UNDOING, *supra* note 7, at 171 (stating that documentary has been privileged over fiction).

17. Actuality films were most famously introduced by the Lumière brothers in 1895. JACK C. ELLIS & BETSY A. MCLANE, A NEW HISTORY OF DOCUMENTARY FILM 293 (2005); *see also* Alexandra Juhasz & Jesse Lerner, *Introduction: Phony Definitions and Troubling Taxonomies of the Fake Documentary*, *in* F IS FOR PHONY: FAKE DOCUMENTARY AND TRUTH'S UNDOING, *supra* note 7, at 6–7 (detailing the development of early actuality films).

18. Silbey, *supra* note 1, at 143.

19. The very first movies, frequently called actualities, were short recordings of everyday activity without explanation or storyline. TIMOTHY CORRIGAN & PATRICIA WHITE, THE FILM EXPERIENCE: AN INTRODUCTION 259 (3d ed., 2012); *see also* Keil, *supra* note 7, at 40–42 (describing the psychological realism of early actuality films).

20. One such film was the Lumière brothers' *L' arrivée d'un train en gare de La Ciotat* (The Arrival of a Train at La Ciotat), which literally documented the arrival of a train into Ciotate station, France. Keil, *supra* note 7, at 39–41; *see also* ELLIS & MCLANE, *supra* note 17.

structuring films as narratives.[21] This process evolved into what today is known as the documentary.[22]

Despite the genre's stature,[23] mainstream audiences have historically neglected documentaries in favor of entertainment-driven, fictional films.[24] In the last decade, however, the documentary has attained a newfound popularity.[25] This can be attributed, in part, to changes in the genre's form, means of creation, and methods of distribution.[26]

First, much like actuality films did a century ago,[27] documentaries have become increasingly entertainment-oriented,[28] as they commonly embrace the storytelling strategies,[29] performative aspects,[30] and production techniques of scripted fare.[31] Additionally, documentaries have begun to take a more active role in instigating events or constructing situations likely

---

21. *See* Keil, *supra* note 7, at 42–46 (explaining the transition of documentary to story-driven films). Contemporary non-fiction television, reality television, and newsmagazines have also adopted the narrative strategies and structure of fiction in order to engage viewers. *See* MITTELL, *supra* note 4.

22. Keil, *supra* note 7, at 43–46.

23. The genre's status is not merely a function of its longevity, but of its grounding in fact rather than fiction, and its ability to inform audiences about issues. Hight & Roscoe, *supra* note 16, at 171.

24. *See* Keil, *supra* note 7, at 40 ("From the outset, audiences and filmmakers alike certainly distinguished between actuality and fiction filmmaking; otherwise the public would not have demonstrated a marked preference for the former in the first years of filmgoing.").

25. Silbey, *supra* note 1, at 109; *see also* ELLIS & MCLANE, *supra* note 17, at 316–21, 332–33 (recounting the commercially successful documentaries of the 1990s–2000s).

26. *See* ELLIS & MCLANE, *supra* note 17, at 294–97, 326–27 (explaining the contribution of new technologies to increased interest in documentary and discussing the expanded market for documentaries); *see generally* Nick Couldry, *Teaching Us to Fake It: The Ritualized Norms of Television's "Reality" Games*, *in* REALITY TV: REMAKING TELEVISION CULTURE, *supra* note 2, at 56–58 (detailing the growth of reality television and its impact on classical documentary forms, and the documentaries convergence with other media).

27. *See* Silbey, *supra* note 1, at 145.

28. *See* BIGNELL, *supra* note 4, at 199–200; MITTELL, *supra* note 4, at 216.

29. *See* Keil, *supra* note 7, at 42–46 (detailing the adoption and use of this strategy in traditional film); *see also* MITTELL, *supra* note 4, at 216, 233.

30. *See* Susan Murray, *"I Think We Need a New Name for It: "The Meeting of Documentary and Reality TV*, *in* REALITY TV: REMAKING TELEVISION CULTURE, *supra* note 2, at 53–54.

31. *See id.* at 40–54 (explaining the difference between documentaries and reality television, and the difficulties in separating them due to the similarity in forms); *see generally* Silbey, *supra* note 1, at 112 (explaining that though documentaries are meant to portray the truth, in reality, they are not based in truth; therefore, they are unrealistic and are like scripted film).

to elicit reactions from participants.[32] Some even "cast" individuals who will make "good TV" or fit into a character type such as hero, villain, or love interest.[33]

Second, advancements in image capturing, editing, and reproduction technologies[34] have enabled documentaries to be produced and distributed more easily and cost-effectively.[35] This low barrier to entry to the public domain, coupled with new methods of distribution and consumption, has helped increase the market for documentaries.[36] One noticeable benefit from this increase is that documentaries no longer need major influxes of financial capital from studios to become commercially viable.[37] Instead, documentaries can be produced with minimal capital investment and distributed via the filmmaker's website, Amazon.com, or a pay-per-view service.[38] Finally, the mass availability and significant price reduction of equipment[39] has cultivated a more personal relationship between the audience and genre, which, in turn, has cultivated a deeper audience interest in documentaries.[40]

---

32. *See, e.g.*, ELLIS & MCLANE, *supra* note 17, at 319–21 (referencing Michael Moore's film *Fahrenheit 9/11* where the political nature of the film elicited rallies and outcries from various groups of people).

33. MICHAEL ESSANY, REALITY CHECK: THE BUSINESS AND ART OF PRODUCING REALITY TELEVISION 135–39 (2008) (describing the way in which reality television producers cast participants and then edit footage to match established character types); *see also* MITTELL, *supra* note 4, at 216.

34. *See generally* CORRIGAN & WHITE, *supra* note 19, at 357–61 (detailing the characteristics and history of early cinema in Hollywood).

35. *See* Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 722 (2010) (discussing the advent of online speech and its ability to make everyone a "producer" and "consumer" because of the high accessibility of films and videos through blogs or other low cost mediums).

36. *See* ELLIS & MCLANE, *supra* note 17, at 294–97 (detailing the impact of consumer technologies on the expansion of the documentary), 326–32 (discussing the factors contributing to the expanded market for documentaries).

37. *See id.* at 294.

38. For example, *Hillary: The Movie*, the independently produced film at the heart of *Citizens United*, was distributed via OnDemand cable. Citizens United v. FEC, 130 S. Ct. 876, 887 (2010).

39. *See* ELLIS & MCLANE, *supra* note 17, at 294.

40. *See generally* GEOFFREY BAYM, FROM CRONKITE TO COLBERT: THE EVOLUTION OF BROADCAST NEWS 150–51 (2010) (explaining how the web and digital media have changed viewer's relationship with the media by permitting the viewer to become an active participant in the medium).

Whether these changes inure to the benefit or detriment of the documentary genre is a matter of opinion.[41] Some scholars argue that adopting such production techniques and stylistic conventions expand the genre's artistic possibilities and commercial viability.[42] Others reason that deviating from the genre's tradition may undermine its heritage and tarnish its reputation.[43] Notwithstanding, both proponents and detractors acknowledge that these changes blur the traditional substantive and aesthetic lines demarcating the documentary genre.[44] To the extent that this conflicts with the viewing public's expectations of what a work labeled "documentary" promises to deliver,[45] it is more than an issue of film aesthetics or artistic expression. Instead, as described below, it is beginning to become one of legal liability.

III. DEFINING "DOCUMENTARY"

A. The Impact of Change

Defining the term "documentary" is not a simple undertaking. As one court observed, even "though its definition may not be ambiguous, the class of films defined as 'documentary-style' is subject to some debate."[46] Some documentarians and scholars define the term *vis-à-vis* the theory that the camera is a neutral recording device meant to capture historical reality.[47] A few distinguish documentaries from other film genres by the absence of

---

41. *See* ELLIS & MCLANE, *supra* note 17, at 334–35.

42. *See id.* at 337–38.

43. *See* Couldry, *supra* note 26, at 60–62 (describing the impact of blurring boundaries and reality television on the status of documentary film).

44. *See* BAYM, *supra* note 40, at 16–17; Murray, *supra* note 30, at 41 (discussing reality television's contribution to blurring the boundaries and whether its impact is positive or negative on documentary).

45. *See generally* CORRIGAN & WHITE, *supra* note 19, at 256–57 (noting the public expectations based on the definition of "documentary").

46. Psenicska v. Twentieth Century Fox Film Corp., Nos. 07 Civ. 10972(LAP), 08 Civ. 1571(LAP), 08 Civ. 1828(LAP), 2008 WL 4185752, at *5 (S.D.N.Y. Sept. 3, 2008) (considering "documentary" within the context of determining whether *Borat* constituted a "documentary-style" film), *aff'd*, Nos. 08-4604-CV, 08-6053-CV, 08-4818-CV, 2009 WL 3824873 (2d Cir. Nov. 17, 2009).

47. *See* Silbey, *supra* note 1, at 127 (stating the presumption that the camera is an unbiased observer); *see generally* BIGNELL, *supra* note 4, at 184–85 (explaining that different documentary subgeneres reflect different philosophies of the camera's function).

filmmaker involvement and an aesthetic of authenticity.[48] Others believe that a documentary reflects an epistemology of truth-telling.[49] Still, some claim that the term has become so flexible that it has lost all meaning or has become obsolete.[50]

B. Documentary Style

An alternative means of identifying and defining a documentary is by its production techniques and style.[51] The documentary aesthetic is largely a function of the techniques and equipment used to record and edit: the tangible materials comprising the documentary.[52] Camerawork is one such technique-driven style.[53] Because filming often occurs on location,[54] documentarians favor hand-held cameras.[55] Hand-held cameras produce point-of-view footage that can look somewhat jittery[56] and is punctuated by noticeable pans and zooms.[57] Other times, cameras are hidden or mounted overhead,[58] generating surveillance-style footage.[59]

---

48. *See* ELLIS & MCLANE, *supra* note 17, at 215–22 (discussing the different philosophical approaches to a filmmaker's involvement in a documentary and the aesthetics of the genre).

49. *Professor Documents the Documentary's Rise to Popularity*, *supra* note 6 ("Viewers see documentaries as truth tellers."); *see* ELLIS & MCLANE, *supra* note 17, at 334–35 (outlining contemporary film theory regarding documentary film's ability and responsibility to present reality).

50. ELLIS & MCLANE, *supra* note 17, at 338.

51. *Id.* at 2–3.

52. *Id.* at 2.

53. MITTELL, *supra* note 4, at 183.

54. ELLIS & MCLANE, *supra* note 17, at 2.

55. BIGNELL, *supra* note 4, at 196; MITTELL, *supra* note 4, at 194–95.

56. MITTELL, *supra* note 4, at 194.

57. *See* ELLIS & MCLANE, *supra* note 17, at 218–19 (discussing the impact of the zooming technique on subjects).

58. The camera is situated to enable a fly-on-the-wall perspective of private events and in private spaces. Lemi Baruh, *Publicized Intimacies on Reality Television: An Analysis of Voyeuristic Content and Its Contribution to the Appeal of Reality Programming*, 53 J. BROAD. & ELEC. MEDIA 190, 194 (2007).

59. *See, e.g.*, *You Don't Like the Truth – 4 Days Inside Guantanamo*, HUMAN RIGHTS WATCH, http://ff.hrw.org/film/you-dont-truth-4-days-inside-guantanamo?city=93 (last visited Feb. 21, 2013) (employing a "surveillance-camera style"); Mick LaSalle, *'The Bay' Review': Be Very Afraid*, SF GATE (Nov. 1, 2012 4:34 PM), http://www.sfgate.com/movies/article/The-Bay-review-Be-very-afraid-4001108.php.

Other features of the documentary style are its reliance on natural, rather than expressive lighting,[60] and environmental or sourced sound, where conversations and background noise can be overheard.[61] Furthermore, contributing to the documentary's aesthetic are the types of materials incorporated such as photos, found footage, archival documents, and voice over narration.[62]

IV. INTERPRETING "DOCUMENTARY": SUBSTANCE OVER STYLE

Although style, as an overt feature, is easy to identify, it does not replace substance. In fact, the documentary aesthetic is no longer exclusive to documentary films. It has been adopted by a variety of fictional media.[63] For example, television programs such as *Modern Family*,[64] *Arrested Development*,[65] and *Chronicle*[66] all employ documentary conventions including handheld cameras and surveillance-style footage.[67] Despite their use of documentary style aesthetics, these works are not transformed from fictional to factual works.[68] Artistic paradigms and academic ponderings

---

60. ELLIS & MCLANE, *supra* note 17, at 2–3 (detailing how lighting in documentary is often a function of shooting on location).

61. This is sometimes called "actuality sound." John Corner, *Analyzing Factual TV: How to Study Television Documentary*, *in* TELE-VISIONS: AN INTRODUCTION TO STUDYING TELEVISION 67 (Glen Creeber ed., 2006); *see also id.* at 66 (discussing overhead exchange where the participants' speech is "unaffected by the camera and the microphone").

62. *See generally id*. at 62–64 (discussing the three modes of documentary image), 66 (defining voice over narration).

63. *See, e.g.*, *They Just Want to Party All the Time*, ENTM'T WEEKLY, June 29, 2012, at 57 ("Ever since *The Blair Witch Project* made a heap of dough out of its shaky-cam conceit, teen-targeted movies have been leaning on the whole first-person, documentary-style setup to spice up their predictable plotlines.").

64. John Sepinwall, *Modern Family: Co-Creator Steve Levitan Weighs in*, NJ.COM (Jan. 14, 2010, 7:05 AM), http://www.nj.com/entertainment/tv/index.ssf/2010/01/modern_family_co-creator_steve.html; *see generally Modern Family* (ABC television broadcast).

65. *"Arrested Development" Arrives on IFC*, IFC (Oct. 19, 2009, 1:10 PM), http://www.ifc.com/fix/2009/10/arrested-development; *see generally Arrested Development* (Fox television broadcast).

66. *See* Owen Gleiberman, *'Chronicle': The Movie That Makes Special Effects Special Again*, ENTM'T WEEKLY (Feb. 9, 2012 1:49 PM), http://insidemovies.ew.com/2012/02/09/chronicle-makes-effects-special-again/ (noting the film's "loosely shot video-diary look"); *see generally* CHRONICLE (Twentieth Century Fox 2012).

67. *See supra* Part III.B. and notes 64–66.

68. Furthermore, because today's audience is familiar with the use of documentary style filming outside of the traditional documentary film, there is little reason to believe that the audience presumes that the documentary aesthetic pertains to documentary substance. *See*

are not controlling factors when the term "documentary" has legal implications; instead, the term "documentary" must be analyzed as a contract term.[69] Courts interpret contract terms according to the terms' plain meaning or by how the average person would understand them.[70] The Supreme Court's jurisprudence demonstrates that plain meaning is synonymous with or reflected in contemporary dictionary definitions.[71] Accordingly, the dictionary is the starting point for determining the meaning of "documentary" as a contract term.

The *Oxford Dictionary of Current English* defines the noun "documentary" as: "a film or television or radio programme giving a factual account of something, using film, photographs, and sound recordings of real events."[72] Similarly, *the American Heritage Dictionary* defines a documentary as the "[p]resent[ation] [of] facts objectively without editorializing or inserting fictional matter, as in a book or film."[73]

---

generally Penn Collins, *How Faux-Documentary Sitcoms Trick Us, and Why We Love Them Anyway*, SCREEN JUNKIES (Nov. 23, 2012), http://www.screenjunkies.com/tv/tv-news/how-faux-documentary-sitcoms-trick-us-and-why-we-love-them-anyway/ (discussing how television shows such as *The Office*, *Modern Family*, *Parks and Recreation*, and *Arrested Development* employ different documentary techniques).

69. *See, e.g.*, Jessica Howard Ltd. v. Norfolk S. Ry. Co., 316 F.3d 165, 168 (2d Cir. 2003). Furthermore, to the extent that uncertainty about the definition of documentary may render the term ambiguous, contract ambiguity is a question of law. *E.g.*, Sayers v. Rochester Tel. Corp. Supp. Mgmt. Pension Plan, 7 F.3d 1091, 1095 (2d Cir. 1993); Metro. Life Ins. Co. v. RJR Nabisco, Inc., 906 F.2d 884, 889 (2d Cir. 1990).

70. *See, e.g.*, Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1264–66 (2011) (using plain meaning to interpret the term "personnel rules and practices" in Exemption 2 of the Freedom of Information Act); CSX Transp., Inc. v. Ala. Dep't of Rev., 131 S. Ct. 1101, 1107–08 (2011) (defining "tax" and "discriminate" according to their plain meaning); Carcieri v. Salazar, 555 U.S. 379, 395 (2009) (stating that terms should not be defined in a way that would nullify plain meaning); First Nat'l Exch. Bank v. Roanoke Oil Co., 192 S.E. 764, 771 (Va. 1937); Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) (explaining that where terms are clear on their face, plain language prevails), aff'd, 231 U.S. 50 (1913).

71. *See, e.g.*, Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1331 (2011) (referencing various dictionary definitions in order to define a term at issue); *Milner*, 131 S. Ct. at 1264 (referencing Webster's Third New International Dictionary and Random House Dictionary in order to define terms); *CSX Transp.*, 131 S. Ct. at 1108 (referencing Black's Law Dictionary and Webster's Third New International Dictionary to define a term's plain meaning); *Carcieri*, 555 U.S. at 388 (defining plain meaning of "now" by using Webster's New International Dictionary and Black's Law Dictionary).

72. OXFORD DICTIONARY OF CURRENT ENGLISH 262 (4th ed. 2006); *see, e.g.*, *Psenicska*, 2008 WL 4185752, at *5 (referencing New Oxford American Dictionary's definition of "documentary").

73. *Documentary*, AMERICAN HERITAGE DICTIONARY, http://www.ahdictionary.com/word/search.html?q=documentary (last visited Nov. 11, 2012); *see also Documentary*, CAMBRIDGE DICTIONARIES ONLINE,

Therefore, when defined as a contract term, a documentary has two components: (1) substantively, it documents actual facts, events, processes, or people, and (2) materially, it is comprised of actual documents evidencing those facts, events, processes, or people.[74]

Although courts have not reached a decision on an audience claim of documentary deception, those that have addressed the issue in related lawsuits have defined documentaries based on their content, rather than their style.[75] The Supreme Court implicitly used a substance-based standard in evaluating *Hillary: The Movie*, the film at the heart of *Citizens United v. Federal Election Commission*.[76] The Court identified *Hillary: The Movie* as a documentary because it is comprised of factual information about Hillary Clinton, a real individual, and it contains real events, real criticisms, filmed interviews, and historical footage of events relating to Clinton.[77] Of equal importance, the Court did not mention the film's aesthetic features, such as camera angles or lighting.[78]

Furthermore, in a case that involved a dispute over the copyright ownership of footage of a Titanic salvage operation, the court described the footage and photographs of the journey as documentary and referred to the resulting film as a documentary.[79] In doing so, the court focused on the substance of the materials; namely, that they documented actual crews undertaking an actual salvage operation of an actual ship.[80]

---

http://dictionary.cambridge.org/dictionary/american-english/documentary_1?q=documentary (last visited Nov. 11, 2012) (defining documentary as "a film or television or radio program that gives information about a subject and is based on facts").

74. *See* ELLIS & MCLANE, *supra* note 17, at 1–3 (describing the common characteristics of documentaries that differentiate them from other types of films).

75. *See, e.g.*, *Psenicska*, 2008 WL 4185752, at *5. The collection of lawsuits in Psenicka involved the Sacha Baron Cohen film *Borat*, which described itself as a documentary-style film. *Id.* at *3. Third party participants unsuccessfully complained that, despite signing waivers stating otherwise, they were misled regarding the film's focus and genre. *Id.* at *5.

76. Citizens United v. FEC, 130 S. Ct. 876 (2010). *Hillary: The Movie* was a "feature-length negative advertisement" made for the express purpose of derailing Clinton's presidential aspirations by casting then-candidate Clinton in a negative light, and criticizing her character and fitness for the Presidency. *Id.* at 890.

77. *Id.* at 890.

78. *Id.*

79. Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic, No. 97 Civ. 9248(HB), 1999 WL 816163, at *1–2 (S.D.N.Y. Oct. 13, 1999).

80. *Id.*

V. PUTTING DECEPTION INTO CONTEXT:

RECENT ALLEGATIONS OF DECEPTION IN "NON-FICTION"

With a concrete definition of documentaries in hand, it is important to understand how documentaries may deviate from this definition. Hoaxes and fabrications in non-fiction media are nothing new.[81] Over the years, news publications, biographers, and television game shows have either confessed to or been caught deceiving the public. A few of the notable allegations that have contributed to the emergence of legal liability for documentary deception are outlined below.

A. Catfish

Allegations of deception have been made against the creators of *Catfish*.[82] When *Catfish* premiered at the 2010 Sundance Film Festival, it was met with equal parts acclaim and skepticism.[83] The documentary follows the Facebook-based relationship between Nev Schulman, a twenty-four year old photographer, and Abby, a young fan of Schulman's and a precocious artist.[84] The relationship began when Nev received a gift in the mail from Abby.[85] Soon after, Nev became Facebook friends with Abby's mother, Angela, and her older sister, Megan.[86] As Nev's relationship with Abby deepened, his admiration for Megan, an artist and musician, blossomed into a digital romance complete with late-night sexting.[87]

Though the film began as a seemingly organic, "anthropological observation" of Facebook, it morphed into a thrilling *Blair Witch*-style investigation.[88] The turning point occurred when Megan sent Nev a clip of

---

81. *See* Matt Volz, *Lawsuit Against 'Three Cups of Tea' Author Dismissed*, USA TODAY (Apr. 30, 2012, 5:17 PM), http://usatoday30.usatoday.com/life/books/news/story/2012-04-30/three-cups-of-tea-lawsuit-mortenson/54645162/1 (describing how four readers of *Three Cups of Tea* sued the author and publisher for fabricating facts in this books which was labeled as "non-fiction." The plaintiffs claimed that they were cheated out of the purchase price and sought a refund because the book was not wholly non-fiction. A federal court dismissed the lawsuit in April 2012).

82. CATFISH (Supermarché 2010); Gardner, *supra* note 10 (stating that since its premier, audiences have debated whether the film is a hoax).

83. Corliss, *supra* note 4, at 64; Gardner, *supra* note 10.

84. CATFISH, *supra* note 82.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.*

her performing a song she had written.[89] An enchanted Nev shared the clip with the filmmakers.[90] The trio searched for the song online, which led to a YouTube performance of the song by Amy Kuney, its singer-songwriter.[91] The surprising revelation that Megan had "palmed off" Kuney's song as her own caused the men to scrutinize Megan's earlier representations, such as those regarding her family, personal life, and her inability to meet Nev, who coincidentally was in town at the time.[92] Simultaneously, the trio investigated Abby's self-described artistic prowess, and made unannounced visits to both Megan's and her mother's homes; to their surprise, they discovered that neither Megan nor Abby existed.[93] Instead, Angela had been masquerading on-line as both Abby and Megan, and had created their fake Facebook profiles.[94] By the end of the film, Angela confessed that she staged the ruse as an escape from her life where she was caring for her two severely disabled stepsons.[95]

Questions about the film's authenticity arose almost immediately after its premiere.[96] Although the filmmakers have insisted that the film is real and they did not learn of Angela's ruse until she confessed,[97] the manner in which this observational documentary[98] stumbled onto such a shocking discovery with a perfectly constructed narrative and plot twist seemed too good to be true—and some audience members thought it was.[99] It required audiences to believe that these shrewd, experienced filmmakers fell under an uncharacteristic cloud of naiveté, while still being discerning enough to

---

89. *Id.*

90. CATFISH, *supra* note 82.

91. *Id.* The song is *All Downhill From Here*. Amy Kuney, *All Downhill From Here* (Spin Move Records). *See also* Gardner, *supra* note 10.

92. CATFISH, *supra* note 82.

93. *Id.*

94. *Id.*

95. *Id.*

96. Gardner, *supra* note 10.

97. Jesse Ashlock, *Two Renegade Doc-Makers Go Hollywood*, DETAILS, Oct. 2011, at 76; Gardner, *supra* note 10.

98. An "observational documentary" is a documentary in which the filmmaker "aims to observe neutrally what would have happened even if he or she had not been present." BIGNELL, *supra* note 4, at 154.

99. Gardner, *supra* note 10 (explaining how some audience members assumed the filmmakers "had figured it all out in advance and were attempting to manipulate audiences into accepting this modern-day digital fable").

capture the footage they needed.[100] Indeed, some critics asserted that the filmmakers were aware of the Angela/Abby/Megan fraud almost immediately, but because they realized the value of the story and that it would eventually fold under the weight of the deception, they played along in order to exploit the filmmaking opportunity.[101] Thus, even if Angela is real, the film's presentation of the incident is deceptive.

Because *Catfish* included significant portions of Kuney's songs and performances, the copyright owner sued the filmmakers for infringement.[102] In response, the filmmakers asserted that the song's inclusion in the documentary was fair use[103] because it was a historical fact that marked the critical turning point in the discovery of Angela's ruse.[104] The filmmaker's knowledge of the situation and whether the film is factual or partly improvised fiction is relevant in determining whether the use of the song constitutes fair use or is simply a pre-planned inclusion to increase production value or create a plot point.[105] Presumably, fair use is applicable if the song was played for commentary purposes during the sequence of events where the men ascertained whether Megan's song was Kuney's.[106] The men realized that Megan's audio file was counterfeit only when they heard Kuney's recording.[107] This defense loses traction, however, if they were aware of the fraud or were actively participating in it for the sake of generating footage.[108] If the filmmakers fabricated the events, and *Catfish* is a "fake" documentary, then the filmmakers cannot claim to have been

---

100. *See id.*

101. *Id.*

102. Complaint for Copyright Infringement at 5–7, Threshold Media Corp. v. Relativity Media, LLC, No. CV10-9318-DMG(AJWx) (C.D. Cal. Dec. 3, 2010); *see also* Gardner, *supra* note 10.

103. Fair use is a limitation on the exclusive right granted by copyright law to the creator of a piece of work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," creating a situation where use of a copyrighted work is not an infringement of the copyright. 17 U.S.C. § 107 (2011); *see also* Gardner, *supra* note 10.

104. *See* Gardner, *supra* note 10.

105. *See* § 107; *see also* Gardner, *supra* note 10 (suggesting the men would have no reason to think that there were lurking copyright issues if they played the song believing it was Megan's).

106. Gardner, *supra* note 10.

107. *Id.*; *see* CATFISH, *supra* note 82.

108. Gardner, *supra* note 10 (noting that usage of the song was fair use because it was part of a real-life documentary).

caught off guard or to have needed to play and replay the song.[109] Thus, according to the record label, the inclusion of this song as well as the length of time it is played would be tantamount to copyright infringement.[110]

B. Joaquin Phoenix and I'm Still Here

An admitted documentary hoax involves Joaquin Phoenix's documentary *I'm Still Here*.[111] Throughout filming, director Casey Affleck and actor/subject Joaquin Phoenix insisted that their project documented Phoenix's retirement from acting and ill-fated foray into rap music.[112] The film included Joaquin's performances and behind-the-scenes interactions with celebrities at music events, fabricated home movies of Phoenix's childhood, and footage of Phoenix's guest appearance on *The Late Show with David Letterman*.[113] In that famously memorialized debacle, which Affleck and Phoenix set up in order to generate content for their film,[114] Phoenix dressed like the Unabomber, acted high, and rambled incoherently.[115] Then, days before the film's premiere, when it seemed inevitable that the hoax would be revealed, Affleck and Phoenix confessed that the film was not a documentary, but an improvised "performance piece" about the corrosive effect of celebrity status, featuring method actor Phoenix as a character.[116] As part of the press junket for the film, Phoenix returned to *Letterman* and acknowledged that his previous visit had been a performance for the film.[117] Letterman joked that the show should be compensated for contributing to the film.[118]

---

109. *See id.*

110. Complaint for Copyright Infringement at 6–7, *supra* note 102; *see also* Gardner, *supra* note 10.

111. I'M STILL HERE (They Are Going to Kill Us Productions 2010).

112. *See* Hephzibah Anderson, *Joaquin Phoenix Offers Us a Reality Check on Celebrity*, THE OBSERVER, (Sept. 25, 2010), http://www.guardian.co.uk/commentisfree/2010/sep/26/joaquin-phoenix-david-letterman.

113. I'M STILL HERE, *supra* note 111.

114. *See* Teeman, *supra* note 11.

115. *The Late Show with David Letterman* (CBS television broadcast Feb. 11, 2009).

116. Anderson, *supra* note 112; *see also* Corliss, *supra* note 4, at 64.

117. Teeman, *supra* note 11.

118. *Id.*

C. A Million Little Pieces

Perhaps the best-known non-fiction fraud in recent history is James Frey's memoir, *A Million Little Pieces*.[119] The 2003 book recounted Frey's battle with and recovery from drug addiction and related forays into crime.[120] It became a New York Times Bestseller and a 2005 Oprah Book Club selection.[121] A few months after Oprah raved about the book, "The Smoking Gun" revealed that Frey had "wholly fabricated or wildly embellished" the details of his life.[122] When Frey confessed to the literary subterfuge, he and his publisher Random House faced dozens of consumer-protection, tort, and contract-based class-action lawsuits.[123] Random House quickly settled the lawsuits and implemented a variety of remedial steps, namely removing the non-fiction designation from the book jacket and adding explanatory "disclaimers" as well as an author's note to the book.[124]

D. Types of Complaints Arising from Documentary Deception

As these examples demonstrate, documentaries can be misleading in different ways and to various degrees. The events documented may have never occurred, the raw materials of which it is made may be fabricated, or the scripted dialogue performed by actors may pose as spontaneous conversation between real people.[125] Alternatively, authentic materials may be misrepresented or edited to produce a false impression.[126]

---

119. JAMES FREY, A MILLION LITTLE PIECES (Random House 2003); *see generally* Jessica Lewis, *Truthiness: Law, Literature & the Problem With Memoirs*, 31 RUTGERS L. REC. 1, 12–16 (2007) (discussing the development and cultural definition of "memoir," and detailing the various opinions regarding meaning and obligation of "memoir" and similar non-fiction forms).

120. FREY, *supra* note 119; *see* Katze, *supra* note 12; Lewis, *supra* note 119, at 12–14.

121. Katze, *supra* note 12, at 210 n.9.

122. *Id.* at 209–14 (summarizing the investigation and discovery of the fraud); Lewis, *supra* note 116, at 14–15.

123. *Id.* at 213–15 (summarizing Frey's confession and apology, and the class-action lawsuit against him and the publisher).

124. *Id.* at 207–08, 214–15 (summarizing the various consequences suffered by Frey and the publisher).

125. *See infra* Part V.A–C; *see, e.g.*, Juhasz & Lerner, *supra* note 17, at 29 (listing examples of faked documentaries and forged documentary materials); *see also* Silbey, *supra* note 1, at 146–47 (describing the criticisms of re-enactments).

126. *See* Juhasz & Lerner, *supra* note 17, at 19 (giving an example of documentary footage that is not footage of what it purports to represent, but rather, it is edited and pieced together to deceive the viewers).

Additionally, a documentarian might conceal his involvement in the events documented, or present his capture as lucky happenstance.[127] For instance, an actual event may be set up by an undercover journalist investigation, or a highly choreographed exercise with a pre-ordained story arc.[128]

Aside from the veracity of a work's content, deception may have been employed in its making.[129] For example, a documentarian may have gained access to places or people under false pretenses.[130] Filmmakers like Joaquin Phoenix and Casey Affleck may misrepresent the purpose of filming to obtain participant cooperation, or generate footage critical to the film's construction.[131] Hence, the viewing audience is aware that such a deception has occurred, but the participants involved at the time were not.[132]

These deceptions can result in a variety of complaints. Media personalities, such as Oprah and David Letterman, asserted that the authors and creators of such works manipulated them into providing free airtime, or becoming unwitting accomplices in the deception.[133] Third parties appearing in these deceptive works, such as those humiliating themselves in *Borat*,[134] claimed that they were duped into participating, and sued for misappropriation of identity and violation of privacy.[135] The largest group potentially impacted by documentary deceptions, and thus

---

127. *See* Gardner, *supra* note 10 (using the film *Catfish* as an example of a documentary where the documentarian is alleged to have hidden his involvement in the documentary and made the surprise ending appear real).

128. *See generally* ESSANY, *supra* note 33, at 135–40 (describing how reality television creators cull footage to craft story arcs).

129. *I'm Still Here* evidences this technique. The events comprising the film were staged yet the film was directed in a way where it appeared that the events depicted were real. *See* Anderson, *supra* note 112.

130. *See* BORAT: CULTURAL LEARNINGS OF AMERICA FOR MAKE BENEFIT GLORIOUS NATION OF KAZAKHSTAN (20th Century Fox 2006).

131. In *I'm Still Here*, Phoenix and Affleck wanted to illustrate the "tragicomic depiction of the cost of celebrity." Anderson, *supra* note 112. To achieve this end, they decided to have Phoenix spoof audiences, including David Letterman, by portraying himself as "unkempt, monosyllabic, [and] seemingly drug-addled" while claiming to film a documentary. *Id.*

132. *See* Teeman, *supra* note 11 (illustrating Letterman as one such participant who was not aware of Phoenix's deception at the time).

133. Katze, *supra* note 12, at 213 (describing Oprah's complaint that because she believed the book was "non-fiction," she devoted a portion of her show to it and its author); Teeman, *supra* note 11 (describing Letterman's reaction as "I've got a sense I've been made a fool of" while discussing Phoenix's appearance).

134. BORAT, *supra* note 130.

135. *Psenicska*, 2008 WL 4185752.

the largest group of potential plaintiffs, is the audience.[136] Consequently, this article focuses on the legal issues arising from documentary deceptions that impact the audience.[137]

VI. IS DECEPTION A LEGAL WRONG?

To viewers who believe they have been deceived by a documentary work, the fundamental wrong is the lie.[138] Although lying is usually morally wrong,[139] it is not necessarily a legally cognizable wrong.[140] Rather, a lie results in liability only when it implicates some legal right, or causes some identifiable harm.[141] Accordingly, liability for deception in a documentary should rest only if the deception translates into a legally cognizable claim.[142]

The crux of the audiences' complaint is that a work representing itself as a documentary is *not*, in fact, a documentary.[143] Those audience members who seek to remedy the deception have a variety of legal claims, depending on the form and circumstances under which an assertion of "documentary" is made—an advertisement, DVD box, television listing.[144]

---

136. *See generally* Dirk Eitzen, *When Is a Documentary?: Documentary as a Mode of Reception*, 35 CINEMA J. 81, 93 (1995) (illustrating how the audience, or viewers, are impacted by what they believe to be claims of truth in documentaries that end up being false or fabricated).

137. This article does not consider deceptions involved in the collection and recording of component content or deceptions involving complaining third-parties.

138. *See generally* Catherine L. Benamou, *The Artifice of Realism and the Lure of the "Real" in Orson Welles's F for Fake and Other T(r)eas(u)er(e)s*, *in* F IS FOR PHONY: FAKE DOCUMENTARY AND TRUTH'S UNDOING, *supra* note 7, at 151–52 (recounting instances where audiences complained about willful deception in documentary radio genres).

139. *See* Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111, 136–37 (2009).

140. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544–46 (2012) (stating that certain false statement can be protected First Amendment speech and is not presumptively unprotected speech).

141. *See id.* 2545–46 (listing examples of crimes involving lies, such as defamation, which implicate an individual's right to privacy, and perjury).

142. *See generally id.* (noting that false statements that have not warranted First Amendment protection "derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with [the speech] such as an invasion of privacy or the costs of vexatious litigation").

143. Aside from the issue of whether a film qualifies as a documentary or what a documentary means, some viewers may be angry because they were hoodwinked by a "fake" documentary. *See* Eitzen, supra note 136.

144. *See, e.g.*, Psenicska v. Twentieth Century Fox Film Corp., Nos. 07 Civ. 10972(LAP), 08 Civ. 1571 (LAP), 08 Civ. 1828(LAP), 2008 WL 4185752 (S.D.N.Y. Sept. 3, 2008)

Because breach of contract and breach of warranty are, perhaps, the most concrete rubrics for analyzing documentary deception as it applies to the audience, they are the focus of the analysis that follows.

A. Common Law Contract

Common law contract is one of the more obvious and broadly applicable doctrines for analyzing the legal implications of documentary deception.[145] Fundamentally, a contract is an exchange of promises, consisting of an offer, acceptance, and consideration.[146] Once an agreement has been formed, contract law serves to enforce the expectations of the parties.[147] In the context of documentary deception, the central complaint is that the viewer expected to view a documentary but received something other than a documentary.[148] It is this failure to provide a fundamental term of the contract, at least according to the viewing public, that gives rise to a breach of contract claim.[149] Since this failure to deliver a documentary is at the heart of all audience claims, it is essential to determine the terms of the contract, and define what a documentary truly is.

1. The Terms of the Contract

Contract law "enforces the reasonable expectations of the parties," induced by promises.[150] Where, however, a contract is silent regarding the

---

(illustrating one such case where three plaintiffs sued for deception during the filming of a documentary), *aff'd*, Nos. 08-4604-CV, 08-6053-CV, 08-4818-CV, 2009 WL 3824873 (2d Cir. Nov. 17, 2009); *see also* Saul Levmore, *A Theory of Deception and Then of Common Law Categories*, 85 TEX. L. REV. 1359, 1361 (2007) (stating that "deception" can be recognized as an area of law that warrants a valid legal claim).

145. Because common law contract is a matter of state law, contract-based actions vary somewhat state-to-state. Notwithstanding, the underlying theories and premises of this body of law are relatively uniform. This section extrapolates those shared principles to liability for deception in documentary. *See* 32 AM. JUR. 2D *Federal Courts* § 338 (1998).

146. *See* THOMAS A. CROWELL, THE POCKET LAWYER FOR FILMMAKERS: A LEGAL TOOLKIT FOR INDEPENDENT PRODUCERS 368–71 (2nd ed. 2011) (enumerating the elements of a contract); PHILIP MILLER, MEDIA LAW FOR PRODUCERS 27–30 (2d ed. 1993) (same).

147. Alexander Meiklejohn, *Redressing Harm Caused by Misleading Franchise Disclosure: A Role for the Uniform Commercial Code*, 3 ENTREPRENEURIAL BUS. L.J. 435, 471–72 (2009); *see* Michael H. Passman, *Transactions of Virtual Items in Virtual Worlds*, 18 ALB. L.J. SCI. & TECH. 259, 269 (2008).

148. *See* Eitzen, *supra* note 136 (positing that viewers may be angry at having believed a lie).

149. *See id.* at 92–93 (illustrating that the viewing public believes that documentarians should have provided the truth to them).

150. Passman, *supra* note 147.

terms, courts will imply the reasonable expectations of the parties.[151] With regard to documentary deception, it is critical to determine the contractual expectations of the viewer. Therefore, the threshold issue is whether the term "documentary" constitutes a material term of the contract when a movie presents itself as a documentary. If it is, then the next step is to ascertain what the promise of a documentary means.

Filmmakers, critics, and even the Academy of Motion Picture Arts and Sciences differentiate documentaries from narrative films.[152] Moreover, producers and marketers designate works "documentary," thereby demonstrating their belief that the genre is a salient characteristic to audiences.[153] Indeed, it has become increasingly common for a single story or subject to be adapted to both the documentary and fictional genres.[154] Therefore, it is reasonable to believe that audiences also distinguish documentaries from fictional genre.[155] Accordingly, it is apparent that the bargained-for exchange is not simply money for titled-work, but money for a specific type of work: a documentary.[156]

---

151. This does not mean that terms will be added or implied because they are reasonable, but instead that a reasonable term that was obviously part of the bargain can be implied. *See* 17A AM. JUR. 2D *Contracts* § 369 (2004); *see also* MILLER, *supra* note 146, at 32–33 (contrasting express and implied contracts).

152. For example, film festivals, the Academy Awards, and the Television Emmys have categories and awards for documentary and reality works. *E.g.*, ELLIS & MCLANE, *supra* note 17, at 341–43, 345–50 (listing an appendix of film festivals featuring documentary films, and an appendix of Academy Award-winning documentaries).

153. Filmmakers and the film industry commonly employ genre to aid in audience comprehension and interest in a film. *See generally* GRAEME TURNER, FILM AS A SOCIAL PRACTICE 119–124 (4th ed. 2006) (describing the symbiotic relationships between the audience's understanding and recognition of genre, and the genre's impact on these perceptions).

154. For example, the documentary film Ashes to Glory portrays the rebuilding of Marshall University's football program after most of its players, coaches, and prominent boosters were killed in a plane crash.

155. *See Novak v. Warner Bros. Pictures*, *No. 2:07-CV-04000-GAF-PLA*, *1–2 *(9th Cir. Mar. 4, 2010)*. Warner Brothers' subsequently produced a dramatic film *We Are Marshall*, which "is based on the same historical facts as Ashes to Glory." Id. *2. The producers unsuccessfully sued Warner Brothers Pictures for copyright infringement. *See id.* at *1–6.

156. An individual who watches a program or movie on free broadcast television, however, is not engaged in such a contractual bargain or exchange. Consequently, contract and warranty analyses proffered herein would apply only to documentary deceptions involving a payment scenario.

2. Breach of Contract

If a party to a contract does not receive the benefit of the bargain or, conversely, fails to fulfill the contractual promise, the contract is breached.[157] In order to warrant a remedy, however, the failure must constitute a material breach.[158] "Materiality is a measure of importance,"[159] and a contract is materially breached when there is a failure to meet a contractual obligation that is essential to the contract.[160]

Materiality can be conceptualized in two ways. First, materiality can be thought of as a component of the contract that would influence a person's decision-making[161] or an element on which the individual would rely on entering into the contract.[162] Second, when the contract is viewed holistically, a material breach occurs when the breach destroys the expected value of the contract.[163] Consequently, to amount to a material breach, there must be a failure that can be objectively determined, and that failure must substantially impair the value of the goods or the contract itself.[164] Translated to deception in documentary, if "documentary" is a material term of the contract, then a breach of this part of the contractual promise is material. Additionally, if the work, judged in its entirety, fails to meet the standard of a documentary, then it amounts to a material breach. For

---

157. THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 124 (Stephen Michael Sheppard ed., compact ed. 2011).

158. Passman, *supra* note 147, at 276–77.

159. THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 156, at 686.

160. The failure to substantively perform a term of the contract destroys the value of the contract to the non-breaching party. THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 156 (defining breach).

161. *See* BLACK'S LAW DICTIONARY 999 (8th ed. 2004) (defining material term as "a contractual provision dealing with a significant issue such as subject matter, price, payment, quantity, quality, duration, or the work to be done").

162. *See* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 156, at 686–87; *see also* Morrison, *supra* note 139, at 119–22 (defining a material statement, in the context of false statements, as one that "has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body" or has the natural and probable effect of impacting a decision).

163. THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 156, at 125.

164. *See, e.g.*, Waddell v. L.V.R.V. Inc., 125 P.3d 1160, 1163 (Nev. 2006); Allen v. Rouse Toyota Jeep, Inc., 398 S.E.2d 64, 65–66 (N.C. Ct. App. 1990); *see also* CROWELL, *supra* note 146, at 372 ("[M]aterial breach substantially affects the benefit the aggrieved party expected to receive from the contract."). By contrast, an immaterial breach is not likely to affect the purpose of the contract and therefore does not support a remedy. *See* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 156, at 125.

example, if a film, on its face, is clearly not a documentary, but a scripted musical, or if its length is advertised as 120 minutes but it runs only 90, there would be a material breach. By contrast, if the film includes one insignificant non-documentary item or is 89 minutes in length rather than 90, it would be a *de minimis* breach, and thus not material.

B. Analysis of Deception

A documentary work can be deceptive and thus fail to meet the basic contractual obligation of "documentary" in a variety of ways. Importantly, different forms of documentary deception have varying degrees of impact. To determine what constitutes a deception that precludes the work from meeting the definition of documentary, resulting in breach, a number of factors must be considered[165]: the type and/or content of the deception, the amount and proportion of deceptive content, the importance of the deceptive content or deceit to the documentary work, its impact on the work as a whole, its spillover effect on non-deceptive content, and whether it is within the audience's awareness (as adjusted for the type of documentary). A typology of documentary deceptions follows.

1. Fake Content or Subject Matter

The clearest case of documentary deception is fabricated or faked content/subject matter, such as when the subject, person, place, or event that the documentary claims to document does not exist or is fabricated. Because this goes directly to the heart of the work, it is also the most evident example of deception that will amount to a material breach of contract.

As previously explained, a "documentary" must (a) be about or document actual facts, events, or people, and (b) be comprised of materials or evidence, such as found footage, photos, or video that documents those events or people.[166] If the subject matter of the documentary is not a real or actual fact, event, or person, the work cannot satisfy the subject matter prong (a). Furthermore, if the subject is fictional, documentary evidence of it can't exist, thus the work cannot satisfy the materials prong (b). Since fake subject matter and content generally will eviscerate the heart of the documentary, they will amount to a material breach.[167]

---

165. No one factor is determinative in documentary deception. Instead, a number of factors must be weighed, much like analyzing fair use of a copyrighted work. *See* 17 U.S.C. § 107 (2012).

166. *See supra* text accompanying notes 74–76.

167. THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 156, at 125 (defining

Applying this to *Catfish*, determining whether there is a deception depends on the nature of the actual deceit. If Angela deceived Nev and the film is about the discovery of the deception and the fallout that results, then the subject matter and evidence presented to the audience is actual and real: Angela actually masqueraded as Abby, manufactured the profile and was caught, and the footage documents each of these events. The filmmaker's awareness of the fraud or the timing of their realization is irrelevant.

The conclusion is different, however, if Angela was an actress pretending to be a woman-pretending-to-be-Megan, and the filmmakers knew this or orchestrated it. In that case, Angela and the ruse are falsely being presented as a real person (albeit a person involved in a deception) and a real experience. Since the content and subject matter are fictional, but are being masqueraded as a documentary, this falsity would amount to a breach of contract for an audience who reasonably expected to see a documentary.[168]

To be clear, this objective definition of "documentary" does not require sincerity or full disclosure on the part of the creator.[169] Concealing a documentarian's prior knowledge of or involvement in the documented event, such as when a documentarian plays along or feigns interest, is not equivalent to passing off a fake event as a real one. It does not impact the substance of the film, and therefore does not negate the promise to deliver a documentary to the viewer. Similarly, there is no deception if fake content or subject matter is not masquerading as real, or if the audience is aware of the fiction. Hence, a recreation identified as a recreation, a fake documentary labeled as a mockumentary, or an actor assuming a fake identity to interact with real people do not constitute deceptions impacting the contractual obligation since there is no reasonable expectation of documentary.[170] Thus, if such content comprised the majority of the work, the work would not meet the definition of "documentary," because it did not contain any documentary content.

Fake subject matter will prevent a work from meeting the definition of documentary, thereby breaching the terms of the contract. An automatic breach is not guaranteed if the subject matter is real but the film contains fabricated materials, such as restaging or using extracted images as photos. Rather, the nature, quantity, and impact of those materials on the work as a whole as well as on the audience's perception of the work must first be

---

material breach as "breach of an obligation that is essential to the whole contract").

168. *Id.*

169. *See supra* Part IV.

170. *See* Collins, *supra* note 68.

considered. Thus, minor fabrications or falsifications about insignificant matters may not amount to a breach, or if they do, may not amount to a material breach deserving of a remedy.[171]

Another type of misrepresentation involves purposefully and falsely presenting material or documentary evidence as something other than it is.[172] In these instances, raw materials, such as film footage, interviews, or documents are real or actual, but they are not documentary evidence of what they purport to be. Whether such a deception constitutes a material breach is analyzed like other faked or fabricated evidence.

Finally, because it is a means of communication,[173] the documentary genre also functions as a language with a grammatical structure and semiotic properties.[174] Much like the way written and spoken language communicate content and emotion through word choice and sentence structure,[175] documentary films communicate through conventions of filmmaking and an aesthetic of realism.[176] Inasmuch as documentary aesthetics correspond to our notions of reality, they signify that the content presented is actual or authentic.[177] When the audience sees hidden camera

---

171. For example, because the moon landing is an actual, historical event, it meets the subject matter requirement of documentary. But fabricated "found footage" purporting to be from the moon landing is not actual documentary evidence of the event, thus it does not comply with the materials requirement for documentary. Whether inclusion of such footage renders the work non-documentary and materially deceptive requires considering several factors: the amount of footage used, the importance of that piece of documentation, its impact on the work as a whole, and whether it is within the audience's awareness for that subgenre of documentary. Thus, footage revealing an alien in the background may have a different impact than staged B-roll footage of NASA engineers staring at a screen.

172. *See* Juhasz & Lerner, *supra* note 17, at 19–21 (describing incidents where material was presented as documentary footage even though the footage was not what it purported to represent).

173. *See* BIGNELL, *supra* note 4, at 193–95 (noting that documentaries "educate the audience about [familiar and unfamiliar] aspects of life"); Silbey, *supra* note 1, at 114 ("Film, like written or spoken language, is a medium through which messages are relayed.").

174. *See, e.g.*, MITTELL, *supra* note 4, at 176 (stating that television and other moving image media possess communicative and semiotic features); Silbey, *supra* note 1, at 151 (suggesting that a documentary's language can be established through camera manipulation and montage technique).

175. *See* Katherine Morton, Current Work: Models of Emotive Spoken Language, MORTON-THATHAM, www.morton-tatham.co.uk/research/kate_research.html (last visited Nov. 11, 2012).

176. *See* BIGNELL, *supra* note 4, at 186–88 (stating how documentary and reality television rely on aesthetics, technologies, conventions, and semiotic codes to communicate reality); Silbey, *supra* note 1, at 148–49 (explaining that documentary films strive for and reflect an aesthetic of realism).

177. *See* BIGNELL, *supra* note 4 at 193–95; Juhasz & Lerner, *supra* note 17, at 10 (stating

footage or jerky zooms, it not only recognizes it as stylistically "documentary," but also interprets it as reflecting what is real.[178] Indeed, these documentary conventions have become acknowledged tropes of truth telling.[179] While words explicitly attest to truth or reality, a documentary's realism signals to the audience, or at least contributes to its perception that the substance presented is actual in nature.[180] It follows that if a creator can deceive through words, she can also deceive through the "language" of film, to wit: the documentary style.

The use of documentary-style materials, aesthetics, and conventions outside of a documentary is not, in and of itself, deceptive. To the contrary, this aesthetic has become common in media.[181] Rather, in some extreme instances, the purposeful exploitation of documentary styles and conventions could be used to misrepresent manufactured content as actual and mislead the audience into believing that such content is, in fact, documentary in nature.[182] Thus, by passing off content as something other than what it is,[183] such as representing a fake event or person as actual documentary evidence, the aesthetic becomes a tool of deception.

Documentary styles or conventions might be used in conjunction with other deceptions. For instance, *I'm Still Here* included what looked like and were presented as home movies documenting Phoenix's youth and family life.[184] In reality, these were fabricated by the filmmakers.[185] Employing documentary aesthetics in this fashion, along with Affleck's and Phoenix's public assertions that the documentary chronicles Phoenix's retirement from

---

that documentary can be conceptualized as a "technology of truth-telling"), 25–29 (describing the way in which documentary conventions are used to assert and convince audiences of truth).

178. In turn, the audience comes to understand these forms of footage and style to designate reality, and hence, be a documentary. *See* MITTELL, *supra* note 4, at 162. Ironically, in order to create the impression of realism and fact, filmmakers sometimes use unnatural processes. *See* BIGNELL, *supra* note 4, at 195.

179. *See* Juhasz & Lerner, *supra* note 17, 28–31 (detailing films that are evidence of "documentary form and its traditional tropes of truth telling).

180. *See generally* ELLIS & MCLANE, *supra* note 17, at 1–3 (defining the characteristics of a documentary and their likely effect on the audience).

181. *See They Just Want to Party All the Time*, *supra* note 63.

182. *See supra* Part V.B.

183. Juhasz & Lerner, *supra* note 17, at 19–21 (describing how material is presented as documentary footage yet it is not footage of what it purported to represent).

184. I'M STILL HERE, *supra* note 111.

185. Anderson, *supra* note 112; *see also* Corliss, *supra* note 4.

acting,[186] misrepresents the deceptive content as actual evidence documenting actual life events. In turn, this was likely to mislead viewers into believing that the film was a documentary, rather than an actor playing a role in a fictional film. Because this fabricates events and evidence, it is deceptive and fails to uphold the contractual promise of "documentary."

2. Bias and Balance in Portrayal

The only relevant factor in defining a "documentary" is that it be about and contain evidence of an actual event or person; the way in which the subject matter is portrayed is irrelevant.[187] Slant, accuracy, completeness, and balance may impact the documentary's message, but they do not render the matter documented or the evidence used as unreal.[188]

All media, even factual-based media, is a product of the creator's active interventions and, thus, is open to the criticism of being deceptive.[189] "'The documentarist, like any communicator in any medium, makes endless choices,'" with regard to the topics to investigate, people to interview, lenses and angles to use, and footage to omit.[190] In fact, documentarians themselves have "implicitly acknowledged that the 'document' at its heart is open to reassessment, re-appropriation, and even manipulation."[191]

The irrelevance of bias or balance is illustrated by *Hillary: The Movie*, the documentary at issue in *Citizens United v. FEC*.[192] This film was made for the express purpose of derailing Hillary Clinton's presidential aspirations by casting then-candidate Clinton in a negative light, and criticizing her character and fitness for the Presidency.[193] The Supreme Court designated it as "a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President" that

---

186. Anderson, *supra* note 112

187. *See supra* Part IV.

188. *See supra* Parts VI.B.1–2.

189. *See* Corner, *supra* note 61, at 61–62 (stating that because filmmakers make choices, a documentary can be criticized as failing to present the truth); Juhasz & Lerner, *supra* note 17, at 14–15 (stating that a documentary is an act of construction subject to the point of view of its creator).

190. Silbery, *supra* note 1, at 128, 162 (describing how editing styles convey information).

191. Silbey, *supra* note 1, at 127.

192. Citizens United v. FEC, 130 S. Ct. 876 (2010).

193. *Id.* at 890 ("[T]he thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President.").

contained more suggestions and arguments than facts.[194] Notwithstanding the criticism, the Court and both parties acknowledged it was a documentary.[195] Accordingly, a documentary can be criticized for being biased, one-sided, poorly-researched, or even defamatory, but it does not cease to be a documentary.

The portrayal of the subject and resulting message can also be impacted by selective editing.[196] Documentarians make endless choices about whom to interview, what to film, and which evidence to include in a work.[197] A 90-minute film or 12 episode reality television series is constructed from hundreds of hours of footage that have been refashioned into the producer's chosen story arcs.[198] In the constructive process, content is inevitably excluded, comments are taken out of context, and timelines are re-organized.[199] Notwithstanding, the underlying content and resulting episode would remain substantively documentary in nature. In any event, a documentary cannot be obliged to present any particular version of the truth since the First Amendment ensures that a speaker, be it a politician, filmmaker, or reporter, can express her opinion,[200] and, conversely, cannot be forced to express any particular opinion.[201]

---

194. *Id.*

195. Though the parties agreed that the film was a documentary, they disagreed as to whether it constituted an electioneering communication that could be banned. *Id.* at 887–89.

196. *See* Silbey, *supra* note 1, at 150 (noting that documentarians acknowledge that content of films are subject to manipulation through editing), 144–45 (explaining that legendary filmmakers, the Lumière brothers, understood that their presentation of facts influences the conclusions drawn by viewers).

197. *See id.* at 128.

198. *See* ESSANY, *supra* note 33, at 139 (describing how reality television creators cull through footage to craft story arcs).

199. *See generally* Corner, *supra* note 61, at 61–62 (describing how documentaries, particularly observational work, are subject to charges of manipulation because of constructive practices, such as selective editing, that comprise the work).

200. U.S. CONST. amend. I. Because the First Amendment protects against government restrictions of speech, a rule of legal liability arising from the expression of one's opinion, countenanced by statute or court, is seen as government restriction. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 436 (1992) (holding that the city ordinance, which restricted otherwise permitted speech solely on the subject of the speech, was unconstitutional); Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag burning was protected speech under the United States Constitution). Restrictions of this sort focused on the media are particularly problematic. Turner Broad. Sys., Inc. v. FEC, 512 U.S. 622, 640 (1994) ("Laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State' . . . . ") (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987)).

201. *See, e.g.*, Hurley v. Irish Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557,

3. Producer Involvement or Creation of Events

Although the documentary standard requires actual events or persons, it does not require that it emerge organically or be wholly free of a documentarian's influence.[202] Generating an event or instigating the people documented might warrant criticisms of inauthenticity, but neither negates the actuality of the event or people.[203] Therefore, because the film still documents real events, people, and their reactions, it retains its documentary label.[204]

For example, in *Lindsay*, the filmmaker not only documented the underwater salvage operation of the Titanic, but was also an active participant in enabling the event.[205] Lindsay, the director, joined forces with R.M.S. Titanic, Inc. ("RMST") to create the film project, and was responsible for crafting the storyboards, designing lighting technology, and ultimately directing how the footage of the Titanic wreck and salvage operation would be filmed.[206] Thus, but for the filmmaker participating in the operation and creating the technology that enabled the underwater filming of it,[207] the salvage would not have been documented. Ultimately, the project fell apart because the underlying contract between Lindsay and RMST for the project was never executed. [208] As a result, a dispute arose

---

581 (1995) (finding that the city could not force organizers of private Boston St. Patrick's Day Parade to include group in parade); Wooley v. Maynard, 430 U.S. 705, 716–17 (1977) (holding that individuals cannot be forced to display message "live free or die" on license plate); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256–57 (1974) (holding that newspapers cannot be required to include response of or subject's version of events).

202. *See generally* Silbey, *supra* note 1, at 128 (describing the choices a documentarian makes).

203. Indeed both prongs of the content test are met: the event is about a real, actual thing and the component content is documentary evidence of that thing.

204. Moreover, producer intervention has increased and "viewers are aware that the participants often act for the camera." *See generally* Lemi Baruh, *Publicized Intimacies on Reality Television: An Analysis of Voyeuristic Content and Its Contribution to the Appeal of Reality Programming*, 53 J. BROADCASTING & ELECTRONIC MEDIA 190, 192 (2009). As a result, the audience is not deceived.

205. *See* Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic, No. 97 Civ. 9248 (HB), 1999 US. Dist. LEXIS 15837, at *5–6 (S.D.N.Y. Oct. 13, 1999) (explaining that the filmmaker choreographed the salvage operation, directed the crews' actions, and determined what equipment to use, which evidence would be filmed and in what order) .

206. *Id.* at *2.

207. *Id.* at *5–6.

208. *Id.* at *2.

over the ownership and future use of the footage and materials.[209] Despite Lindsay's involvement in the event, because the event, people, and places captured on film were real, both the litigants and the court characterized the character of the footage to be documentary.[210]

This underscores that in determining what is fake and deceptive, there must be a distinction between the documented person being real, and his or her behavior and reactions being "real" and genuine. Reality television shows have been criticized for casting combustible people, encouraging them to misbehave, and then waiting for the inevitable drama.[211] Whereas in the past, the presence of the camera produced a hyper-self-consciousness that caused people to feign naturalism, today it leads people to "perform" for the camera, and as a result, to be seen as misleading.[212]

While reality participants or their reactions might be "fake," they remain actual people, and their words remain actual statements even when they are disingenuous. Moreover, viewers understand this type of performance is insincere, and they factor it into their evaluation of what they see.[213] As one district court recently observed, viewers are quite familiar with the story set-ups and editing of reality television.[214] Consequently, this type of disingenuous portrayal does not impact the documentary nature of the work.[215]

Similarly, people may be deceived about the event or purpose of filming. The individual may think he is meeting a teen for a sexual

---

209. *Id.*

210. *Lindsay*, 1999 U.S. Dist. LEXIS 15837, at *1–2 (describing the film as a documentary and also detailing the involvement of Lindsay, the director, in the film).

211. *See* ESSANY, *supra* note 33, at 135–36.

212. This variation in the subjects' behaviors can be seen in three documentaries, *World in Action, Hotel and Wife Span.* Corner, *supra* note 61, at 67–83. Whereas in *World in Action*, Jose Ramos Horta's behavior is more authentic, the behavior of the participants in *Hotel* and *Wife Swamp* is more entertainment oriented, and thereby, "the level of authenticity" is lower. *Id.; see also* ESSANY, *supra* note 33, at 138 ("Cast members . . . who now see themselves on TV might begin acting differently on camera based on how they perceive themselves to appear.").

213. *See, e.g.*, King v. Fox Entm't Grp., Inc., No. 4:08-CV-688-Y, 2009 U.S. Dist. LEXIS 112680, at *6 (N.D. Tex. May 4, 2009).

214. *Id.*

215. As Roger Ebert noted in defending *Catfish*, "everyone in the film is exactly as the film portrays them," underscoring that even when a person on camera is "faking," it is nevertheless documenting that person in that moment. Roger Ebert, *Catfish*, CHI. SUN-TIMES, (Sept. 22, 2010), rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20100922/REVIEWS /100929991.

encounter, rather than being caught in a sting by *To Catch a Predator*,[216] or is giving Kazakh journalist Borat an etiquette lesson, rather than being filmed for a feature film.[217] Nonetheless, the reactions of these participants are authentic and recordings of them constitute documentary evidence. Consequently, although documentary content may be made possible through deception, it does not render that content or work deceptive. The third party may have a privacy-related claim against the filmmaker or journalist due to the deceptive circumstances of filming,[218] but the audience has no breach of contract claim emanating from the work itself.

VII. LEGAL REMEDIES FOR DECEPTION

A. Breach of Contract as a Possible Remedy

In a breach of contract action resulting from documentary deception of a paid-for work, because the contractual bargain never materialized as promised, the remedy is to return the parties to their pre-contract positions whereby damages are measured by the amount paid.[219] This would require either refunding the viewer his money, or where the viewer had purchased a DVD or other tangible version of the work, requiring the viewer to return it for a refund.[220] If, on the other hand, the documentary was rented, purchased as pay-per-view, or as a ticket to see the purported documentary, there is nothing for the viewer to return since he has already consumed the work. Nonetheless, where a party cannot discover the breach or defect until after accepting an item, the viewer can revoke acceptance.[221]

---

216. *To Catch A Predator* (NBC broadcast television).

217. Cindy Streit, an owner of an etiquette school and one of the plaintiffs in the *Borat* actions, stated that she agreed to give an etiquette lesson and host a dinner party, and be filmed doing so, because she believed Borat was a Belarussian dignitary and that the film would be used for a foreign documentary. *Psenicska*, 2008 WL 4185752, at *2. In exchange, Streit received $4,450 and signed a set of release forms, waivers of liability, and consent agreements (which, incidentally, did not support Streit's claims). *Id.* at *2 n.6.

218. *See* Castro v. NYT Television, 851 A.2d 88, 91 (N.J. Super. Ct. App. Div. 2004) (detailing invasion of privacy and various related claims due to false filming by reality television program).

219. CROWELL, *supra* note 146, at 372.

220. *Id.* at 372.

221. *See* Timothy Davis, *UCC Breach of Warranty and Contract Claims: Clarifying the Distinction*, 61 BAYLOR L. REV. 783, 796 (2009) (stating that where a defect is difficult to discover, a buyer can revoke acceptance for the purchase of a good). Where the viewer would not have known that the work was not a documentary until after she has paid for and watched the work, she can revoke her acceptance, but may have nothing to return.

B. Warranty: "Defective" Documentary

It is possible that, despite meeting the facial definition of a documentary,[222] the documentary may nonetheless be "defective" because it includes non-documentary elements, manufactured content, recreations, actors masquerading as real people, or scripted exchanges.[223] These techniques could render the documentary "defective," and lead to a breach of warranty action because of their significant impact on the documentary as a whole.[224]

A breach of warranty action considers whether the reasonable expectations for an item were met or whether the item provided the expected product value.[225] Breach of warranty stems from tort actions for deceit, but has become integrated into contract law.[226] Although warranty is most commonly discussed in the context of Article 2 of the Uniform Commercial Code ("UCC") involving sales of goods,[227] it can and should be applied by analogy to other contractual transactions not involving the sale of goods.[228]

Warranties can be express or implied.[229] An express warranty arises from a promise of quality, an affirmation of fact or a description about the good that becomes the basis of the bargain.[230] An implied warranty arises

---

222. *See supra* text accompanying notes 74–76.

223. *See supra* Part VI.B.

224. *See* CORRIGAN & WHITE, *supra* note 19, at 271 (noting the significance of documentary); ELLIS & MCLANE, *supra* note 17, at 1–2 (contrasting subject matter of documentary against that of narrative fiction and drama).

225. *See* Davis, *supra* note 220, at 798.

226. Kabir Masson, *Paradox of Presumptions: Seller Warranties and Reliance Waivers in Commercial Contracts*, 109 COLUM. L. REV. 503, 508 (2009).

227. Article 2 of the UCC regulates the sale of goods between merchants. U.C.C. § 2-102, 104 (2010). A merchant is one whose business is to buy and sell goods. THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 156, at 694.

228. *See, e.g.*, Glenn Dick Equip. Co. v. Galey Constr., Inc., 541 P.2d 1184, 1189–90 (Idaho 1975) (stating that extending the UCC to a lease transaction must be determined under the circumstances); *see* also *Meiklejohn*, *supra* note 147, at 438 (advocating for the application of U.C.C. § 2-313 section on express warranties by analogy to the sale of business format franchises); Debra L. Goetz et al., *Special Project, Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1169 (1987) ("Courts use [an analogy] approach to extend Code warranties to nonsale transactions in goods.").

229. LEONARD DUBOFF & CHRISTY O. KING, ART LAW IN A NUTSHELL 74 (4th ed. 2006).

230. § 2-313(2). The description becomes woven into the fabric of the contractual agreement. *See* § 2-313(3).

as a consequence of making the contract, regardless of the warrantor's words or desire.[231] Article 2 of the UCC states that an implied warranty of merchantability promises that the goods are "fit for the ordinary purposes for which such goods are used."[232] When goods fail to meet either the explicit or implied standard, the warranty is breached.[233]

Breach of warranty requires no fault or intent.[234] Unlike breach of contract, however, the test for breach of warranty is wholly objective.[235] Courts only consider whether the item failed to conform to an affirmation of fact or whether it was not merchantable.[236] Thus, the plaintiff must prove only that there was a warranty, the goods failed to conform to that warranty, and that a loss was suffered as a result.[237]

The principles of warranty may be applicable to deception in documentary. Since warranty is an assurance of quality, it is particularly apt to analyzing a work that is fundamentally "real," but includes non-documentary or fictional elements. When a movie or television program is labeled a "documentary," such as in an ad or on a DVD cover, it is a description of the work, tantamount to warranting that the work and/or its content is documentary or will conform to what the average person expects of a documentary.[238] If the work fails this expectation due to a defect in content or composition, there is a breach of either the express warranty of documentary or the implied warranty of merchantability that the work functions as a documentary.[239]

---

231. 17A AM. JUR. 2D *Contracts* § 401 (2011).

232. § 2-314(2).

233. *See* Davis, *supra* note 220, at 786–88.

234. DUBOFF & KING, *supra* note 228, at 72–73.

235. *See* Christie's Inc. v. SWCA, Inc., 867 N.Y.S.2d 650, 657 (Sup. Ct. 2008) (holding that the proper standard for breach of warranty is whether the representations furnished by the seller with respect to the goods can be said to have had a reasonable basis in fact at the time the representations were made); Davis, *supra* note 220, at 796–98 (stating that the test for breach of contract is both objective and subjective).

236. *See, e.g.*, Waddell v. L.V.R.V. Inc., 125 P.3d 1160, 1163 (Nev. 2006); Allen v. Rouse Toyota Jeep, Inc., 398 S.E.2d 64, 65–66 (N.C. Ct. App. 1990); *see also* Davis, *supra* note 220, at 796–97.

237. DUBOFF & KING, *supra* note 228, at 73.

238. *See* ELLIS & MCLANE, *supra* note 17, at 1–3.

239. In contrast, a breach of contract claim requires that the work facially fail to meet the definition of documentary. *See* Leggett & Platt, Inc. v. Yankee Candle Co., No. 4:06-CV-366-Y, 2008 WL 723582, at *5 (N.D. Tex. Mar. 18, 2008) (discussing the difference in requirements between a breach of contract and breach of warranty claim).

Any number of things can cause or contribute to a defect: the inclusion of fabricated or illegitimate materials, the proportion of "fake" material to "real" material, the absence of actual documentary evidence, significant misrepresentation through editing, recreations substituted for facts, or employing actors.[240] Though a single or insignificant deviation or inclusion of a fictional element might not render the whole work defective, it is not necessary for the defect to fundamentally alter the essential nature of the supposedly documentary work into fiction or non-documentary for a breach of warranty, as would be required in a breach of contract claim.[241]

C. Remedy for Breach of Warranty

Though breach of warranty, like breach of contract, arises from the failure to meet contractual expectations, it is a distinct cause of action.[242] In a breach of contract, the remedy is to return the parties to their pre-contract positions and return the purchaser's money.[243] In a breach of warranty, the purchaser-plaintiff received a defective item that fails to meet the standard or quality promised, so it is not as valuable as the purchaser believed it would be.[244] Therefore, damages for breach of warranty are measured by the difference between the value of the item as warranted, typically established by the price, and the actual value of the defective item.[245]

Applying this theory to documentary deception, the viewer would be entitled to the difference between the warranted documentary film and the defective or non-documentary film delivered.[246] Thus, if the viewer paid $10 for a documentary film, but due to the defect, the true documentary value of the film was only $6, the viewer could recover $4 in damages. Admittedly, valuing a defective documentary work or assigning a monetary value to a "defect" is not as simple as calculating value where the cost of

---

240. *See supra* Part IV.B.

241. *See generally* Passman, *supra* note 147, 276–77 (discussing the elements of a material breach of contract). For example, a brand new tricycle with a broken wheel is still a tricycle, but the broken wheel renders the tricycle defective and breaches the warranty of merchantability.

242. Davis, *supra* note 220, at 800.

243. CROWELL, supra note 146, at 372.

244. *See* Davis, *supra* note 220, at 786–88.

245. *See* Bishop Logging Co. v. John Deere Indus. Equip. Co., 455 S.E.2d 183, 193 (S.C. Ct. App. 1995) ("The formula for calculating direct damages is the value of the goods as warranted less the value of the goods as accepted."); DUBOFF & KING, *supra* note 228, at 73.

246. As with a breach of contract claim, a viewer's recovery via breach of warranty is premised on payment. If there is no payment, the viewer has no economic loss.

repair or the price of a lesser version of the item is known. Difficulty in calculation, however, is not a defense to breach of warranty.[247]

These viewers may be analogized to fine art forgery cases, as a purchaser of counterfeit artwork may sue for breach of warranty.[248] The value of artwork is determined not only by the work's authenticity, but also by its aesthetic appeal.[249] Because the visual content of the original and the forgery are almost identical, it is reasonable that the art purchaser would have gained some aesthetic enjoyment during the time the purchaser thought the artwork was real.[250] As a result, the extent of damage is questionable.[251] As applied to a defective documentary, moviegoers who see a defective or fake documentary may extract at least some film-viewing value, at least until they discover that the work is deceptive.[252]

Therefore, in practice, a viewer pursuing a breach of warranty claim would recover only a portion of the price paid. Since it is unlikely that viewers would independently litigate a $3 or $4 claim, a creator or producer may not consider a breach of warranty claim to be a significant threat. If, however, these individual claims were combined into a class action lawsuit, as was done with readers of *A Million Little Pieces*,[253] it

---

247. *See* Park West Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1295 (App. Ct. 1979) (holding that merely because damages for breach are not susceptible to precise determination does not insulate defendant from liability).

248. *E.g.*, *Christie's Inc.*, 867 N.Y.S.2d 656–57; *see also* DUBOFF & KING, *supra* note 228, at 73–74 (discussing breach of warranty lawsuits by art purchasers); Brian D. Tobin, *The Virtues of Common Law Theories and Disclosure Requirements in the Market for Fine Art*, 21 SETON HALL J. SPORTS & ENT. L. 333, 336–37, 342 (2011) (discussing the history of breach of warranty claim for art fraud).

249. *See* DUBOFF & KING, *supra* note 228, at 58; Tobin, *supra* note 247, at 344–45.

250. *See* Tobin, *supra* note 247, at 363–64; Balog v. Center Art Gallery-Hawaii, Inc., 745 F. Supp. 1556, 1563 n.16 (D. Haw. 1990) (stating that because "the ordinary purpose to which an artwork is put to be displayed is for its aesthetic appeal," even a counterfeit will have value approaching that of the original).

251. *See generally* Balog, 745 F. Supp. at 1563 n.16 ("The ordinary purpose to which artwork is put is to be displayed for its aesthetic appeal. And with respect to this ordinary use, a counterfeit will have satisfied that purpose equally with an original. For this reason . . . the implied warranty of merchantability would not be applicable . . . .).

252. These situations are not, however, identical. A "fake" artwork claim, i.e., art forgery, focuses largely on who created the work, whereas a "fake" documentary claim, i.e., non-documentary or defective documentary, focuses on the content comprising the work.

253. Although in the *A Million Little Pieces* litigation, Random House returned the purchase price of the book to readers willing to state that they had been misled, this specific settlement of $2.3 million does not serve as precedent requiring that the purchase price be refunded. Instead, it was a mechanism to dispose of claims early in the litigation, and was also part of Random House's damage control strategy, so it was quite liberal. *See* Katze, *supra* note

could lead to significant financial liability,[254] not to mention a great deal of negative publicity.

VIII. CONCLUSION

Despite what some film scholars or documentarians may suggest, a documentary does not promise truth, let alone attest to the objectivity of its content or the honesty of the people documented.[255] Indeed, to impose such requirements on documentaries would both artificially and unnecessarily restrict the opinions of creators and prevent the form from being used to its full potential. Nonetheless, while "documentary" does not promise truth, when the term is used in the context of a contract, it *does* promise that the work is comprised of documentary evidence chronicling actual facts, events, processes, or people.[256] A work that falls short of this standard or substantially deviates from it may amount to breach of contract or warranty.

The mere fact that a purported documentary work is deceptive in some respect does not produce legal liability. Rather, the deception must either preclude the work from meeting the objective definition of "documentary," which breaches the contractual promise to provide a documentary, or render the work "defective," which breaches the warranty of being a documentary.[257] Judged by this standard, deceptions such as producer-controlled events, "fake" participants, and unfair or biased portrayals, do not amount to objective deception and breach.

Where a deception transpires, however, it is important for creators or producers to understand that they cannot avoid contractual or warranty liability[258] by claiming that they were unaware of the fraud or did not intend to deceive the audience. Although lack of fault may protect the creator or producer from claims of tortious misrepresentation[259] or criminal

---

12, at 207 n.2.

254. Indeed, "there are numerous state statutory vehicles that permit actions against parties that engage in commercial fraud or misrepresentation." Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1218 (2005) (arguing that individual claims aggregated as a class action might have some chance of success).

255. *See* Corner, *supra* note 61, at 61.

256. *See* ELLIS & MCLANE, *supra* note 17, at 3–4.

257. *See infra* Part VII.

258. This, of course, presumes that all hurdles such as privity, agency, standing, and the status of third party beneficiaries are cleared.

259. The tort of common law misrepresentation requires that the misrepresentation be

fraud,[260] as these require intent to deceive, it has no bearing on whether the terms of a contract or warranty were met.[261]

To some degree, the potential liability for a deceptive documentary is relatively limited. Only viewers who expended funds will be entitled to economic recovery for breach of contract, and even then, damages would be limited to a refund of the money spent. Liability for breach of warranty is likely to be less costly for defendants because the "defective" documentary work will often have some, albeit minimal, value. This value will reduce damages accordingly. If, however, thousands of claims are consolidated, financial liability increases exponentially. Moreover, even if audience complaints about a deceptive documentary do not materialize into a multi-million dollar class-action settlement, the cost to a documentarian's reputation will likely be significant and enduring.

---

intentional. ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 203 (2004); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984) (stating that allegations of tortious fraud against print media require that the media know the statement is false and that the reader rely on it).

260. Under criminal fraud statutes, a false statement alone will not subject the speaker to liability. Rather, the speaker must also know that the statement was false and intend to mislead. *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003). The federal perjury statute applies only where a witness "give[s] false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." United States v. Dunnigan, 507 U.S. 87, 94 (1993) (citing 18 U.S.C. § 1621). This past term, the Supreme Court held that liability for criminal fraud requires more than proof of lying, but also requires some intent to deceive and tangible harm or consequence. United States v. Alvarez, 132 S. Ct. 2537 (2012).

261. Breach of contract and breach of warranty do not require intent to deceive. *See* DUBOFF & KING, *supra* note 228, at 72–73.