The Fifth Element: The Unspoken Element in the Fair Use Four-Part Test

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Without question the most powerful exception to the copyright regime is the doctrine of fair use. When correctly applied, the doctrine allows new creators to use, copy, and even exploit for profit discrete portions of copyrighted material without having to pay even a single dollar in licensing fees to the owner.\footnote{B. Douglas Robbins is a partner at the O’Leary Wood & Robbins Media Law Group in San Francisco, California, a litigation boutique specializing in representing clients who buy, sell, lease, create, or manage media. Mr. Robbins holds a J.D. from the University of Pennsylvania Law School, and an A.B. from the University of California, Berkeley.} Since the Supreme Court has upheld the constitutionality of the latest, in a series, of extensions to the copyright term,\footnote{The doctrine of fair use, is codified by the Copyright Act of 1976, as follows: “[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107. “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts. . . .’” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting U.S. Const. art. I, § 8, cl. 8). The fair use doctrine “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” Id. at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990) (brackets omitted)).} the most bloody battles between the owners of media, and the artists who seek to mutate and mutilate that media, are over the scope and the nature of fair use.

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\footnote{2 The Court held the controversial Sonny Bono Copyright Term Extension Act of 1998 constitutional, despite the fact that Congress extended the copyright term to an unprecedented length: the life of the author plus 70 years and 95-120 years in the case of corporate-created work. See Eldred v. Ashcroft, 537 U.S. 186, 188 (2003). How this impossibly-long copyright term incentivized more creativity, more work, and/or more discovery from authors and researchers in the arts and sciences, was never explained either by the Court, who declined to examine that issue, nor Congress passing the act in the first place. Instead Congress chose to focus on the benefits such a long term would inure to the copyright creator’s children and grandchildren. But Congress never did take up the entirely empirical question of how it could be that Walt Disney bothered to create Mickey Mouse, despite the fact that at the time of his creation, Mickey would provided no likely benefit to Disney’s children or grandchildren after Disney passed away. See Copyright Act of 1909 (providing that in 1928 copyright ran for a maximum of 54 years, putting Mickey in the public domain in 1982).}
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I. INTRODUCTION

For artists seeking to use copyrighted media in their installations without having to purchase a license, fair use seeks satisfaction of a fluid four-part test. A finding of fair use is more likely in those cases in which: (1) the artist’s use transforms the copyrighted material into something new and does so for non-commercial ends; (2) the “nature of the copyrighted work” is factual, not fictional; (3) the amount of the work used is less rather than more, and the heart of the copyrighted work is not used; and (4) the artist’s use did not damage the “potential market for or value of the copyrighted work.” Nowhere in this four-prong test is there any mention of whether the copyrighted material used is unique or a member of a category of work in limited supply. Yet numerous courts have pondered this unspoken “Fifth Element,”—the question of limited availability or uniqueness—when evaluating fair use claims. We’ll examine the Fifth Element and the deeper analytical and policy reasons for its emergence, despite any explicit endorsement from Congress.

II. UNIQUENESS AS THE FIFTH ELEMENT

A. The Unique Kennedy Assassination Film

On November 22, 1963 Abraham Zapruder, a Dallas dress manufacturer and amateur photographer, by “sheer happenstance,” filmed the assassination of President Kennedy on an eight-millimeter color movie camera. No other photographer had captured the events of the assassination. The images on the film were absolutely unique. Life Magazine paid $150,000 (equivalent to over a million dollars today) to purchase thirty frames of the movie from Zapruder and publish them.

Color Film, Zapruder Film, Copyright © 1963, by Abraham Zapruder.

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3 17 U.S.C. § 107; see also Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006) (“The heart of the fair use inquiry is into the first specified statutory factor identified as “the purpose and character of the use.””).

Four years later, a professor of philosophy from Haverford College, hired by *Life* to write an article about the assassination, gained access to the *Life* archives and, without authorization, took 35 mm photos of the crucial Zapruder frames. Later, when the Professor left *Life*, he sought permission to use those images in his own book. *Life* declined to license the photos, but the Professor used some of the images anyway in his book *Six Seconds in Dallas*, which is “a serious, thoughtful and impressive analysis of the evidence” surrounding the Kennedy assassination. *Life* sued, through its parent company, then-known as Time Inc., and the Professor argued fair use.

In conducting its fair use analysis the Court first noted that “The doctrine is entirely equitable and is so flexible as virtually to defy definition.” And while it frowned upon the Professor having purloined the images from *Life*, the Court did ultimately find fair use, in part due to the uniqueness of the Zapruder film. It reasoned that “there is a public interest in having the fullest information available on the murder of President Kennedy,” and that even sketch copies of the Zapruder frames were not a satisfactory substitute for the originals. Over time, this rationale would serve as the prototype for a number of courts examining the uniqueness element: that fair use is a doctrine of equity, and that our cultural history demands third-party commentators be able to use the original source material, without a license, especially in cases in which no other substitute will do.

**B. The Unique “Rumble in the Jungle” Footage**

This is exactly what a federal court held nearly thirty years later in a case involving the use of video footage from a George Foreman/Muhammad Ali boxing match.

In the mid-1970s, tin-pot dictator Mobutu Sésé Seko paid Don King the handsome sum of $10 million to bring a high profile boxing event between Foreman and Ali to Zaire. Twenty years later, Monster Communications Inc. produced a documentary about the famous “rumble in the jungle” called *When We Were Kings*. The documentary would go on to win the Academy Award for Best Documentary Feature but before that, Ted Turner sought to use some of Monster’s “rumble” footage in his own documentary called *Ali: The Whole Story*. Monster sued the Turner Broadcasting System for copyright infringement arguing only they, the owners, should be able to use the rare fight footage. But Turner argued fair use. And Turner won.

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5 *Id.* at 131-32; see also *Lennon v. Premise Media Corp.*, 556 F. Supp.2d 310, 322 (S.D.N.Y. 2008) (“There is a strong presumption that [the transformation] factor favors a finding of fair use where the allegedly infringing work can be characterized as involving one of the purposes enumerated in 17 U.S.C. § 107: criticism, comment, news reporting, teaching scholarship, or research.” (internal quotation marks and ellipsis omitted)) (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004)).

6 *Id.* at 144.

7 *Id.* at 146.

In examining the four elements of fair use, the court also looked at the Fifth Element, uniqueness, employing reasoning strikingly similar to the Zapruder court’s: “only a finite number of photographers capture images of a given historical event. Hence . . . the degree of protection that properly may be afforded to them must take into account that too narrow a view of the fair use defense could materially undermine the ability of other Ali biographers to tell, in motion picture or perhaps still photographic form, an important part of his story.” The Monster Communications court grounded its uniqueness analysis just like the Zapruder court, by noting “There is a public interest in receiving information concerning the world in which we live.” The Court seemed mindful of the fact that allowing a private party to lock away our collective cultural history defeats the proper goals of the copyright regime, which is to nourish artistic and scientific endeavors, not stifle them.

C. The Non-Unique Reginald Denny Video

Conversely, when a copyright holder can successfully argue that the work used is not unique and alternative reference sources were available, then they will more likely be able to defeat a claim of fair use. That is exactly what happened in Los Angeles News Service, a case involving the videotape of the infamous Reginald Denny beating occurring in the midst of the 1992, South Central riots. Los Angeles News Service shot the footage from a helicopter and then sold it to various television outlets for a fee. When KCAL-TV Channel 9 was unable to

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9 Id. at 494.
10 Id. at 494.
11 See Fogerty v. Fantasy, Inc., 510 U.S. 517, 524 (1994) (finding that the copyright law’s “primary objective” is “to encourage the production of original literary, artistic, and musical expression for the good of the public.”). Even the copyright holder’s limited monopoly is designed to benefit society as a whole. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (explaining that “establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas”); Mazer v. Stein, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”); Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 843 (Fed. Cir. 1992); see generally Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1108-09 (1990).

The Constitution itself describes the basic Clause objective as one of “promot[ing] the Progress of Science and the Useful Arts,” i.e., knowledge, learning, creativity, and discovery. U.S. Const. Art. I § 8, cl. 8. The Clause exists not to “provide a special private benefit,” Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984), but “to stimulate artistic creativity for the general public good,” Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). It does so by “motivat[ing] the creative activity of authors” through “the provision of a special reward.” Sony Corp. of Am., 464 U.S. at 429. “The ‘reward’ is a means, not an end.” Eldred v. Ashcroft, 537 U.S. 186, 245 (2003) (Breyer, dissenting). The copyright term is limited so that its beneficiaries, the public, “will not be permanently deprived of the fruits of an artist’s labors.” Stewart v. Abend, 495 U.S. 207, 228 (1990).
license the clip from the L.A. News Service, the station ran the footage anyway. L.A. News Service sued. KCAL defended by arguing fair use and the trial court agreed, holding, in the vein of the Zapruder and Ali courts that “the Denny Videotape is a unique and newsworthy videotape of significant public interest and concern.”

Alas, KCAL’s victory was short-lived. The 9th Circuit reversed the trial court finding it significant that the L.A. News Service footage was not unique because there were other photographic images of the same beating available that KCAL could have used as a substitute: “Although KCAL explains that it used the tape because it recorded news of considerable significance from the best perspective of any witness, there is no evidence that alternatives were not available (albeit from a less desirable vantage point).” Not unique. Not fair use.

D. The Fifth Element as a Proxy for Equitable Use

The reason why the Fifth Element is so important to the fair use inquiry is not because there is something about uniqueness for uniqueness sake that militates against the scope and power of copyright. Rather, the Fifth Element helps the courts to answer a more fundamental question of equity, one that lies at the heart of fair use: Why is it so vital for this material, and only this material, to be used here? If the party claiming fair use cannot offer a legitimate answer to this question, then it will begin to appear that the material in question was used for a whole host of improper reasons, such as: (1) the user was too dull to invent her own original expression; (2) the user was too lazy to bother to engage in the “drudgery” of “working up something fresh”; (3) the user wanted to piggyback on the popularity or “entertainment value”

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12 The case does not say why KCAL was denied permission to purchase the footage from the L.A. News Service.
13 Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119, 1120 (9th Cir. 1997) (emphasis added).
15 Id. at 1123. In summary the court held:
   In sum, KCAL’s use of LANS’s copyrighted tape was arguably in the public interest because it was a percipient recording of a newsworthy event. However, KCAL’s use was commercial and came in the wake of LANS’s refusal of a license. Although KCAL explains that it used the tape because it recorded news of considerable significance from the best perspective of any witness, there is no evidence that alternatives were not available (albeit from a less desirable vantage point). Also, while the tape had been licensed and published before KCAL’s use, it is not obvious that there was no impact on the market for first publication rights as KCAL itself requested a license. There is no dispute that KCAL used the heart of the tape. Under these circumstances, we cannot say that fair use is the only reasonable conclusion a trier of fact could reach in this case.
Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119, 1123 (9th Cir. 1997).
16 Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997) (“If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish) . . . .”).
of the material;\textsuperscript{17} (4) the user sought to make easy money with minimal investment of time, energy, or capital by appropriating another’s work with a built-in and proven revenue stream.\textsuperscript{18} For reasons that should be obvious, none of these sad-excuses advance the public interest\textsuperscript{19} of enriching the culture through new creative or artistic expression; and so as a matter of equity, none will ground a fair use defense.

But in those cases in which the appropriator has not failed, outright, to meet some or most of the other four elements, arguing that the material is unique or in limited supply can significantly bolster the user’s fair use position. And although there is no “Fifth Element” per se in the fair use statutory scheme, answering the question of why the user had to use this material, is part of fair use’s larger “rule of reason”\textsuperscript{20} which seeks equity on a “case by case”\textsuperscript{21} basis. To the extent the Fifth Element can help the court answer this question, it becomes a key consideration in many fair use inquiries.

There are at least three categories of materials that will typically support a Fifth Element argument. From strongest to weakest, they are: (1) unique or limited recordings of factual events, (2) unique or limited artwork used in a non-fictional medium, and (3) unique or limited artwork used in a fictional medium.

1. **Factual Events in Factual Medium**

The strongest Fifth Element argument pertains to use of material recording a factual event. We have already seen examples of this in the Zapruder and Ali cases where the courts held that the public interest demands that these unique journalistic events be available for use by the rest of us, for comment, critique, and subsequent historical re-examination.

In these kinds of cases, the defendant can persuasively argue that these original resources, and only these original sources, had to be copied and used because (1) there was no other reference materials in existence, (2) we cannot go back in time to re-record the event ourselves, and (3) fictional re-enactments of the factual event are not equivalent substitutes because they lack the mood, look, feel, and other intangible qualities that inure to the authentic historical event.

This last argument is especially salient (and only available in the context of the use of factual material). On the one hand, it is not impossible to simply recreate history through a

\begin{itemize}
  \item \textsuperscript{17} *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003) (finding no fair use because, “[t]he purpose of showing these clips likely goes beyond merely making a reference for a biography, but instead serves the same intrinsic entertainment value that is protected by Plaintiffs’ copyrights”).
  \item \textsuperscript{18} *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986) (finding no fair use because “the primary purpose behind defendant’s parody is not an effort to make a social comment but is an attempt to make money”).
  \item \textsuperscript{19} “[C]ourts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest. The greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair.” *Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006).
  \item \textsuperscript{20} *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984).
  \item \textsuperscript{21} *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (holding each case of infringement and fair use should be examined on a “case by case” basis, emphasizing and enlarging one of the four fair use factors in one case and deemphasizing and limiting the same factor in a different case “in light of the purposes of copyright”).
\end{itemize}
series of fictional reenactments, some cheesier than others. And certain documentarians have
taken this route, sometimes for creative reasons, sometimes for reasons having to do with
avoiding copyright infringement, defamation liability, or violating third-parties’ privacy rights,
and sometimes because there was just no other option. But were the courts to force journalists
and artists, as a matter of course, to engineer reenactments in lieu of using original media, we
would undoubtedly lose an exceedingly rich connection to our past. The source material, in its
own way, physically touched the event: recording the actual light as it reflected from the action,
perceiving and reproducing on media the sound waves as they rippled over the microphone
diaphragm. The primary material conveys to the rest of us what it was like to see and hear these
events with a level of detail and credibility that is only possible from the vantage point of
actually being there. The source material provides us with a level of confidence as to “what
actually happened” for which no substitute can be had.

22 Errol Morris, for example may have single-handedly legitimized the historical reenactment in his seminal
1988 work, The Thin Blue Line. Morris explains why re-enactments can be crucial tools for telling historical stories:

Critics don’t like re-enactments in documentary films – perhaps because they think that
documentary images should come from the present, that the director should be hands-off. But a
story in the past has to be re-enacted. Here’s my method. I reconstr uct the past through
interviews (retrospective accounts), documents and other scraps of evidence. I tell a story about
how the police and the newspapers got it wrong. I try to explain (1) what I believe is the real
story and (2) why they got it wrong. I take the pieces of the false narrative, rearrange them,
emphasize new details, and construct a new narrative.

Errol Morris, Play It Again, Sam (Re-enactments, Part One), THE NEW YORK TIMES, Apr. 3, 2008, at ___.

23 In the 2006 documentary, This Film Is Not Yet Rated, director Kirby Dick exposes the Motion Picture
Association of America (“MPAA”) rating system—the system that assigns movies their G, PG, PG-13, R, or NC-17
ratings—as hopelessly arcane, hypocritical, and politically biased. See THIS FILM IS NOT YET RATED (IFC Films
2006). Leadership and attorneys from the MPAA declined to give permission to be recorded or photographed. As a
compromise, Kirby employed voice actors and cartoon characters reenacting the Kafka-like interactions he had with
the MPAA.

24 In the 2004 documentary film, Chicago 10, for example, the filmmaker, Brett Morgen, reenacts court
proceedings that had occurred in 1968, using stylized computer generated cartoons and professional voice-actors.
See CHICAGO 10 (Consolidated Documentaries 2004). This was the process:

Director Brett Morgen takes archival film of the protests outside the 1968 Chicago
convention, combines it with actors reading from court transcripts of the Chicago Seven trial —
there were no cameras in that courtroom — and animates the action through a technique called
motion-capture. It’s the same process used in films like The Polar Express and Beowulf, where
actors are filmed and then have their images digitally painted into virtual environments, so that
they seem like characters in a video game.

Bob Mondello, ‘Chicago 10’ Re-Animates a Protest Story, NPR, Feb. 29, 2008, also available at
Imagine for example if the Rodney King beating tape never existed, and instead we had to rely upon audio/visual reenactments of these events based upon witness descriptions. In no serious way would these reenactments be treated with the same level of credibility as the original. Absent actual original media, large swaths of the public would doubt the beating ever occurred, or occurred with the surreal brutality that it did—even with original media, a small population still has its doubts.

This is true of a whole series of historical events that seem positively incredible to those who were not there except for the fact that we have original media to help tell the story: the magnitude of Katrina at New Orleans captured on videotape; the paranoid viciousness of Nixon as reflected in the White House audio recordings; the systematic evil of the Nazi holocaust as recorded in black and white.

Even in cases where the material is not, strictly speaking, unique, a strong Fifth Element argument can still be used if the material belongs to a category of material in limited supply. The best and most ubiquitous example of this is the use of older historical materials frequently seen in documentary film to illustrate the look and feel of an era. Think of those goofy and condescending educational films from the 50s. Mom’s in an apron serving dinner. Dad is lecturing Bobby to wash his hands. Little Sally says “I know I’m supposed to wash my hands, and I’m only a stupid girl.” These films are fantastic, less so for their message of hygiene as for their historical capture of the 1950s social order: Father rules as patriarch, a consequence of his status in the capitalist strata. He wields a brief case as if it were a scepter. Mother is servile and obedient, deriving her worth from her ability to please Father’s various appetites. Bobby and Sally are mere “Fathers” and “Mothers” in the making, but for now operate simply as docile servants than full human beings. These amazing little vignettes into American life often show up in documentary film to highlight our values and illustrate, in many cases, how far we have not come.

In using these historical clips the Fifth Element can be invoked because only a limited supply of these materials exist, and whether these films are fictional, as in the case of most advertisements, or factual, in the case of news clips, their force and power all operate in the same way: as historical artifacts created by and featuring people of that time. In answering the question, but why did you have to use this clip here, the documentarian can honestly answer,

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25 Michael Moore is perhaps among the best known of those using these sort of films, shorts, and ads to critique American values. Examples are seen in his Roger and Me, and the Academy-Award-winning Bowling for Columbine. Roger and Me (Warner Bros. 1989); Bowling for Columbine (United Artists 2002).
well, only a very limited supply exists of any of these sorts of clips and this is the only one we found that fit our purposes.\footnote{26}

Moreover, were a modern documentarian to simply re-enact one of these historical clips the results would invariably be artificial, and phony. Worse, faithful re-enactments fail to escape the protections of copyright which prohibits the creation of “derivative” works without permission.\footnote{27} As a consequence, the modern documentarian’s reenactment would have to feature brand-new characters, and a brand-new script, defeating the entire purpose of trying to replicate original historical media with any sort of accuracy.

2. Fiction Used in Factual Medium

A Fifth Element argument of intermediate strength can be employed in those cases in which unique or limited fictional copyrighted material, i.e., material from a fictional movie, a piece of artwork, an article of music, etc., is employed in a new work of non-fiction.\footnote{28}

Still, there are plenty of examples of subsequent users successfully invoking fair use in the replication of entirely fictional work. A federal court in New York, for example, recently took up this question. Ben Stein’s pro-religion documentary, Expelled, runs 15 seconds of John Lennon’s famous song, “Imagine,” where Lennon sings, “Nothing to kill or die for, and no religion too.”\footnote{29} The documentary used the song as a reference point to critique an entire post-modernist “secular utopian vision” which the filmmakers believed was likely to eventually take some sort of evil political form.\footnote{30} Yoko Ono and other interested parties sued claiming copyright infringement. The producers of Expelled argued fair use—and won.

“Imagine” is a song, and like nearly all songs, is unique. Making a Fifth Element argument, the Court noted that “it was important that [the documentarians] use ‘Imagine,’ rather than some other song expressing similar views, because it is the paradigm example that has the most cultural force to it because it represents the most popular and persuasive embodiment of the viewpoint that the world is better off without religion” and for that reason this particular song’s “emotional impact . . . on listeners” was unique.\footnote{31}

In another case, a book publisher reduced Grateful Dead concert posters to thumbnails and placed them in a timeline in a coffee-table book chronicling the history of the band, called, Grateful Dead: The Illustrated Trip. In this context, the unique artwork was found to be fair use

\footnote{26} In the unlikely event multiple historical clips were similar enough to have worked, the documentarian can argue she is stuck in a double-bind. On the one hand the documentarian had to use one clip or the other. On the other hand, no matter which clip was used, the copyright holder could always ask the question \textit{well, why couldn’t you have used the other clip?}

\footnote{27} Only the copyright holder has the right “to prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2).

\footnote{28} The fair use claim for use of fictional works is always weaker than a claim for non-fictional works as dictated by the second fair use element, “nature” of the work. \textit{See} Campbell, 510 U.S. at 586 (“[C]reative expression for public dissemination falls within the core of the copyright’s protective purposes.”); \textit{Bill Graham Archives v. Dorling Kindersley Ltd.}, 448 F.3d 605, 612 (2d Cir. 2006).


\footnote{30} \textit{Id.} at 323.

\footnote{31} \textit{Id.} at 324.
because the small posters “serve[d] as historical artifacts graphically representing the fact of significant Grateful Dead concert events.”\textsuperscript{32} In other words the use satisfied the Fifth Element by answering the question of \textit{why did this material have to be used in this instance} thus: because the concert posters were unique historical artifacts that helped to tell the nonfiction story of one of America’s most important rock bands.

3. Fiction in Fiction

The category traditionally afforded the least amount of fair use leeway involves the use of fictional artistic media, unique or otherwise, in other fictional artistic media. Although there are exceptions, more often than not, fair use will not win the day here. Two cases involving the famous artist Jeff Koons are instructive. In one case Koons lost. In another, he won.

\begin{center}
\includegraphics[width=0.4\textwidth]{puppies.jpg}
\includegraphics[width=0.4\textwidth]{string_of_puppies.jpg}
\end{center}

\textit{Photograph, Puppies, Copyright © 1980 by Art Rogers.}

\textit{Wood painted sculpture, String of Puppies, Copyright © 1998 by Jeff Koons.}

In \textit{Rogers,} Koons copied Art Rogers’s photograph of eight German Shepherd puppies to create a sculpture called \textit{String of Puppies.}\textsuperscript{33} Koons argued fair use and lost. The court was unpersuaded that one artist should be able to take copyrighted material “in toto” from another artist, taking “much more than would have been necessary” to make a satirical point.\textsuperscript{34} Unlike the cases involving historical or journalistic events, Koons could not argue that his use was necessitated by the public’s need to know. Additionally, for reasons only known to Koons and his lawyers, Koons did not argue the Fifth Element suggesting there was something unique about Rogers’s puppies that justified its copying. One can make arguments one way or the other, but we never will know what the court would have thought of the idea that, as a factual matter, the puppies were somehow unique. The court never took up the issue.

Fourteen years later, Koons found himself embroiled in another copyright action. Battle-hardened, this time Koons seemed ready for the fight. In \textit{Blanch,} Koons appropriated a photograph of a pair of women’s donning Gucci sandals from \textit{Allure Magazine,} for his 10 foot by 14 foot photorealistic painting: \textit{Niagara.}\textsuperscript{35} \textit{Niagara} displays the dangling legs and feet of

\textsuperscript{32} \textit{Bill Graham Archives v. Dorling Kindersley Ltd.,} 448 F.3d 605, 610 (2d Cir. 2006).

\textsuperscript{33} \textit{Rogers v. Koons,} 960 F.2d 301, 305 (2d Cir. 1992).

\textsuperscript{34} \textit{Id.} at 311.

\textsuperscript{35} \textit{Blanch v. Koons,} 467 F.3d 244, 247 (2d Cir. 2006).
women, some in expensive Italian sandals, over a landscape of sweets and pastries in order to, in Koons’s words, “comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images.”

The Allure photographer, Andrea Blanch, sued Koons for copyright infringement and Koons defended, arguing fair use. But this time, Koons won.

Koons appears to have prevailed for multiple reasons. In large part Koons won this round because he was able to prove that Niagara transformed the Allure photo from shoe porn, into a meditation of consumerist society. Koons turned the Allure photo on its head, from an object that eroticized material goods into a critique of the culture of consumption. But also of significant importance to the court was the Fifth Element.

The court appeared to find Koons’s own justification persuasive: “Although the legs in the Allure Magazine photograph ‘Silk Sandals’ might seem prosaic, I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself.”

Id. at 252.

But Koons asserts—and Blanch does not deny—that his purposes in using Blanch’s image are sharply different from Blanch’s goals in creating it. Compare Koons Aff. at ¶ 4 (“I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.”) with Blanch Dep. at 112-113 (“I wanted to show some sort of erotic sense[,] ... to get ... more of a sexuality to the photographs.”).

The sharply different objectives that Koons had in using, and Blanch had in creating, “Silk Sandals” confirms the transformative nature of the use.

Id. at 255 (alternations omitted).

36 Id. at 247.
37 But Koons asserts—and Blanch does not deny—that his purposes in using Blanch’s image are sharply different from Blanch’s goals in creating it. Compare Koons Aff. at ¶ 4 (“I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.”) with Blanch Dep. at 112-113 (“I wanted to show some sort of erotic sense[,] ... to get ... more of a sexuality to the photographs.”).
38 Id. at 255 (alternations omitted).
found in almost any glossy magazine . . . something that everyone experiences constantly.”

The difference between photographing his own Gucci clad sandals and using the Allure photograph is the “difference between quoting and paraphrasing.” In short, the Allure photograph was a member of a category of media in limited supply for which there was no substitute. It met the Fifth Element.

III. CONCLUSION

The Fifth Element is a powerful argument that artists can employ to help bolster their fair use defense. For a further discussion of this topic and other issues related to the use of media in documentary film visit the Fair Use Webinar at the O’Leary Wood & Robbins webpage, http://www.owrlaw.com/medialaw.html. There you will find a downloadable video series on the fair use doctrine, the documentary filmmaker’s statement of best practices in fair use, and other topics related to ways in which content creators can use copyrighted material without being compelled to purchase a license.

39 Id.
40 Id. “We conclude that Koons thus established a “justification for] the very act of [his] borrowing.” Campbell, 510 U.S. at 581. Whether or not Koons could have created “Niagara” without reference to “Silk Sandals,” we have been given no reason to question his statement that the use of an existing image advanced his artistic purposes.” Id.
41 It is true that, unlike the case of the entirely unique Zapruder film, Koons did not have to use this particular photograph from this particular issue of Allure Magazine. But in order to express his point in a powerful way Koons did have to use some photo from a fashion magazine and if not this one from Allure then it would have been from Vogue, Elle, Glamour, or its equivalent. In that case, Koons would be right back in the same position, no worse and no better. In other words, Koons is in a kind of double-bind, discussed above in the context of 1950s film clips. See supra Part II.D.1. This is why media of a category in limited supply, supports a Fifth Element argument, albeit not as powerfully as entirely unique media.