



Copyright Law's Fair Use Doctrine as an Infringement Defense

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I. Introduction

The Copyright Act's purpose is defined in Article I, Section 8, Clause 8 of the United States Constitution: “[t]o promote the Progress of Science and useful Arts”¹ The doctrine of fair use is both a

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question of law and fact² and gives courts the flexibility to avoid the rigid implementation of Copyright Law that would otherwise ‘stifle the very creativity which that law is designed to foster.’³ It is an affirmative defense to copyright infringement for which the defendant bears the burden of proof.⁴ Fair use is “one of the most important and well-established limitations on the exclusive right of copyright owners” and is codified in 17 U.S.C. § 107.⁵

II. Statutory Provision: 17 U.S.C. § 107

Title 17, Section 107 of the United States Code states that fair use does not constitute copyright infringement. Although the statute does not define the term “fair use,” the statute gives four factors for determining whether the use of the work constitutes fair use, as follows:

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¹ U.S. CONST. art. I, § 8, cl. 8.

² Pac. & S. Co., Inc. v. Duncan, 744 F.2d 1490, 1495, n.8 (11th Cir. 1984).

³ Stewart v. Abend, 495 U.S. 207, 236 (1990).

⁴ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985).

⁵ H.R. REP. NO. 94-1476, at 65 (1976).

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶

Moreover, even if the purpose of the copyrighted work is for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” then the copyrighted work is still subjected to the fair use test.⁷ Additionally, even an unpublished work may be the subject of a copyright action, for which a fair use defense may be raised.⁸

III. Legislative Intent

⁶ 17 U.S.C. § 107 (1976).

⁷ H.R. REP. NO. 94-1476, at 65 (1976).

⁸ 17 U.S.C. § 107.

The judicial doctrine of fair use has been recognized many times in case law before the express statutory recognition in 17 U.S.C. § 107.⁹ Although courts have ruled on the fair use doctrine many times throughout the years, the courts have still not articulated a “real definition of the concept”¹⁰ Since fair use is an “equitable rule of reason, no generally applicable definition is possible,”¹¹ and determining whether there is fair use must be decided on the particular facts of each case.¹² The four factors in 17 U.S.C. § 107 provide boundaries for “balancing the equities.”¹³ Due to “rapid technological change,” courts are flexible in applying the fair use doctrine on a case-by-case basis.¹⁴

17 U.S.C. § 107 is intended to offer guidance in determining when the doctrine applies.¹⁵ However, this doctrine is not a bright-line test because of “the endless variety of situations and combinations of

⁹ H.R. REP. NO. 94-1476, at 65 (1976).

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

circumstances that can rise in particular cases”¹⁶ The statute is not intended to “change, narrow, or enlarge [the judicial doctrine of fair use] in any way.”¹⁷ Every factor in 17 U.S.C. § 107 must be “explored, and the results weighed together, in light of the purposes of copyright.”¹⁸

IV. Evaluation of the Factors

A. The Purpose and Character of the Use

The first factor, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes” was not intended to limit fair use to not-for-profit or educational uses.¹⁹ Regardless of whether the purpose and character of the use is commercial or non-profit, it will be weighed in consideration with the other three fair use factors.²⁰

¹⁶ Id.

¹⁷ Id.

¹⁸ Campbell, 510 U.S. 569, 578 (1994).

¹⁹ H.R. REP. NO. 94-1476, at 65 (1976).

²⁰ Id.

The first factor’s purpose is to determine “whether and to what extent the new work is ‘transformative.’”²¹ Although not determinative, transformative use furthers the purpose of copyright law.²²

Transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”²³ Further, an educational and not-for-profit use does not “insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”²⁴

²¹ Campbell, 510 U.S. at 579. “Transformative works” are those works “altering the original with new expression, meaning or message.” Id. at 569. Justice Story expressed this first factor when he said, “In short, we must often . . ., look to the nature and object of the selections made [from the original work]. . . .” Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C. Mass. 1841). In contrast, a derivative work “is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (1976).

²² Campbell., 510 U.S. at 579.

²³ Id.

²⁴ Campbell, 510 U.S. at 584.

B. The Nature of the Copyrighted Work

The second factor in 17 U.S.C. § 107 is “the nature of the copyrighted work.”²⁵ As the Court in Campbell v. Acuff-Rose determined “[t]his factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”²⁶ For example, several Supreme Court cases have contrasted a fictional short story with factual works, a soon-to-be-published memoir with published speech, motion pictures with news broadcasts and creative works with bare factual compilations.²⁷

C. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The third factor in 17 U.S.C. § 107 considers “the amount and substantiality of the portion used in relation to the copyrighted work as a

²⁵ 17 U.S.C. § 107(2). Justice Story defined this second factor as the “value of the materials used” Folsom, 9 F. Cas. at 348.

²⁶ Campbell, 510 U.S. at 586.

²⁷ Id. (citing Stewart v. Abend, 495 U.S. at 237-38; Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. at 563-64; Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 455 (1984); Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348-351 (1991)).

whole.”²⁸ “[T]he extent of permissible copying varies with the purpose and character of the use.”²⁹ This factor examines the “quantity of the materials used” as well as “their quality and importance, too.”³⁰ The Court looks for whether “‘a substantial portion of the infringing work was copied verbatim’ from the copyrighted work . . . for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or

²⁸ 17 U.S.C. § 107(3). Justice Story expressed the third factor as “the quantity and value of the materials used” Folsom, 9 F. Cas. at 348.

²⁹ Campbell, 510 U.S. at 586-87.

³⁰ Campbell, 510 U.S. at 587. For example, in Harper & Row Publishers, Inc., the 300 words taken out of President Ford’s memoirs were ‘essentially the heart of the book,’ even though this material was around 13% of the infringing article. 471 U.S. at 565, 66. As the Court remarks, “a taking may not be excused merely because it is insubstantial with respect to the infringing work.” Further, as Judge Learned Hand stated, ‘no plagiarist can excuse the wrong by showing how much of his work he did not pirate.’ Id. at 565 (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936)). On the contrary, “the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.” Id.

changed, is more likely to be merely superseding use, fulfilling demand for the original.”³¹

D. The Effect and Use upon the Potential Market For or Value of the Copyrighted Work

The fourth factor in 17 U.S.C. § 107 considers “the effect of the use upon the potential market for or value of the copyrighted work.”³² To evaluate the fourth factor, courts must consider the “extent of market harm caused by the particular actions of the alleged infringer” and “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market” for the original.”³³ One does not need to show that actual present harm or that future harm will result.³⁴ Instead, “a showing by a preponderance of the

³¹ Campbell, 510 U.S. at 587-88.

³² 17 U.S.C. § 107(4).

³³ Campbell, 510 U.S. at 590.

³⁴ Sony Corp. of America, v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

evidence that some meaningful likelihood of future harm exists.”³⁵

Further, the ‘harm to the original’ as well as the ‘harm to the market for derivative works’ must be taken into account.³⁶

V. Supreme Court Decisions

Three examples of where the Supreme Court has decided whether the use of the copyright constituted fair use are Sony Corp. of America, v. Universal City Studios, Inc., Harper & Row Publishers, Inc. v. Nation Enterprises, and Campbell v. Acuff-Rose. In each decision, the Court reversed the Court of Appeals’ decision.

In Sony Corp. of America, Sony manufactured and sold home video tape recorders and Universal owned the copyrights on some of the television programs.³⁷ The general public used these video tape recorders sold by Sony to record television broadcasts and some of these

³⁵ Id. The Court in Sony Corp. of America further notes that “[i]f the intended use is for commercial gain, that likelihood may be presumed. But if it is for noncommercial purpose, the likelihood must be demonstrated.” Id.

³⁶ Campbell, 510 U.S. at 590.

³⁷ Sony Corp. of America, 464 U.S. at 419-20.

broadcasts were owned by Universal.³⁸ The Court needed to determine whether Sony's sale of the home video tape recorders to the general public constituted copyright infringement.³⁹ The U.S. Supreme Court concluded that home "time-shifting" constitutes fair use of a copyrighted work.⁴⁰ "Time-shifting" is when a person in the general public uses a VTR, such as Sony's Betamax, to record a program so that it can be watched at a later time.⁴¹ The Court found the Court of Appeals' decision erroneous because it incorrectly assumed that fair use is "rigidly circumscribed by a requirement that every such use must be 'productive.'"⁴² The Court concluded with two important points. First, the court said that the copyright holders who licensed their works on television would not object to people time-shifting their works in the privacy of their homes because "a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the

³⁸ Id. at 420.

³⁹ Id.

⁴⁰ Sony Corp. of America, 464 U.S. at 455.

⁴¹ Id. at 421.

⁴² Sony Corp. of America, 464 U.S. at 455.

portion of their audience that is available only through time-shifting.”⁴³

Second, “time-shifting” will most likely not cause any likelihood of non-minimal harm to the potential market or the value of the copyrighted works.⁴⁴ ⁴⁵The Court stated that the Betamax was “capable of substantial noninfringing uses,” and therefore Sony’s sale of the Betamax’ to the public “does not constitute contributory infringement of respondent’s copyrights.

In Harper & Row Publishers, Inc. v. Nation Enterprises, an undisclosed source sent The Nation Magazine with an unpublished manuscript of “A Time to Heal: The Autobiography of Gerald R. Ford.”⁴⁶ The Nation then wrote a 2,250-word piece titled “The Ford Memoirs-Behind the Nixon Pardon,” where 300 of the words were

⁴³ Id. at 446, 456. The Court in Sony makes clear that “a copyright holder may not prevail unless he speaks for virtually all copyright holders with an interest in the outcome.” Id. at 446.

⁴⁴ Id. at 456. The Court in Sony stated that “the legitimacy of [a substantial] market is not compromised simply because these producers have authorized home taping of their programs without demanding a fee from the home user. The copyright law does not require a copyright owner to charge a fee for the use of his works. . . .” Id. at 447.

⁴⁵ Id. at 456.

⁴⁶ Harper & Row Publishers, Inc., 471 U.S. at 542.

copyrighted.⁴⁷ Time agreed to buy the exclusive right to print prepublication excerpts from Harper & Row Publishers, Inc so that the excerpts could appear in Time Magazine.⁴⁸ However, after The Nation's article was published, Time canceled and Harper & Row filed suit against The Nation for copyright infringement.⁴⁹ Thus, the Supreme Court needed to determine whether "fair use" "sanctions the unauthorized use of quotations from a public figure's unpublished manuscript."⁵⁰

Ultimately, the Court reversed the Court of Appeals' decision and found that the defendant's "verbatim excerpts from the unpublished manuscript [were] not a fair use. . . ."⁵¹ Particularly, the Court stated The Nation magazine's use of the copyrighted material was not excused by the public's interest in the subject matter because "[t]he fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material

⁴⁷ Id. at 542, 545.

⁴⁸ Id. at 542.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id. at 569.

of possible public importance.⁵² The Court of Appeals also erred when it “overlook[ed] the unpublished nature of the work and the resulting impact on the potential market for first serial rights”⁵³ Last, the Court found that the Court of Appeals gave “too little weight to the qualitative importance of the quoted passages of original expression.”⁵⁴ The Court of Appeals never specified which of the 300 words of The Nation’s 2,250-word article were copyrightable.⁵⁵ Further, the Court of Appeals excluded the “quotes attributed by Ford to third persons and quotations from Government documents.” It was not Congress’ intent to allow “unfettered access to the unpublished copyrighted expression of public figures.”⁵⁶

⁵² Id. at 558, 569. The Court in Harper & Row Publishers, Inc. also stated that “[t]he public interest in the free flow of information is assured by the law’s refusal to recognize a valid copyright in facts.” Id. at 558 (quoting Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., Inc., 621 F.2d 57, 61 (2d Cir. 1980)).

⁵³ Id. at 569.

⁵⁴ Id.

⁵⁵ Id. at 542, 566.

⁵⁶ Id. at 569. The Court in Harper & Row Publishers, Inc. stated that the market “encourages the creation and dissemination of memoirs of public figures. In the economists’ view, permitting ‘fair use’ to displace

In Campbell v. Acuff-Rose, the Supreme Court addressed the question of whether 2 Live Crew's commercial parody⁵⁷ of Roy Orbison's song, "Oh, Pretty Woman," constituted "fair use."⁵⁸ Respondent Acuff-Rose was assigned the rights to the rock ballad "Oh, Pretty Woman" by Roy Orbison and William Dees in 1964 and the Petitioner, 2 Live Crew, is a popular rap music group.⁵⁹ In 1989, 2 Live

normal copyright channels disrupts the copyright market without a commensurate public benefit." Id. at 568.

⁵⁷ When defining parody, the Supreme Court in Campbell states that it "is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works." 510 U.S. at 580. Conversely, satire has been defined as a work 'in which prevalent follies or vices are assailed with ridicule [or are] attacked through irony, derision, or wit.' Id. at 581. "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing." Id. at 580-81.

⁵⁸ Id. at 571-72. With regard to "the opportunity for fair use of copyrighted materials," Justice Story explained, '[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.' Id. at 575 (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (C.C. Mass. 1845)).

⁵⁹ Id. at 572.

Crew member Campbell wrote “Pretty Woman.”⁶⁰ Subsequently, on July 5, 1989, 2 Live Crew’s manager contacted Acuff-Rose’s agent and said that 2 Live Crew had written a parody of “Oh, Pretty Woman” and would give Acuff-Rose “all credit for ownership and authorship of the original song” and that 2 Live Crew was willing to pay a fee.⁶¹ 2 Live Crew’s request was expressly rejected by Acuff-Rose,⁶² but in June or July of 1989, 2 Live Crew “released records, cassette tapes, and compact discs of ‘Pretty Woman’ in a collection of songs” and identified Orbison and Dees as the authors and Acuff-Rose as the publisher.⁶³ After almost 250,000 copies of “Oh, Pretty Woman” had been sold, Acuff-Rose sued 2 Live Crew and its record Luke Skywalker Records for copyright infringement.⁶⁴

The Supreme Court reversed and remanded the lower court’s decision and held that “a parody’s commercial character is only one

⁶⁰ Id.

⁶¹ Id.

⁶² Acuff-Rose’s agent stated ““I am aware of the success enjoyed by ‘The 2 Live Crews’, but I must inform you that we cannot permit the use of a parody of ‘Oh, Pretty Woman.’”” Id. at 572-73.

⁶³ Id. at 573.

⁶⁴ Id.

element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying.”⁶⁵ In coming to this conclusion, the Court found that there was not an evidentiary presumption to address “whether a transformative use, such as a parody, is a fair one” with regard to the first factor, the character and purpose of the use, and the fourth factor, market harm.”⁶⁶ Additionally, the Court noted that the Court of Appeals erred in concluding that 2 Live Crew had “copied excessively from the Orbison original, considering the parodic purpose of the use.”⁶⁷

VI. 2000 and Beyond

Throughout the last decade, many of the hotly contested copyright fair use cases have stemmed from the growth of technology and the use of the Internet. In Kelly v. Arriba Soft, the plaintiff sued the defendant

⁶⁵ Id.

⁶⁶ Id. at 594. The Court noted that parody “has an obvious claim to transformative value” and “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.” Id. at 579.

⁶⁷ Id. at 594.

for copyright infringement when the plaintiff found out that the defendant was using the plaintiff's photographs in its search engine database.⁶⁸ The Ninth Circuit held that the defendant's "reproduction of Kelly's images for use as thumbnails⁶⁹ in Arriba's search engine" constituted fair use. The first factor weighed in favor of Arriba; the second factor weighed slightly in favor of Kelly; the third factor weighed neither for nor against either party; and the fourth factor weighs in favor of Arriba.⁷⁰ Similarly, in Perfect 10, Inc. v. Amazon.com, the

⁶⁸ Kelly v. Arriba Soft, 336 F.3d 811, 815 (9th Cir. 2003).

⁶⁹ Thumbnails are defined as "reduced, lower-resolution versions of full-sized images on third-party computers." Perfect 10, Inc v. Amazon.com, 508 F.3d 1146, 1155 (9th Cir 2007).

⁷⁰ Id. at 820-22. The Ninth Circuit in Kelly also concluded that the District Court should not have reached the issue as to the display of Kelly's larger images when the user clicks on the thumbnails because neither party moved for summary judgment and Arriba's response did not concede the prima facie case for infringement as to those images. Id. at 817. Therefore, this issue was remanded. Id. at 815.

With regard to the fair use determination, the "first factor weighs in favor of Arriba due to the public benefit of the search engine and the minimal loss of integrity to Kelly's images"; the second factor weighs only slightly in favor of Kelly because "[p]ublished works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred" and "Kelly's images appeared on the internet before Arriba used them in its search image"; the third factor does not help either party because "although Arriba did copy each of

plaintiffs claimed that Google violated its copyright with the in-line linking and thumbnail images to the full-size images.⁷¹ The Ninth Circuit held that Google's use of Perfect 10's thumbnails was a fair use because Google's use of Perfect 10's thumbnail images "provided a significant benefit to the public."⁷²

In 2005, the Author's Guild and a coalition of publishers sued Google for copyright infringement based on the Google Library Project.⁷³ Although the parties settled on October 28, 2008,⁷⁴ Mr. Adam

Kelly's images as a whole, it was reasonable to do so in light of Arriba's use of the images; and the fourth factor weighs in favor of Arriba because "there would be no way to view, create, or sell a clear, full-sized image without going to Kelly's web sites." *Id.* at 820-22.

⁷¹ *Perfect 10, Inc v. Amazon.com*, 508 F.3d at 1157.

⁷² *Id.* at 1168. The Court noted that the first factor weighs "heavily in favor of Google" because "the transformative nature of Google's use is more significant than any incidental superseding use or the minor commercial aspects of Google's search engine and website." *Id.* at 1167.

⁷³ Adam W. Sikich, *Fair or Foul? The Unanswered Fair Use Implications of the Google Library Project*, 2 *Landslide* 24, 24 (2009). The purpose of the Google Library project was to "digitally scan entire printed books from the collections of five libraries (University of Michigan, Harvard University, Stanford University, Oxford University, and New York Public Library), store them on Google's servers, and index and display snippets of those books online." *Id.* Google would not

Sikich evaluated whether Google would have prevailed in the U.S.

District Court for the Southern District of New York under the fair use defense.⁷⁵ Mr. Sikich concluded that the district court would have “factor[ed] in the massive scope and systematic nature of Google’s

charge the user to search the archive, but would make money through banner advertising. Id.

⁷⁴ Id. at 25. The parties arrived at the following settlement:

Google will be allowed to continue its efforts to scan, digitize, and include books in an electronic book database; sell advertising on pages containing digitized books; and, with the cooperation of copyright owners, sell institutional subscriptions to the electronic book database and sell individual online access to books.

Copyright owners who remain in the class will receive 63% of all revenue generated from Google’s commercialization efforts related to the Library Project. Google also will make payments to copyright owners whose books were digitally scanned without permission if they remain in the class and submit a timely claim.

At the time the settlement was announced, it was estimated that each legitimate claim will entitle the copyright owner to approximately \$60 per book. Google also will be creating and funding a Books Rights Registry that it envisions as an opportunity for participating copyright owners who remain in the settlement class to commercialize their books via the Internet. In exchange for participating in the settlement, copyright owners release all claims of copyright infringement against Google and the libraries cooperating in the digital scanning efforts.

Id.

⁷⁵ Id.

unauthorized copying, thereby denying Google’s fair use claim.”⁷⁶ In making this determination Mr. Sikich stated that “the scales of equity tip towards the rights holders (i.e., factors one and three favor the rights holders, factor two is indeterminate, and factor four arguably tilts towards Google).”⁷⁷ Further, Mr. Sikich added that allowing Google’s fair use claim to prevail would have sent “a message that would effectively permit widespread copying of copyrighted works without authorization-as long as a convincing public benefit is emphasized by the copier.”⁷⁸

Conclusion

The purpose of copyright law is defined in Article I, Section 8, Clause 8 of the United States Constitution. Fair use is codified in 17 U.S.C. § 107 and the four factors for determining fair use are (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the

⁷⁶ Id. at 28.

⁷⁷ Id.

⁷⁸ Id.

potential market for or value of the copyrighted work.⁷⁹ The four factors are explored and weighed together, in light of the purposes of copyright law.⁸⁰ The purpose of the first factor is to ask whether and to what extent the new work is transformative.⁸¹ The more transformative the new work, the less other factors, like commercialism, may weigh against fair use.⁸² With regard to the second factor, a finding of fair use is harder to establish when the former work is copied.⁸³ The third factor pertains to the amount and substantiality of the portion used in relation to the copyrighted works as a whole and the extent of permissible copying varies with factor one.⁸⁴ The fourth factor will vary with the amount of harm and with the strength of the other factors. Although the fair use defense to copyright infringement is not defined by a bright-line, there is at least a line that is drawn and it moves on a case by case basis.

⁷⁹ 17 U.S.C. § 107.

⁸⁰ Campbell, 510 U.S. at 578.

⁸¹ Id. at 579.

⁸² Id.

⁸³ Id. at 586.

⁸⁴ Id. at 586-87.

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