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Copyright Infringement and the Fair Use Defense: Navigating the Legal Maze

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**COPYRIGHT INFRINGEMENT
AND THE FAIR USE DEFENSE: NAVIGATING THE
LEGAL MAZE**

Daniel P. Fernandez, H. Wayne Cecil,** & Alex R. Figares****

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An instructor may desire to distribute copyrighted work to students. In that regard, several options are available: (1) purchase the material; (2) pay a licensing fee; (3) seek permission; or (4) copy the material without purchasing, licensing, or obtaining permission, and seek shelter within the Fair Use defense. However, the fourth option carries the risk of litigation. In that context, this Article examines the unauthorized copying and distribution of copyrighted material for teaching and the doctrine of Fair Use. The Article first summarizes the basics of copyright law. The Article then analyzes *Patton*, a seminal decision of the Eleventh Circuit Court of Appeals. The Article discusses the four statutory Fair Use factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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. Then the Article examines how the federal courts interpret and apply these factors, and how the courts may find direction in the Educational Guidelines developed by a congressional Ad Hoc Committee. The inquiry considers whether all four factors must be weighted equally and whether there is a distinction between paper and digital copies. The conclusion presents recommendations for navigating the legal maze of copyright infringement and the Fair Use Defense.

I. INTRODUCTION

An instructor¹ desiring to distribute copyrighted work to students at no charge has several options available: (1) purchase the material from the copyright owner; (2) pay a licensing fee to the copyright owner; (3) request and receive permission; or (4) distribute the material without

1. For purposes of this Article the term "instructor" is intended to be synonymous with the terms "teacher," "faculty," or "professor."

purchasing, licensing, or obtaining permission, and seek shelter within the Fair Use defense.² Yet, the fourth option carries risk of litigation. In that context, this Article examines the unauthorized distribution of copyrighted material for teaching and the doctrine of Fair Use. The Article summarizes the basics of copyright law and the Fair Use defense. Next, the Article analyzes the seminal decision of the Eleventh Circuit Court of Appeals (Eleventh Circuit) in *Cambridge University Press v. Patton*.³ Additionally, the Article discusses the four statutory Fair Use factors⁴ and how they are interpreted and applied by federal courts, with a particular emphasis on educational settings, where there is little to no guidance as to how the factors should be applied. For example, are all four factors to be weighted equally, and does it matter whether copies are paper or digital? Additionally, the Article analyzes how the courts may find direction in the Educational Guidelines developed by a Congressional Ad Hoc Committee. The conclusion presents recommendations for navigating the legal maze of copyright infringement and the Fair Use defense.

II. BASICS OF COPYRIGHT LAW

The Copyright Clause of the U.S. Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”⁵ The current statute in the United States is the Copyright Act of 1976, as amended (Copyright Act).⁶ The purpose of copyright is “to promote the creation of new works for the public good by providing authors and other creators with an economic incentive to create.”⁷ Yet, case law acknowledges that protection of the rights of authors and creators should not be applied in such an overbroad and strict manner that it would discourage potential authors and creators from building on the works of others.⁸ The Eleventh Circuit has stated “[s]ome unpaid use of copyrighted materials must be allowed in order to prevent copyright from functioning as a straightjacket that stifles the very

2. 17 U.S.C. § 107 (1992) (“[T]he Fair Use of a copyrighted work . . . is not an infringement of copyright.”).

3. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

4. 17 U.S.C. § 107.

5. U.S. CONST. art. I, § 8, cl. 8.

6. 17 U.S.C. § 106 (2002); see also *Patton*, 769 F.3d at 1255-56. For a more thorough history of the evolution of the Fair Use doctrine, see Robert Kasunic, *Fair Use and the Educator’s Right to Photocopy Copyrighted Material for Classroom Use*, 19 J.C. & U.L. 271 (1993).

7. *Patton*, 769 F.3d at 1237 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

8. *Id.* at 1238.

creative activity it seeks to foster.”⁹ This is particularly true in the educational context. In fact, Congress strongly believed that under the proper circumstances, Fair Use should allow educational copying of material otherwise entitled to copyright protection.¹⁰ However, care must be taken not to allow too much unpaid copying, otherwise, “we risk extinguishing the economic incentive to create that copyright is intended to provide.”¹¹ Section 107 of the Copyright Act provides, in part, “the Fair Use of a copyrighted work . . . is not an infringement of copyright.”¹² Thus, the unpaid, unlicensed distribution of copyrighted works under the Fair Use¹³ doctrine involves a balancing of interests. Nonetheless, the Copyright Act is silent as to how the factors should be balanced, or how much weight the courts should give to each of the four factors.¹⁴ However, the U.S. Supreme Court has held that the factors are not to be treated in isolation, but are all to be explored, and the results weighed together in light of the purposes of copyright.¹⁵

In a copyright infringement lawsuit, the courts determine the appropriate balance between infringement and Fair Use.¹⁶ Fair Use may be asserted as a defense to a claim of copyright infringement.¹⁷ Fair Use is an equitable doctrine,¹⁸ and because it is an affirmative defense, the party that raises the defense carries the burden of proof in demonstrating its applicability.¹⁹

A defendant has the burden of persuading the court that allowing the unpaid use of the copyrighted material is equitable and consistent with the purposes of copyright.²⁰ In making its determination, a court must evaluate the facts in light of four considerations contained in Section 107 of the Copyright Act.²¹ While the law provides certain exclusive rights to the owners of copyrighted materials, there is an important exception to exclusiveness specifically related to teaching. The teaching exception, codified in Section 107, reads:

9. *Id.*

10. *Id.* at 1267.

11. *Id.* at 1238.

12. 17 U.S.C. § 107 (1992).

13. *Id.*

14. *Patton*, 769 F.3d at 1260.

15. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 114 S. Ct. 1164, 1170-71 (1994)).

16. *Id.* at 1238.

17. *Id.* (citing 17 U.S.C. § 107 (2015)).

18. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters. Int’l*, 533 F.3d 1287, 1308 (11th Cir. 2008) (quoting *Stewart v. Abend*, 495 U.S. 207, 236–37, 110 S. Ct. 1750, 1768 (1990)).

19. See *Campbell*, 510 U.S. at 590; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561, 105 S. Ct. 2218, 2231 (1985).

20. *Patton*, 769 F.3d at 1238.

21. 17 U.S.C. § 107. (2015).

Fair Use of a copyrighted work . . . for . . . teaching (including multiple copies for classroom use) . . . is not an infringement of copyright. In determining whether the use made of a work, in any particular case, is a fair use, the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.²²

Section 110 elaborates, by providing that:

the following are not infringements of copyrights: (1) display of a work . . . in the course of face-to-face teaching activities of a nonprofit educational institution . . . unless . . . the performance . . . is given by means of a copy that was not lawfully made . . . and . . . the person . . . knew or had reason to believe was not lawfully made.²³

With the Technology, Education and Copyright Harmonization Act (TEACH Act),²⁴ signed into law on November 2, 2002, Congress attempted to rectify the discrepancies in the application of Fair Use to classroom versus distance education. The TEACH Act resolves a number of the inconsistencies by providing responsibilities and criteria for administrators, technologies, and instructors.²⁵ However, the TEACH Act still presents challenges for both instructors and students.

On April 28, 2015, the U.S. Copyright Office launched its Fair Use Index, which is designed to provide the public with searchable summaries of major Fair Use decisions.²⁶

Although not a substitute for legal advice, the Index is searchable by court and subject matter and provides a helpful starting point for those wishing to better understand how the federal courts have applied the Fair Use doctrine to particular categories of works or types of use, for example, music, internet/digitization, or parody.²⁷

22. *Id.*

23. 17 U.S.C. § 110 (2015); *see also* Technology, Education and Copyright Harmonization Act (TEACH Act) of 2001, Pub. L. No. 107-273, § 13301, 116 Stat. 1758 (2002).

24. § 13301, 116 Stat. at 1758.

25. 17 U.S.C. § 110.

26. *U.S. Copyright Office Publishes Index of Fair Use Decisions* (Apr. 28, 2015), <http://copyright.gov/newsnet/2015/580.html>.

27. *Id.*

A. The “Media Neutrality” Principle

The “media neutrality” principle “mandates that the ‘transfer of a work between media does not alter the character of that work for copyright purposes.’”²⁸ Section 102(a) of the Copyright Act provides, in part, “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, *now known or later developed*. . . .”²⁹ The *Patton* Court commented on the foresight of Congress in establishing a doctrine that would protect works created with technology that did not exist at the time the law was enacted and extending copyright protection to them. This prevented unjustified distinctions that would make copyright dependent upon the particular medium in which the work may be fixed. The Court stated that:

[T]he media neutrality doctrine concerns copyrightability and does not dictate the result in a Fair Use inquiry. Congress would not have intended this doctrine to effectively displace the flexible work-by-work fair use analysis in favor of a one dimensional analysis as to whether the case involves a transfer of a work between media.³⁰

It should not make any difference whether the copyrighted work or the unlicensed duplicate is hard copy or digital and online for purposes of Fair Use. Hence, according to *Patton*, media neutrality should not play a role in the Fair Use analysis of educator provided electronic course materials.³¹ In fact, the Court held that Congress would not have intended for media neutrality to replace the required work-by-work Fair Use analysis, in essence creating a “one dimensional analysis as to whether the case involves a transfer of a work between media.”³²

B. Case-by-Case and Work-by-Work Approach

Due to their highly fact-specific nature, Fair Use determinations are made on a case-by-case and work-by-work basis, through the application of the four factors to each function in controversy.³³ Otherwise, as the

28. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1261 (11th Cir. 2014) (citing *Greenberg v. Nat’l Geographic Soc’y*, 533 F.3d 1244, 1257 (11th Cir. 2008) (*en banc*) (quoting *N.Y. Times Co., Inc. v. Tasini*, 533 U.S. 483, 502 (2001)). *Id.* at 1261 (citing *Greenberg v. Nat’l Geographic Soc.*, 533 F.3d 1244, 1257 (11th Cir. 2008) (*en banc*) (quoting *N.Y. Times Co., Inc. v. Tasini*, 533 U.S. 483, 502, 121 S. Ct. 2381, 2392 (2001))).

29. 17 U.S.C. § 102(a) (2015) (emphasis added).

30. *Patton*, 769 F.3d at 1261.

31. *Id.* at 1261.

32. *Id.*

33. *See Campbell, v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78. (1994).

Eleventh Circuit noted, there would be no principled method for determining whether a “nebulous cloud of infringements” should be excused under the Fair Use defense.³⁴

III. THE EDUCATIONAL GUIDELINES

In an effort to address the lack of clarity and the uncertainty regarding the application of Fair Use to copyrighted material, in 1963, an Ad Hoc Committee of representatives from educational institutions and the media was established at the urging of Congress.³⁵ The Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision (Committee) met several times between 1963 and 1976. The Committee consulted with various copyright stakeholders, including textbook publishers, music publishers, librarians, and authors in an attempt to establish clear guidelines regarding Fair Use in the educational context.³⁶

The Committee was opposed to any revision to the copyright law that would damage or unduly restrict the “creative educational process in America’s nonprofit school system.”³⁷ The Committee fought for a broad Fair Use exemption for educational uses, while authors espoused a case-by-case review.³⁸ In the end, the Committee agreed on a set of Educational Guidelines (Educational Guidelines or the Guidelines).³⁹ Unfortunately, the Educational Guidelines were negotiated and adopted with little or no participation by the most relevant stakeholders. In fact, the Educational Guidelines were opposed by major universities and educational organizations.⁴⁰

The House Report (the Report) accompanying the Copyright Act of 1976 included a set of Fair Use guidelines with respect to books and periodicals.⁴¹ The Report set forth that the Educational Guidelines were meant to be minimum standards of educational Fair Use under Section 107.⁴² The Report went on to further clarify that the extent of permissible

34. *Patton*, 769 F.3d at 1259.

35. David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453, 464 (2009).

36. *Id.* at 465.

37. HARRY N. ROSENFELD, MAJOR PROBLEMS OF COPYRIGHT LAW AS VIEWED BY THE AD HOC COMMITTEE ON COPYRIGHT LAW REVISION, 55 (1970), available at <http://files.eric.ed.gov/fulltext/ED039724.pdf>.

38. Simon, *supra* note 35, at 465.

39. *Id.*

40. *Id.* at 465-66 (quoting Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1958 (2007))

41. H.R. REP. NO. 94-1476, at 67-68 (1976).

42. *Id.* at 68.

copying for educational purposes could change in the future.⁴³ In fact, the Guidelines were meant to be advisory in nature, and there could be instances in which copying that fell outside of the Guidelines could nonetheless be allowed under Fair Use criteria.⁴⁴

The Educational Guidelines were divided into three sections, each addressing a different aspect of educational Fair Use. The first section dealt with single copying of copyrighted material for teachers.⁴⁵ Under this section, the Guidelines provided that a single copy, from an identified list of copyrighted materials, could be made for the teacher's scholarly research, for use in teaching in a class, or for use in preparation to teach a class.⁴⁶

The second section addressed the use of multiple copies of copyrighted material in the classroom.⁴⁷ Under this section, the Guidelines allowed for multiple copies, not to exceed more than one copy per student, made by the teacher for classroom use or discussion. Each copy was to include a copyright notice, and was to meet the brevity, spontaneity, and cumulative effect tests (as defined in section two of the Guidelines).⁴⁸

Section three of the Guidelines contained a list of prohibitions as it pertained to sections one and two.⁴⁹ Noteworthy among the prohibitions is that notwithstanding the uses allowed under sections one and two, copying was not to be used to create, replace, or substitute for anthologies, compilations, or collective works.⁵⁰ Additionally, the copying of works meant to be consumable in the course of study or teaching fell outside of the minimum Fair Use standards of the Educational Guidelines.⁵¹ Key among the prohibitions in the Guidelines was that students were not to be charged in excess of the copying costs of the materials being copied.⁵² This factor became the central focus of the analysis in the later "course pack" cases.⁵³

Although the Educational Guidelines are not controlling on the courts, they have been referenced and applied by certain courts as persuasive authority.⁵⁴ In *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983), the Court of Appeals for the Ninth Circuit found that the "Guidelines

43. *Id.*

44. *Id.*

45. *Id.* at 68-69.

46. *Id.* at 68.

47. *Id.*

48. *Id.*

49. *Id.* at 69.

50. *Id.*

51. *Id.*

52. *Id.* at 70.

53. See *infra* text accompanying note 119.

54. *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983).

represent the Congressional Committee's view of what constitutes fair use under the traditional judicial doctrine developed in the case law."⁵⁵ As such, the Guidelines were intended to represent minimum standards of Fair Use, and while not controlling on the court, "they are instructive on the issue of fair use in the context of this case."⁵⁶ Another court found that "[a]lthough the Classroom Guidelines purport to 'state the minimum and not the maximum standards for educational fair use,' they do evoke a general idea, at least, of the type of educational copying that Congress had in mind."⁵⁷ Some courts have used the Guidelines in conjunction with the four factor analysis to determine whether a particular copyright infringement was protected by the Fair Use defense.⁵⁸ In *Basic Books, Inc. v. Kinko's Graphics Corp.*,⁵⁹ the court analyzed whether Kinko's violated copyright infringement laws by copying excerpts from books without permission, and then compiling them into university course packets which were later sold to students. It held that "[f]or a proper analysis, there must be initial consideration given to the issue of what comprises educational copying and whether Kinko's status as a for-profit corporation, and its profit making intent, renders it outside of a Guidelines review."⁶⁰

It would appear that most courts that use the Educational Guidelines as part of their analysis of a Fair Use defense do so in conjunction with, and not in lieu of, the four Fair Use factors. In fact, at least one court has held that "[t]here are strong reasons to consider the legislative history. The statutory factors are not models of clarity, and the fair use issue has long been a particularly troublesome one."⁶¹ Although not binding on the courts, the Educational Guidelines are considered persuasive authority.⁶²

IV. THE *PATTON* CASE

The decision of the Eleventh Circuit in *Patton*⁶³ is significant. As the District Court noted "there is no precedent on all fours for how the factors should be applied where excerpts of copyrighted works are copied by a nonprofit college or university for a nonprofit educational purpose"⁶⁴

55. *Id.*

56. *Id.*

57. *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996).

58. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

59. *Id.*

60. *Id.* at 1535-36.

61. *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d at 1389.

62. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 919 n.5 (2d Cir. 1994).

63. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

64. *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1210 (N.D. Ga. 2012).

This makes the *Patton* decision precedent for public (and potentially private nonprofit) universities in the states of Alabama, Florida, and Georgia, which comprise the jurisdictional area of the Eleventh Circuit. Moreover, the case may serve as persuasive authority in the other federal courts throughout the United States regarding the Fair Use Doctrine.

In *Patton*, three academic publishing houses filed a copyright infringement action against the Board of Regents of the University System of Georgia and Georgia State University (GSU).⁶⁵ GSU had a policy that allowed instructors to make digital copies of excerpts of books published by the three publishing houses available to students without paying licensing fees.⁶⁶ The publishing houses alleged seventy-four individual instances of infringement.⁶⁷ The District Court made several findings relevant to this discussion: (1) the plaintiffs failed to establish a prima facie case of 26 alleged incidences of infringement; (2) the Fair Use defense applied in 43 of the claimed instances; and, (3) GSU had infringed copyrights in 5 instances.⁶⁸ The third point should spark the attention of the academic community.

The specific issue in *Patton* was “whether the unpaid copying of scholarly works by a university for use by students—facilitated by the development of systems for digital delivery over the Internet—should be excused under the doctrine of fair use.”⁶⁹ Publishers typically market their books by regularly sending complimentary or trial copies to instructors.⁷⁰ The publishers intend that instructors will assign the books as required reading so that students will purchase them.⁷¹ Instead of assigning whole books, some instructors assign only excerpts.⁷² This may be accomplished by putting the excerpts on reserve at the library where the students can read the assignment.⁷³ Alternatively, instructors may prepare bound, photocopied, paper “coursepacks” with excerpts from different books or works.⁷⁴ Customarily, a third-party copy shop assembles these coursepacks, providing the services of copying, binding, obtaining the requisite licenses from the respective publishers, and charging for the completed and licensed coursepack.⁷⁵ However, in recent years, universities have abandoned paper coursepacks and have

65. *Patton*, 769 F.3d at 1238.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1238-39.

72. *Id.*

73. *Id.* at 1239.

74. *Id.*

75. *Id.*

substituted digital distribution on the Internet.⁷⁶

GSU provides and maintains two on-campus systems for digital distribution of course materials to students.⁷⁷ In short, both systems provide “course-specific webpages through which instructors may make course material available, including digital copies of excerpts from books, which students in the course may view, print, or save.”⁷⁸ These digital downloads have surpassed the paper coursepack system. At GSU, in spring 2009 only fifteen coursepacks were offered, while hundreds of courses had the material available for digital download.⁷⁹ Students paid for these downloads only indirectly with tuition and fees.⁸⁰

There is a well-established mechanism for licensing and obtaining “permissions” for use of copyrighted works.⁸¹ While GSU paid permission fees for use of the excerpts that its bookstore assembled and sold as paper coursepacks, GSU did not subscribe to licensing and paying fees for the online version of coursepacks.⁸² Thus, the *Patton* Court framed the central issue in the case to be, “[U]nder what circumstances GSU must pay permissions fees to post a digital copy of an excerpt of Plaintiffs’ works”⁸³ The plaintiffs in *Patton* “alleged that hundreds of GSU professors have made thousands of copyrighted works—including works owned or controlled by Plaintiffs—available on GSU’s electronic reserve systems without obtaining permissions from copyright holders, and that GSU’s administration facilitated, encouraged, and induced this practice.”⁸⁴ The lawsuit was based on theories of direct, indirect, and vicarious copyright infringement.⁸⁵ Among its defenses GSU asserted Fair Use because “any alleged use of copyrighted materials was for the purpose of teaching, scholarship or research and for nonprofit educational purposes.”⁸⁶

The University System of Georgia had a copyright policy entitled the “Regents’ Guide to Understanding Copyright & Educational Fair Use.”⁸⁷ This policy was revised in 2009 and remained in effect during the pendency of the litigation. Under this policy, GSU instructors desiring to post copyrighted works online for their students were required first to determine whether they believed that the online posting would be Fair

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1240.

80. *Id.*

81. *Id.*

82. *Id.* at 1240-41.

83. *Id.* at 1241.

84. *Id.*

85. *Id.* at 1241-42.

86. *Id.* at 1242.

87. *Id.*

Use. The process for making a determination prompted instructors to fill out a checklist.⁸⁸

The checklist was intended to mirror the analysis a court might perform in analyzing a Fair Use defense to a copyright infringement action.⁸⁹ The checklist provided checkboxes and criteria for each of the four statutory factors. These criteria numerically weigh either for or against a finding of Fair Use. Instructors were to check each criterion that applied to their proposed use of an excerpt. Then the instructor would add up the checks to determine whether or not the factor favors a finding of Fair Use. Where the factors in favor of Fair Use outnumbered the factors against it, then the instructor was advised to rely on the Fair Use defense. Conversely, when the factors against Fair Use outnumbered those that favor it, then the instructor was told to obtain permissions from the copyright holder.⁹⁰

V. WEIGHTING THE FOUR FAIR USE FACTORS

The proper scope of Fair Use is essentially an evidentiary question,⁹¹ and “the fair use inquiry is a flexible one. The four statutory factors provide courts with the tools to determine—through a weighing of the four factors in light of the facts of a given case—whether a finding of fair use is warranted in that particular instance.”⁹²

Yet, the Copyright Act does not specify the relative weight courts should attach to each of the four factors. Nor does the Act precisely identify how the factors ought to be balanced.⁹³ The Supreme Court has stated that “the four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”⁹⁴ Thus, a given factor may be more important or less important in determining whether a use should be considered fair under the specific circumstances of the case.⁹⁵

Accordingly, the four factors “do not mechanistically resolve fair use issues.”⁹⁶ The Eleventh Circuit in *Patton* concluded that the District Court had erred in “giving each of the four factors equal weight, and in

88. *Id.*

89. *Id.* at 1242-43.

90. *Id.* at 1243.

91. *Id.*

92. *Id.* at 1259.

93. *Id.* at 1260.

94. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

95. *See id.* at 1175.

96. *Patton*, 769 F.3d at 1260 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.* 105 Ct. 2218, 2245 (1985) (Brennan, J., dissenting)).

treating the four factors as a simple mathematical formula.”⁹⁷ In fact, the circumstances of a particular case may necessitate weighting some of the factors more heavily than others.⁹⁸ This approach is the antithesis of a bright line standard and makes a predictable outcome challenging in a case that is not clearly at one extreme of the spectrum.

VI. FIRST FACTOR: THE PURPOSE AND CHARACTER OF THE USE

The first factor in the Fair Use analysis is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁹⁹ This appears rather straightforward. However, the *Patton* Court observed a cautionary note from the Supreme Court that “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”¹⁰⁰ Rather than providing clarity, this language makes the Fair Use determination even more elusive.

Additionally, the “Supreme Court has cautioned against the use of the facets to create ‘hard evidentiary presumption[s]’ or ‘categories of presumptively fair use.’”¹⁰¹ Yet, the Eleventh Circuit in *Patton* set out two “facets” to be used in the analysis of this first statutory factor: “(1) the extent to which the use is a ‘transformative’ rather than merely superseding use of the original work and (2) whether the use is for a nonprofit educational purpose, as opposed to a commercial purpose.”¹⁰² The second facet appears to be little more than a restatement of the first statutory factor in the Fair Use analysis. It is not clear how this second facet comports with the admonition of the Supreme Court that facets should not be used to create hard evidentiary presumptions, that educational, not for profit use does not insulate it from infringement, or that commercial use does not bar a finding of fairness.

A. Transformative Use

The initial inquiry of the “facet” analysis put forward by the Eleventh Circuit is whether the use is “transformative.” That is, “whether the new work merely supersedes the object of the original,” or adds newness, with

97. *Id.*; see also *Campbell*, 510 U.S. at 569.

98. *Patton*, 769 F.3d at 1260.

99. 17 U.S.C. § 107(1) (2015).

100. *Patton*, 769 F.3d at 1261-62 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1174 (1994)).

101. *Id.* at 1261 (alteration in original) (citing *Campbell*, 114 S. Ct. at 1174).

102. *Id.* (citing *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters. Int'l*, 533 F.3d 1287, 1309 (11th Cir. 2008)).

a distinct purpose or character, that changes the original work or gives it “new expression, meaning, or message.”¹⁰³ The *Patton* Court reasoned that a transformative work would not normally supplant the market for the original.¹⁰⁴ In other words, the target market for the copy would not be the same as for the original work.

The *Patton* Court elaborated on the meaning of “transformative” by referencing examples from the Second, Fourth, and Ninth Circuit Courts of Appeal:

[A] parody transforms a work by appropriating elements of the work for purposes of comment or criticism, and thus reflects transformative value because it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. A nontransformative use, on the other hand, is one which serves the same “overall function” as the original work.¹⁰⁵

Even verbatim copying has been found to be transformative if the copy serves a different function than the original work.¹⁰⁶ In *Perfect 10, Inc. v. Amazon.com, Inc.*,¹⁰⁷ the Ninth Circuit found “a search engine’s copying of website images in order to create an Internet search index transformative because the original works ‘serve[d] an entertainment, aesthetic, or informative function, [whereas the] search engine transforms the image into a pointer directing a user to a source of information.’”¹⁰⁸

The Fourth Circuit in *A.V. v. iParadigms LLC*,¹⁰⁹ concluded that “use of student papers in an online plagiarism detection database [was] transformative because the database used the papers not for their original purpose as schoolwork, but rather to automatically detect plagiarism in the works of other student authors.”¹¹⁰

In *Bill Graham Archives v. Dorling Kindersley, Ltd.*,¹¹¹ the Second Circuit found the “use by publishers of concert posters reproduced in full, although in reduced size, in a biography of a musical group transformative because the use was for historical and educational purposes, rather than advertising and informational purposes.”¹¹²

The *Patton* Court concluded that the excerpts posted on the GSU

103. *Id.* at 1262 (quoting *Campbell*, 114 S. Ct. at 1171).

104. *Id.*

105. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007)).

106. *Id.*

107. 508 F.3d at 1146, 1165 (9th Cir. 2007).

108. *Id.*

109. *A.V. ex rel. Vanderhye v. iParadigms LLC*, 562 F.3d 630, 640 (4th Cir. 2009).

110. *Id. Patton*, 769 F.3d at 1262.

111. *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006).

112. *Id. Patton*, 769 F.3d at 1262.

website were not transformative because the excerpts were verbatim copies of the original works that had merely been converted to digital format.¹¹³ Neither did the Court find that the copied excerpts served a distinct function from the originals (*i.e.*, the copies served as reading material, in the same manner as the originals, for the students taking the courses).¹¹⁴ The Court noted “[a]lthough a professor may arrange these excerpts into a particular order or combination for use in a college course, this does not imbue the excerpts themselves with any more than a *de minimis* amount of new meaning.”¹¹⁵

Even though the Court concluded that the GSU copies were not transformative, that facet alone was not dispositive and is a separate analysis from whether it is a commercial versus nonprofit educational use.¹¹⁶ The Court also noted that “the Supreme Court has recognized in dicta that nonprofit educational use may weigh in favor of a finding of Fair Use under the first factor, even when nontransformative.”¹¹⁷ The key here is that the user and the use itself must be truly nonprofit.¹¹⁸ In contrast, the cases where for-profit copy shops were selling coursepacks or allowing copies without paying a licensing fee to the copyright holder, the use was found to be nontransformative and commercial.¹¹⁹ Thus, the Fair Use doctrine was inapplicable.¹²⁰

B. Nonprofit Public Benefit vs. Commercial Exploitation

GSU is a nonprofit institution and used the copies in courses clearly for educational purposes.¹²¹ However, the *Patton* Court pointed out that “it is not entirely clear that use by a nonprofit entity for educational purposes is always a ‘nonprofit’ use as contemplated by § 107(1).”¹²² They stated that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without

113. *Patton*, 769 F.3d at 1262.

114. *Id.* at 1263.

115. *Id.* (citing *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996)).

116. *Id.* at 1263 (quoting *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters. Int’l*, 533 F.3d 1287, 1309 (11th Cir. 2008)).

117. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 n.11 (1994)).

118. *Id.* at 1264 (citing *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921-22 (2d Cir. 1994)).

119. *See, e.g.*, *Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1531-32 (S.D.N.Y. 1991); *Blackwell Publ’g, Inc. v. Excel Research Grp. LLC*, 661 F. Supp. 2d 786, 794 (E.D. Mich. 2009).

120. *Princeton Univ. Press*, 99 F.3d at 1389.

121. *Patton*, 769 F.3d at 1264.

122. *Id.* at 1265.

paying the customary price.”¹²³

The Eleventh Circuit reviewed a line of cases where nonprofit institutions only received an indirect economic benefit or enhanced professional reputation. In those cases the use was found to be commercial even though the entities themselves were nonprofit.¹²⁴ The Court essentially concurred with language from a Second Circuit case in that courts will be less likely to sustain a defense of Fair Use when the secondary use amounts to

“[C]ommercial exploitation,” i.e., when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material. Conversely, courts 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.¹²⁵

Finding that unlicensed copies did not give GSU an indirect economic benefit such as an enhanced reputation, the *Patton* Court concluded that it merely made accessing the materials easier for the students.¹²⁶ Although the Court acknowledged that GSU benefitted by being able to provide the copies without paying licensing fees, this could not be reasonably considered “commercial exploitation.”¹²⁷ In this regard, the Court stated that “the use provides a broader public benefit—furthering the education of students at a public university.”¹²⁸ In a review of the legislative history of the Copyright Act of 1976, the Eleventh Circuit noted:

The text of the fair use statute highlights the importance Congress placed on educational use. The preamble to the statute provides that fair uses may include “teaching (including multiple copies for classroom use), scholarship, or research” and the first factor singles out “nonprofit educational purposes.” 17 U.S.C. § 107. The legislative history of § 107 further demonstrates that Congress

123. *Id.* (quoting *Harper & Row Publishers, Inc., Publr. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

124. *Id.*

125. *Id.* (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d at 913, 922). *But see id.* at 1266 n.24.

126. *Id.* at 1266.

127. *Id.* at 1267.

128. *Id.*

singled out educational purposes for special consideration.¹²⁹

The *Patton* Court then agreed with the District Court that the first factor favored a finding of Fair Use. However, the Eleventh Circuit postponed further analysis until its later discussion of factor four (the effect on the potential market for the work).¹³⁰

VII. SECOND FACTOR: THE NATURE OF THE COPYRIGHTED WORK

The second Fair Use factor is “the nature of the copyrighted work.”¹³¹ For this part of the Fair Use analysis, the *Patton* Court used two criteria.¹³² First, works that are highly creative with substantial originality and inventiveness receive stronger copyright protection and the courts are less likely to render a finding of Fair Use.¹³³ Factual or informational works are more likely to be subject to the Fair Use doctrine than fiction or fantasy.¹³⁴ However, even factual works that are imbued with a great deal of creativity may fall into the highly creative category and be afforded stronger copyright protection.¹³⁵ Second, an author has the right to the first publication of a work. Thus, unpublished works are given greater protection than published works.¹³⁶ Since the GSU copies were all published works, the *Patton* Court did not elaborate on this second criterion. Concluding that the second factor was of relatively little importance in the GSU case the *Patton* Court stated:

Where the excerpts of Plaintiffs’ works contained evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author’s experiences or opinions, the District Court should have held that the second factor was neutral, or even weighed against fair use in cases of excerpts that were dominated by such material.¹³⁷

129. *Id.*

130. *Id.*

131. 17 U.S.C. § 107(2) (2015).

132. *Patton*, 769 F.3d at 1268 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

133. *Id.*

134. *Id.* (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985)); see also *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

135. *Patton*, 769 F.3d at 1268.

136. *Id.* (citing *Harper & Row*, 471 U.S. 564 (1985)).

137. *Id.* at 1270.

VIII. THIRD FACTOR: AMOUNT AND SUBSTANTIALITY

“[T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole” is the third Fair Use factor.¹³⁸ The issue is whether the amount used has been excessive and exceeded the bounds of Fair Use.¹³⁹ To make the analysis even more complicated, the *Patton* Court concluded that this third factor was “intertwined” with the first and fourth factors.¹⁴⁰ In other words, the inquiry examines the amount copied in light of the purpose and character of the use and the impact of the copies on the market for the original.¹⁴¹ The District Court had established a 10% or one chapter guideline for a finding of Fair Use.¹⁴² However, the *Patton* Court rejected this “bright line” approach relying on the Supreme Court’s pronouncement that Fair Use analysis must be “performed on a case-by-case/work-by-work basis.”¹⁴³ The Eleventh Circuit found regarding this factor:

[T]he District Court properly considered whether the individual instances of alleged infringement were excessive in relation to Defendants’ pedagogical purpose, properly measured the amounts taken in all cases based on the length of the entire book, and properly declined to tie its analysis under the third factor to the Classroom Guidelines or to the coursepack cases. However, we find that the District Court erred in applying a 10 percent-or-one-chapter safe harbor in its [sic] analysis of the individual instances of alleged infringement. The District Court should have analyzed each instance of alleged copying individually, considering the quantity and the quality of the material taken—including whether the material taken constituted the heart of the work—and whether that taking was excessive in light of the educational purpose of the use and the threat of market substitution.¹⁴⁴

IX. FOURTH FACTOR: EFFECT UPON POTENTIAL MARKET OR VALUE OF THE COPYRIGHTED WORK

The fourth, and final, Fair Use factor is “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁴⁵ The concerns

138. 17 U.S.C. § 107(3) (2015).

139. *Patton*, 769 F.3d at 1271.

140. *Id.*

141. *Id.*

142. *Id.* at 1271.

143. *Id.* at 1271–72 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

144. *Id.* at 1275.

145. 17 U.S.C. § 107(4) (2015).

here involve potential market harm, market substitution, or a use that supplants the original.¹⁴⁶ Furthermore, “[m]arket harm is a matter of degree, and the importance of [the fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.”¹⁴⁷ A key question under factor four is “whether Defendants’ use—taking into account the damage that might occur if ‘everybody did it’—would cause *substantial* economic harm such that allowing it would frustrate the purposes of copyright by materially impairing Defendants’ incentive to publish the work.”¹⁴⁸

X. EDUCATIONAL GUIDELINES ANALYSIS

Although the *Patton* Court did not use the Educational Guidelines in its Fair Use analysis, the Court did reference the Guidelines. It cautioned the trial court not to give “undue weight to the amounts of copying set forth in the Classroom Guidelines.”¹⁴⁹ The *Patton* Court further stated that “while the Classroom Guidelines may be seen to represent Congress’ tentative view of the permissible amount of educational copying in 1976, we are not persuaded by the Plaintiffs’ argument that the Classroom Guidelines should control the analysis under factor three in this case.”¹⁵⁰ Thus, the Court did not discard the Educational Guidelines, it simply determined that “to treat the Classroom Guidelines as indicative of what is allowable would be to create the type of ‘hard evidentiary presumption’ that the Supreme Court has cautioned against, because fair use must operate as a ‘sensitive balancing of interests.’”¹⁵¹

However, the Educational Guidelines would have provided the trial court with additional direction in its evaluation of the four factors; thus facilitating the trial court’s analysis, and bestowing the trial court with additional tools in its determination of the appropriate weight to give each of the four Fair Use factors. If used as a tool, and not as an additional factor, the Educational Guidelines could be instructive on remand.

A. Applicability of the Guidelines

As espoused by the *Basic Books* court, the first step in any case that applies the Educational Guidelines to a Fair Use analysis is to make a

146. *Patton*, 769 F.3d at 1275.

147. *Id.* (citing *Campbell*, 510 U.S. at 590 n.21).

148. *Id.* at 1276 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985)).

149. *Patton*, 769 F.3d at 1273-74.

150. *Id.* at 1274.

151. *Campbell*, 510 U.S. at 584 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, at 455 n.40 (1984)).

determination as to whether the Guidelines even apply, or whether the particular set of facts faced by the court places the case outside of a Guidelines review.¹⁵² In *Basic Books*, the court held that the facts of the case placed Kinko's outside of the Guidelines. Kinko's was engaged in the business of copying for profit, and for-profit copying did not fit within the definition of educational copying, as is required in order for the Guidelines to apply within the parameters of a Fair Use factor analysis.

In the *Patton* case, an initial analysis favors the application of the educational guideline factors to the Court's determination of whether the Defendants' actions are entitled to Fair Use protection. The copyright infringement alleged by the Plaintiff publishing houses was a result of policies allowing GSU instructors to make digital copies of excerpts of Plaintiffs' books available to students without paying the Plaintiffs. The fact that the Defendants did not directly charge or make a profit from making these digital copies available to students weighs heavily in favor of the application of the Educational Guidelines. Educational copying, by its very nature, implies a non-profit purpose or motive, especially when the Defendants are not in the business of providing copies for profit.¹⁵³ Accordingly, the District Court could incorporate the Educational Guidelines into its four factor Fair Use analysis.

B. Multiple Copies for Classroom Use

Having determined that the Educational Guidelines apply to the actions of the Defendants, the District Court could next apply the Guidelines to the facts. Since excerpts of books were digitally copied and placed online for use by students in their respective classes, factor two of the Guidelines, pertaining to multiple copies for classroom use, could be useful to the District Court in its analysis.

Under factor two of the Guidelines, the District Court could find that there is Fair Use of the infringed material if: (1) there is no more than one copy of the copyrighted material made per student in a course; (2) the material is for classroom use or discussion; (3) the copying meets the following tests: (a) brevity; (b) spontaneity; and (c) cumulative effect; and (4) each copy includes a copyright notice.

152. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1535-36 (S.D.N.Y. 1991).

153. In fact, the Defendants' actions are more akin to library copying, which the U.S. Supreme Court has acknowledged as a Fair Use of copyrighted material. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (1973), *aff'd*, 420 U.S. 376 (1975). Classroom and library copying are viewed more sympathetically by the courts since they generally do not involve commercial exploitation and have socially useful objectives. *Basic Books*, 758 F. Supp. at 1536.

1. One Copy Per Student

This first prong of the second factor of the Educational Guidelines presents a challenge when analyzing material that has been digitally copied and uploaded to a website that is widely available to the student body as a whole. Even if access is limited to students within a particular class, it would be very difficult to determine how many times a document has been downloaded. However, this is not significantly different from an instructor providing students with a hard copy of copyrighted material. The students are free to copy or do with the material as they please without the instructor or school having any control as to how the material is utilized by the students. In fact, the media neutrality principle would suggest that posting digital copies of otherwise protected material is no different than distributing hard copies in class. As such, the posting by a teacher of digitally copied material to an online server for student access, under the principle of media neutrality, should comply with the requirement that only one copy of the copyrighted material be given to a student in a course.

2. The Material is for Classroom Use or Discussion

There is no question that the material provided to students in the *Patton* case was for classroom use or discussion. Accordingly, this prong of factor two of the Guidelines is satisfied.

3. The Copying Meets the Brevity, Spontaneity, and Cumulative Effect Tests

The next prong of factor two of the Guidelines requires that the copying meet the brevity, spontaneity, and cumulative effect tests. These tests must necessarily be done on a case-by-case basis and each separate allegation of copyright infringement must be analyzed independently to verify that these tests are satisfied.

a. Brevity Test

The Guidelines define brevity for prose as “[e]ither a complete article, story or essay of less than 2,500 words, or an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less.”¹⁵⁴ If this were the only test considered, such a mechanical application of rigid and finite figures would likely be rejected by the courts.¹⁵⁵ However, “brevity” is one test of a multi-test, multi-prong, approach espoused by

154. H.R. REP. NO. 94-1476, at 68.

155. *Patton*, 769 F.3d at 1260.

the Guidelines. As such, it provides courts with concrete numerical guidance on possible minimum acceptable copying standards, which could be used by the courts as a tool in conjunction with the other tests and Fair Use factors.

In the *Patton* case, whether the specific instances of alleged copyright infringement satisfy the brevity test are necessarily evidentiary questions which must be determined on a case-by-case basis. However, on remand, as part of its analysis, the District Court could apply the brevity test to determine whether the Educational Guidelines are satisfied.

b. Spontaneity Test

The “spontaneity” test requires that “[t]he copying [be] at the instance and inspiration of the individual teacher, and [t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.”¹⁵⁶

The spontaneity test is a bit more difficult to satisfy, as most instructors prepare their lessons with anticipation. However, it may be that as part of the final preparation process, and as a result of last minute inspiration, the instructor decides to use copyrighted material in the classroom, and makes the copy available to students. The spontaneity test also requires the court to examine evidence in order to determine whether the inclusion or use of copyrighted material was spontaneous; and thus, falls within the parameters of the Educational Guidelines.

c. Cumulative Effect Test

The Cumulative Effect test requires: (1) that the material copied be used for only one course in the school; (2) not more than one article, story, essay, short poem, or two excerpts be copied from the same author, and not more than three from the same collective work or periodical volume during one class term; and (3) that there not be more than nine instances of multiple copying for one course during one class term.¹⁵⁷

As with the brevity and spontaneity test, the cumulative effect test requires an evidentiary analysis by the court in order to determine whether the copying in question falls within the parameters of the Educational Guidelines.

156. H.R. REP. NO. 94-1476, at 69.

157. *Id.*

4. Copyright Notice Requirement

The Educational Guidelines provide that each copy of the material provided to students include a notice of copyright.

C. Courts Should Consider the Educational Guidelines When Determining Fair Use

Courts should consider the Educational Guidelines in conjunction with, or as additional persuasive authority to, the traditional four-factor Fair Use analysis. In particular, on remand, the District Court in the *Patton* case could consider the Educational Guidelines when conducting its factor three analysis. Even though the District Court held that its factor three analysis would not be bound by the Educational Guidelines, and the Eleventh Circuit upheld the District Court's decision, the Educational Guidelines can still provide the District Court with guidance in its factor three analysis.

The District Court is not bound by the Educational Guidelines. However, in light of the fact that a Fair Use inquiry must be a flexible one,¹⁵⁸ and that the four statutory Fair Use factors are not to be considered exclusively,¹⁵⁹ the Educational Guidelines could be used on remand to determine whether the amount of the copyrighted material used in relation to the work as a whole weighs in favor of Fair Use protection.

XI. CONCLUSION

The Copyright Act of 1976 provides the criteria for the Fair Use defense. The law states four factors:

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.¹⁶⁰

The method for applying the four factors is explained by federal case law. The Eleventh Circuit in *Patton*¹⁶¹ specifically addressed unlicensed

158. *Patton*, 769 F.3d at 1259.

159. *Stewart v. Abend*, 495 U.S. 207, 236–37 (1990).

160. 17 U.S.C. § 107. (2015).

161. *Patton*, 769 F.3d at 1232.

use of copyrighted material by a public university for nonprofit educational purposes. Yet, the guidelines provided by the Eleventh Circuit and the Supreme Court do not provide a bright line standard for determining the application of Fair Use. They actually make the Fair Use analysis complicated, cumbersome, and uncertain. While not an exhaustive list, the guiding principles established by the federal courts for applying the four factors may be summarized as follows:

- The four Fair Use factors are not equally weighted and should not be treated mechanistically with a bright line numerical rule.
- There must be a case-by-case, work-by-work, holistic analysis which carefully balances the four factors in each instance.
- A user has the burden of persuading the court that allowing unpaid use of the copyrighted material is equitable and consistent with the purposes of copyright.
- There is no difference whether the copyrighted work or unlicensed duplicate is hard copy or digital and online.
- A finding of Fair Use may be favored if:
 - The use is for nonprofit educational (teaching) purposes, even if the use is not transformative, if the user and the use itself are actually nonprofit;
 - A copy is transformative rather than merely superseding use of the original work;
 - The copy adds newness, with a distinct purpose or character that changes the original work or gives it new expression, function, meaning, or message;
 - A copy produces a value that benefits the broader public interest;
 - Copies are factual or informational works; or
 - The original has been published.
- A finding of copyright infringement may be favored if:
 - The user receives an indirect economic benefit or enhanced professional reputation;
 - The new work merely supersedes the object of the original work;
 - The secondary use amounts to “commercial exploitation,” i.e., when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material;
 - The original works are highly creative with substantial originality and inventiveness;
 - The original is not yet published;
 - The amount copied has been excessive; or
 - The use causes significant market harm, market substitution, or supplants the original work.

After reviewing the statute and the guiding principles of the courts,

one conclusion is clear: It is not easy to determine whether providing unlicensed copies to students is protected by the Fair Use doctrine. The Educational Guidelines developed by the Congressional Ad Hoc Committee may be quite useful to the courts in applying the four factor test of Fair Use. However, in light of the long, arduous, and somewhat conflicting list of considerations, it may be difficult for instructors to conclude that they are within Fair Use. Putting the responsibility on individual instructors to draw legal conclusions on whether *he/she believes* that Fair Use applies seems fraught with potential liability issues. Leaving instructors without a clear, bright line standard places the instructor in a precarious legal position. Colleges and universities should establish a protocol or internal clearinghouse upon which instructors can rely that they are within Fair Use. College and university instructors should address Fair Use issues to their appropriate university officials to ensure they do not get lost in the complex legal maze.

