**ANNOTATIONS AND COMMENTS**

This jury instruction applies when a defendant raises as an affirmative defense that his use of a plaintiff’s work should be excused as a “fair use.” The affirmative defense of fair use is a mixed question of law and fact as to which the proponent carries the burden of proof. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1307 n.21 (11th Cir. 2008).

Section 107 of the Copyright Act lists the four factors to be considered to determine if the use of the copyright holder’s work is a fair use. 17 U.S.C. § 107. Nevertheless, the fair use doctrine is an “equitable rule of reason,” and neither the examples of possible fair uses nor the four factors recited in the statute are to be considered exclusive. *Peter Letterese & Assocs.*, 533 F.3d at 1308 (citing *Stewart v. Abend,* 495 U.S. 207, 236-37, 110 S. Ct. 1750, 1768, 109 L. Ed. 2d 184 (1990)). Moreover, the statutory factors are not to be treated in isolation, one from another – all four factors “are to be explored, and the results weighed together in light of the purposes of copyright.” *Id*.

Fair use must be determined on a case-by-case basis, by applying the four factors to each work at issue. However, each of the four factors should not be given equal weight, as in a simple mathematical formula. Rather, some factors will weigh more heavily on the fair use determination than others. Similarly, analysis of the amount and quality of the portions used should not be done by a mere mathematical formula and does not have to comply precisely with the Classroom Guidelines that are part of the legislative history, as the Classroom Guidelines do not carry the force of law and were intended to suggest a minimum, not maximum, amount of allowable educational copying that might be fair use; fair use inquiry is a flexible one. *Cambridge University Press v. Patton*, 769 F.3d 1232, 1259-60, 1274-75 (11th Cir. 2014) (quoting from H.R. Rep. No. 94-1476 (1976)).

 Although the burden of proof is on the proponent of the affirmative defense of fair use, the Court in *Cambridge* imposed a burden on the plaintiff to rebut a presumption of fair use under the fourth prong of the test - effect on the market for the work - by coming forward with evidence of the availability of licenses (digital permissions) for the work. *Id*. The Court reasoned that the availability of such licenses weighed against fair use, whereas evidence that no such licenses were available would support the defense. This burden seems to apply only in cases in which the relevant market is for licenses to use plaintiffs' works in a particular way rather than markets for plaintiffs’ original works themselves or derivative works based upon those works. The Court continued to stress that the overall burden of proof is still on the proponent of fair use. *Id.* at 1278-79.

The first factor to be considered, the purpose and character of the use of the copyrighted work (17 U.S.C. § 107), is a factor with several facets. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001). Two of these facets are “ whether the use serves a nonprofit educational purpose, as opposed to a commercial purpose; and the degree to which the work is a ‘transformative’ use, as opposed to a merely superseding use, of the copyrighted work.” *Peter Letterese & Assocs.*, 533 F.3d at 1309. These facets are not to be used to create hard evidentiary presumptions or categories of presumptively fair use. *Id*. at 1309. “Rather, the commercial or non-transformative uses of a work are to be regarded as separate factors that tend to weigh against a finding of fair use, and the force of that tendency will vary with the context.” *Id*.

As to the first of these facets, the “Supreme Court has emphasized 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 paying the customary price.’” *Id*. at 1310 (*quoting Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562, 105 S. Ct. 2218, 2231, 85 L. Ed. 2d 588 (1985)).

The second facet is the degree to which the defendant’s use is “transformative,” as opposed to a superseding use, of the copyrighted work. *Id*. A transformative work is “‘one that adds something new, with a further purpose or different character, altering the first work with new expression, meaning or message.’” *Id*. at 1310 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 114 S. Ct. 1164, 1171, 127 L. Ed. 2d 500 (1994). The more transformative the new work, the less significance is to be afforded other factors, like commercialism, that may weigh against a finding of fair use. *Id*. at 1309-9.

Under the second factor, the nature of the copyrighted work (17 U.S.C. § 107), there is a hierarchy of copyright protection, depending upon the nature of the copyrighted work. Original works merit greater protection than derivative works; creative works merit greater protection than factual works; and unpublished works merit greater protection than published works. *Peter Letterese & Assocs.*, 533 F.3d at 1312; *SunTrust Bank*, 268 F.3d at 1271.

The out-of-print nature of a work is also entitled to consideration under this second factor. The legislative history of Section 107 provides: “A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is ‘out of print’ and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case…” S. Rep. No. 94-473, at 64 (1975) (1975 WL 370213). The Eleventh Circuit endorsed the relevance of the “out-of-print” nature of a work under the second factor in *Peter Letterese & Assocs.*, 533 F.3d at 1313.

The third factor to be considered is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. 17 U.S.C. § 107. In order to come within a fair use, the portion of the copyrighted work that a defendant has taken must be reasonable in light of the purpose and character of the use. *Peter Letterese & Assocs.*, 533 F.3d at 1314. This factor is also “intertwined” with the fourth factor, and “partly functions as a heuristic to determine the impact on the market for the original.” *Id*. The inquiry, therefore, is whether the amount taken is reasonable in light of the purpose of the use and the likelihood of market substitution. *Peter Letterese & Assocs.*, 533 F.3d at 1314 n.30.

Two points on this factor bear particular emphasis. First, the amount and substantiality of the portion used is measured with respect to the copyrighted work as a whole, and it is not measured with respect to the putatively infringing work. *Peter Letterese & Assocs.*, 533 F.3d at 1314-15. Second, in addition to evaluating the quantity of the work copied, what must be also considered is its quality and importance to the original work. Even if it is only a small amount of material that is copied, it may be substantial from a qualitative standpoint if the defendant has copied the heart of the copyrighted work. *Id*.

The fourth factor to be considered is the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. Here, two inquiries are to be made: “ the extent of the 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.” *Peter Letterese & Assocs.*, 533 F.3d at 1315 (quoting *Campbell*, 510 U.S. at 590, 114 S. Ct. at 1177) (internal quotation marks omitted).

The adverse effect with which fair use is primarily concerned is that of market substitution. Because the focus here is on uses “that most directly threaten the incentives for creativity which the copyright tries to protect,” a court should be far less concerned if the user is profiting from an activity of which the copyright owner could not possibly take advantage for his own profit. *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984).