

NOTES

IMITATION IS THE SINCEREST FORM OF ... INFRINGEMENT?: GUITAR TABS, FAIR USE, AND THE INTERNET

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INTRODUCTION

In a small community on the Internet, a battle is taking place. The music industry is on the offensive, laying siege to websites that post guitar tablature (or “tabs”). On the defensive are the small website owners who run these sites and the guitarists who use them. The conflict is over whether guitar tabs infringe on songwriters’ copyrights. Although the implications of this copyright battle are currently restricted to a small Internet community, in a world attempting to balance the use of new technologies with protecting valid copyrights,¹ a decision on whether posting guitar tabs constitutes copyright infringement could impact the path of copyright law and the doctrine of fair use on the Internet in the future.

The legality of online guitar tab sites is relevant to many of today’s law students and has already inspired several works of legal scholarship.² This Note argues that posting guitar tabs on the Internet is not copyright infringement and that similar behavior should be permissible under the fair use doctrine. Beginning by describing guitar tabs and the current conflict with copyright law on the Internet, this Note will explain copyright law and the fair use doctrine as applied to musical works, particularly guitar tabs. The Note then evaluates guitar tabs under the four statutory factors of the fair use test and concludes that guitar tabs constitute a fair use of the underlying songs.³ This finding could have far-reaching ramifications for all Internet users. Specifically, a finding of fair use for guitar tabs could protect not only future guitar tab users and creators but also any originator of a work based on copyrighted material who posts his creation online.

1. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

2. See Aaron Cook, Note, *Music Publishers Slay Musicianship*, 8 TEX. REV. ENT. & SPORTS L. 101 (2007); Laura E. Gary, Note, *A Reason for Musicians To Fret: Copyright Infringement in Online Guitar Tablature*, 9 VAND. J. ENT. & TECH. L. 831 (2007). These works also deal with guitar tabs on the Internet, and the authors come to similar conclusions, albeit by different routes. This Note, while discussing the same four-factor test discussed in the other works, also deals with the broad public policy implications that are implicit in this issue’s resolution.

3. The “underlying works” term is used in this Note to represent the songs on which the guitar tabs are based.

I. GUITAR TABS: THE SOURCE OF THE PROBLEM

Guitar tabs are illustrations of how to play a song on the guitar.⁴ The word “tabs” in “guitar tabs” is short for tablature.⁵ Tabs are created when a person listens to a song and derives by ear the chords or finger placements that sound most like those played in the song.⁶ Those finger placements are then written down in a notation format unique to guitar tabs. This process, which can result in a variety of tabs written by different listeners for the same song,⁷ is distinct from transcribing music because tabs involve evaluating the song and recreating the song as it sounds best on the guitar.⁸ Because of the complexity of many songs and the skill of the professional musicians who play them, many guitar tabs offer easier ways to play songs or how to play songs in different keys, so that novice guitar enthusiasts can learn them.⁹ Other tabs strive to recreate the original as accurately as possible.

4. Tablature, of the kind discussed in this Note, can only be created for guitars. Although a musician could play any instrument using sheet music, only guitars have the fret structure that enables musicians to create a tablature that does not use notes, rhythmic indicators, or the musical scale.

5. See Bob Tedeschi, *Now the Music Industry Wants Guitarists To Stop Sharing*, N.Y. TIMES, Aug. 21, 2006, at C1.

6. See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 659 n.131 (2006). People can also copy guitar tabs from sheet music or tablature purchased in stores. Because of the limited amount of music that is provided commercially in sheet music or tablature form, this is an uncommon practice and will not be considered here. See *infra* notes 104, 191 and accompanying text (describing how only 25 percent of songs are made into sheet music and only 2 percent of songs are published as online tablature).

7. See Urban & Quilter, *supra* note 6, at 659 n.131.

8. See *id.* There are many different techniques for creating a similar sound on the guitar. Each tab creator has dozens of choices on how to recreate a song, which makes each guitar tab a unique and original creation.

9. For example, tab creators often adapt songs that involve complicated finger picking by creating chords for the song so less experienced guitar players can learn to play the song, although it will sound somewhat different. Tabs can also be created for songs that were not originally played on the guitar.

Guitar tabs are distinct from sheet music.¹⁰ Sheet music shows notes on a musical scale, whereas tabs are designed for people who are unable to read sheet music.¹¹ Tabs simply show guitar players where to place their fingers on the strings to get the correct sound.¹² Unlike sheet music, which uses musical notes to convey the length or measure a note should be played, tabs do not convey rhythm. A person must have heard the song before in order to play the tabs correctly.¹³ To illustrate the difference between sheet music and guitar tabs, below is the first line of *Twinkle, Twinkle, Little Star* in sheet music and guitar tab form:¹⁴

Twin-kle, twin-kle, lit - tle star, how I won-der what you are!

```

E | 0-0-7-7-9-9-7--5-5-4-4-2-2-0-- |
B | ----- |
G | ----- |
D | ----- |
A | ----- |
E | ----- |

```

10. See *Morning Edition: Music Industry Goes After Guitar Tablature Sites* (NPR radio broadcast Aug. 7, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5622879>.

11. See Dominic White, *Website for Aspiring Guitarists Fights To Keep on Playing*, DAILY TELEGRAPH (London), Aug. 30, 2006, at 1.

12. See *Morning Edition*, *supra* note 10 (“It’s not formal sheet music. It’s much rougher than that. It uses dashes, numbers, and letters to represent the strings, frets, and chords.”).

13. See *id.* This is why guitar tabs often include lyrics—there is no other way to convey the rhythm of the song.

14. The sheet music shown here is available at <http://en.wikipedia.org/wiki/Image:Twinkle.png>, and is reproduced with permission under Creative Commons Attribution—Share Alike 2.5 Generic License, <http://creativecommons.org/licenses/by-sa/2.5/>. The guitar tabs were constructed by the author.

The reader should note that the tabs for *Twinkle, Twinkle, Little Star* are fairly simple. For more complex songs, the difference between the sheet music and tabs will be even more drastic. For example, tabs use the following symbols to convey guitar techniques: “/” to slide up; “\” to slide down; “h” for hammer-on; “p” for pull-off; “~” for vibrato; “+” for harmonic; “x” to mute a note; and “b” for bends. These symbols, intermixed with the fret numbers and strings, result in guitar tabs that look nothing like the corresponding sheet music.

Obviously, sheet music and tabs look nothing alike. If a musician is familiar with the rhythm and strumming of a song, however, both sheet music and tabs have the same result: they allow musicians to play the song.

This close relationship with the underlying song brings tabs into the realm of copyright law. Because guitar tabs teach musicians an interpretation of another artist's musical composition, tabs may infringe upon the original songwriter's copyright. This is the premise of the current conflict on the Internet.

II. THE CURRENT COPYRIGHT CONFLICT: THE MUSIC INDUSTRY VERSUS GUITAR TAB WEBSITES

Since the Internet's inception, a host of websites have been created that provide forums for users to post and compare guitar tabs to a variety of songs.¹⁵ Many of these sites, in addition to posting guitar tabs, also provide guitar lessons and discussion forums for users to share their experiences and techniques for playing guitar.¹⁶ Over the last several years, millions of visitors have used these sites to learn to play guitar.¹⁷

In July 2006, the music publishing industry, through its representatives, the National Music Publishers' Association and the Music Publishers' Association of America, sent letters to several prominent guitar tab websites demanding that the owners of the websites take down their guitar tabs.¹⁸ The letters indicated that the music industry would send formal notices to the websites' service providers, requesting that they shut down the websites if the guitar tab

15. See generally GuitarTabs.com, <http://www.guitartabs.com> (last visited Mar. 30, 2008); GuitarZone.com, <http://www.guitarzone.com> (last visited Mar. 30, 2008); MyGuitarTabs.com, <http://myguitartabs.com> (last visited Mar. 30, 2008); OLGA: On-Line Guitar Archive, <http://www.olga.net> (last visited Mar. 30, 2008). As of the publication date of this Note, OLGA's website is not available due to "legal issues." *Id.*

16. See, e.g., UltimateGuitar.com, <http://www.ultimate-guitar.com/lessons> (last visited Mar. 30, 2008); see also Tedeschi, *supra* note 5, at C1 ("The free tablature sites often host vibrant communities of musicians, who rate each other's tablature and trade ideas and commentary.")

17. See Tedeschi, *supra* note 5 ("Ultimate-Guitar.com had 1.4 million visitors in July, twice the number from a year earlier."); see also White, *supra* note 11; *Morning Edition*, *supra* note 10 ("The sites are proliferating and attracting millions of visitors.")

18. See OLGA: On-Line Guitar Archive, *supra* note 15 ("We received a 'take down' letter from lawyers representing the NMPA and the MPA."); see also Tedeschi, *supra* note 5.

website providers refused to remove the tabs.¹⁹ Claiming that guitar tabs constitute copyright infringement,²⁰ the music industry argued that guitar tabs are derivative works of the original composition and are therefore covered under the original song's copyright.²¹ As a result of these letters, many of the guitar tab websites shut down or removed their tabs.²² New websites, however, appear every day to fill the void.²³

The conflict over guitar tab websites poses the question of whether posting guitar tabs is copyright infringement or fair use. Analyzing the situation using the four statutory factors of the fair use test demonstrates that there are strong arguments for considering guitar tabs a fair use. Before undertaking this analysis, though, it is important to understand the purpose of both copyright law and the fair use doctrine as they relate to guitar tabs.

19. Letter from Ross J. Charap, Moses & Singer LLP, Counsel for the Nat'l Music Publishers Ass'n, to Peter J. Allen, Owner of GuitarTabs.com, available at <http://www.guitarnoise.com/forums/viewtopic.php?t=26207> (last visited Mar. 30, 2008) ("IN [sic] short, we ask that you promptly remove all unauthorized copyrighted material from your website and confirm its removal to us in writing.... However, in the event that you choose to ignore this request, we shall press our demand that [your service provider] take down your site.").

20. *Id.* ("It has come to our attention that your website, GuitarTabs.com, makes available tablature versions of copyrighted musical compositions The versions of these publishers' musical works that you post on your website are not exempt under copyright law. In fact, U.S. copyright law specifically provides that the right to make and distribute arrangements, adaptations, abridgements, or transcriptions of copyrighted musical works, including lyrics, belongs exclusively to the copyright owner of that work. Many, if not all, of the compositions on your website ... are protected by copyright.... Under the circumstances, both the transcriber of the compositions and you as the owner of the website are copyright infringers.").

21. See Tedeschi, *supra* note 5.

22. The OLGA: On-Line Guitar Archive website was shut down by its server in September 2006 and is no longer available on the Internet. See OLGA: On-Line Guitar Archive, *supra* note 15; see also *Morning Edition*, *supra* note 10 ("Balch says he's temporarily pulled most of the tabs off his site."). An online organization has also formed to protect the interests of guitar tab websites. The Music Student and Teacher Organization ("MuSATO") "[f]ight[s] for the freedom to fairly use tablature in online education." MuSATO, <http://www.guitarzone.com/musato> (last visited Mar. 30, 2008).

23. See Tedeschi, *supra* note 5.

III. COPYRIGHT LAW: A BACKGROUND

A. The History and Purpose of Copyright Law

Copyright law derives from the Constitution. Article I, Section 8 states that “Congress shall have the power to ... 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.”²⁴ Congress acted on this power for the first time in 1790 by passing a United States copyright statute.²⁵ Almost two hundred years later, Congress codified the many amendments and improvements to that law by passing the Copyright Act of 1976, which defines the current copyright law of the United States.²⁶

The purpose of copyright law is to encourage scientific and artistic efforts by protecting the outcome of those efforts—the scientific or artistic works themselves.²⁷ To effect this purpose, copyright law protects “original works of authorship fixed in any tangible medium of expression” from which it “can be perceived, reproduced, or otherwise communicated.”²⁸ Although copyright law protects the works of artists and scientists, courts have always balanced this protection against the public’s need for information and the public welfare.²⁹ In other words, “the progress of Science and useful Arts” is a foremost priority in copyright law, regardless of whether that progress is made by artists, scientists, or the public.

Copyright law covers everything that Americans consider art, as well as some things that Americans might not, including books, essays, paintings, sculptures, plays, movies, speeches, lectures, articles, and software.³⁰ Musical compositions and songs are among

24. U.S. CONST. art. I, § 8.

25. See H.R. REP. NO. 94-1476, at 47 (1976).

26. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (2000)).

27. See U.S. CONST. art. I, § 8.

28. 17 U.S.C. § 102(a).

29. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985) (discussing how copyright law is “intended to increase and not to impede the harvest of knowledge”).

30. 17 U.S.C. § 102.

the artistic creations covered by copyright law. Within the confines of copyright law, however, there is precedent that applies solely to musical works.

B. Copyrights for Musical Works

Musical compositions, including lyrics, are among the works of authorship protected under the copyright statute.³¹ Until thirty years ago, when the 1976 Act was passed, for a songwriter to obtain a copyright for his song, he needed to “fix” his composition in written sheet music or other manuscript form.³² Although musicians continued recording music throughout the twentieth century, those recordings never created a copyright in the recorded song.³³ This changed in 1976, when Congress broadened the definition of “fixing” and made recorded songs copyrightable, regardless of whether the songwriter was willing or able to produce the work in written form.³⁴ According to the Copyright Act in force today, a sound recording is a fixation of a musical composition.³⁵

The copyright of a musical composition covers the entirety of the song.³⁶ If both words and music are combined to produce a single

31. *See id.*

32. *See* *White-Smith Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908); *see also* *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183, 1189-90 (S.D.N.Y. 1973) (discussing the history of *White-Smith* and the 1909 Copyright Act).

33. *See* *Rosette*, 354 F. Supp. at 1190-93.

34. 17 U.S.C. § 101 (“Phonorecords’ are material objects in which sounds ... are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”); *see also* *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 63 (2d Cir. 1996) (holding that a compact disc was a fixed copy); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 433 (4th Cir. 1986) (“One of the important purposes of [§ 102], as declared in the legislative history, was to broaden the scope of fixation, an essential requirement for copyright medium of expression and, specifically to abrogate the ‘artificial’ rule enunciated in *White-Smith Co. v. Apollo Co.*, ... which precluded protection for works not embodied in human-readable medium.” (citation omitted)).

35. *See* 17 U.S.C. § 101 (“‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds”). Although a sound recording can create a copyright, a live performance cannot. A live performance of a song that is not video- or audio-taped will not create a copyright for that song because an unrecorded live performance cannot be copied, reproduced, or communicated. *See* DAVID NIMMER ET AL., *CASES AND MATERIALS ON COPYRIGHT* 32 (6th ed. 2000). A live performance, therefore, does not fall within the definition of a copyrightable work and cannot create a copyright for the performed song.

36. *See* 17 U.S.C. § 102.

artistic creation, the copyright will protect against the unauthorized use of the whole song, the lyrics alone, the music alone, or any combination thereof.³⁷ The copyright for a musical work is lenient, however, regarding rhythms and melodies.³⁸ Because the rhythms and melodies of most popular songs reflect compositions by other songwriters,³⁹ copyright law allows a musical composition to be “suggestive” of other works, as long as the work contains enough originality to render it eligible for an independent copyright.⁴⁰

To infringe the copyright of a musical composition, a person must deprive the copyright holder of a statutory right. Section 106 of the Copyright Act gives copyright holders the rights:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.⁴¹

To take any of these rights from a copyright holder is to infringe on his copyright. Common examples of copyright infringement are the

37. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[B] (2007).

38. See *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (holding that “neither rhythm nor harmony can in itself be the subject of copyright”).

39. See NIMMER & NIMMER, *supra* note 37, § 2.05[D].

40. See *id.* Compare *McIntyre v. Double-A Music Corp.*, 179 F. Supp. 160 (S.D. Cal. 1959) (refusing to find criteria of originality in work that added an introduction, some repetition, and other embellishments), and *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950) (refusing to find originality for work that simply added a new bass line), with Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 253-54 (1996) (describing how, in the context of copyright of musical arrangements, courts are aware of the danger of lowering the standard of originality to any trivial variation from the preexisting work).

41. 17 U.S.C. § 106.

unauthorized public performance of another person's song, using another person's music or lyrics in a different musician's own song, or copying a sound recording without first obtaining a license. The music publishing industry wants consumers and website owners to think that guitar tabs are on this list.⁴² That is up for debate.

IV. HOW GUITAR TABS INTERSECT WITH COPYRIGHT LAW

The guitar tabs posted on the Internet do not constitute obvious copyright infringement because they are not copies of an already existing tablature.⁴³ If online guitar tabs were merely copies of sheet music or published tabs, this Note's argument against infringement would be tenuous. Under such circumstances, guitar tabs would be analogous to the song piracy discussed in the *Napster*⁴⁴ and *Grokster*⁴⁵ cases, in which the websites facilitated direct copying of copyrighted material. But guitar tabs are not exact or complete copies of a musical composition. In fact, each guitar tab is a unique entity reflecting its creator's interpretation of how to play a song. This creative element, combined with the differences between tabs and the original work in both medium (a song recording versus manuscript form) and instrumentation (many instruments versus guitar only), leads to the inquiry whether guitar tabs deserve independent copyright protection and are therefore not infringements of the underlying musical composition.

A. Do Guitar Tabs Deserve Independent Copyright Protection?

Guitar tabs are copyrightable; they are a "tangible medium of expression" that can be "perceived, reproduced, or otherwise communicated."⁴⁶ Guitar tabs do not, however, have the requisite originality to obtain their own copyrights. To create an independent copyright, a musician must do more than write a new bass line⁴⁷ or

42. See *supra* notes 19-21 and accompanying text.

43. See *supra* note 6 and accompanying text.

44. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir 2001).

45. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

46. 17 U.S.C. § 102.

47. *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950).

compose a new introduction;⁴⁸ the new work must be distinguishable as a separate work of authorship. Considering the fact that, when played correctly, guitar tabs allow guitarists to recreate the underlying song, they are not distinguishable as a separate or original work of authorship. Guitar tabs could only qualify for their own copyrights if they took extensive license from the underlying songs. Instead of finding an independent copyright, courts are more likely to consider a guitar tab to be a derivative work of the musical composition.

B. Guitar Tabs as Derivative Works

Guitar tabs are akin to derivative works. A derivative work is any creation based on a preexisting work.⁴⁹ “A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship,” is also a derivative work.⁵⁰ Since tabs are based on a preexisting musical composition, and simply modify or revise that preexisting work, they fall within the definition of a derivative work.

A derivative work receives its own limited copyright,⁵¹ which extends only to the original material added by the derivative author and not to the preexisting material.⁵² Guitar tabs, like musical arrangements, could constitute a copyrightable derivative work.⁵³ Although this may seem like good news for guitar tab creators, it is not.

Copyright law grants a copyright holder the right to create and control derivative works.⁵⁴ Consequently, only the copyright holder has the right to license his song for use in a movie, for performance by another artist, or for the creation of sheet music or tabs. Any

48. *McIntyre v. Double-A Music Corp.*, 179 F. Supp. 160 (S.D. Cal. 1959).

49. 17 U.S.C. § 101 (defining a derivative work 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”).

50. *Id.*

51. 17 U.S.C. § 103.

52. *Id.* “This means that the screenplay for *Get Shorty* will be copyrighted independently of the novel, so long as it meets the requirements for protection.” JAMES S. HELLER, *THE LIBRARIAN’S COPYRIGHT COMPANION* 20 (2004).

53. See NIMMER & NIMMER, *supra* note 37, § 2.05[C].

54. 17 U.S.C. § 106.

unlicensed derivative works are susceptible to an infringement claim. “To be an infringement [a] ‘derivative work’ must ... incorporate a portion of the copyrighted work in some form”⁵⁵ while still meeting a minimum level of originality. Guitar tabs clearly incorporate portions of the underlying work or they would not be able to mimic the sound of the song they are designed to teach. Tabs probably have the minimum originality required for a derivative work as well.⁵⁶ If copyright law is interpreted in this way, guitar tab creators are infringing on songwriters’ copyrights because they did not obtain a license before making the derivative tablatures.

Despite this analysis, guitar tabs may not actually be derivative works. Not all works based on copyrighted material are derivative works. Examples of works that contain unlicensed portions of copyrighted works but remain independent fair uses include: collectors’ guides, restaurant guides, and consumer guide books.⁵⁷ Guitar tabs resemble consumer guide books in that they are “critical and evaluative as well as purely informational” and “do nothing to ‘recast, transform, or adapt the things to which they [refer].”⁵⁸ Similar to the aim of consumer guide books, the intent in making guitar tabs is not to adapt or transform the musical composition but rather to evaluate and critique the underlying work so that it may be accurately and more easily portrayed as a tab. If courts consider guitar tabs in this way, they may be less likely to consider guitar tabs to be derivative works. If, despite the analogy to consumer guide books, courts determine that guitar tabs *are* derivative works, the legal analysis is not completed.

Classification as a derivative work does not render guitar tabs per se copyright infringements requiring a license from the copyright owner. Many creations based on copyrighted works, such as

55. COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 62 (1976).

56. The creation of guitar tabs is somewhat analogous to the work of musical arrangers, whose pieces have met the minimum originality requirements for a derivative work. See *Consol. Music v. Ashley Publ’ns, Inc.*, 197 F. Supp. 17 (S.D.N.Y. 1961); *Desclee & Cie., S.A. v. Nemmers*, 190 F. Supp. 381 (E.D. Wis. 1961).

57. See *Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980, 990-91 (D. Minn. 2003) (discussing examples from *Ty, Inc. v. Publ’ns Int’l, Ltd.*, 292 F.3d 512 (7th Cir. 2002)).

58. *Id.* at 991 (paraphrasing 17 U.S.C. § 101).

parodies⁵⁹ and news reports,⁶⁰ can be published without a license under the doctrine of fair use.⁶¹

V. OVERVIEW OF THE FAIR USE DOCTRINE

A. *History of the Fair Use Doctrine*

Although copyright law protects the creator of an original work by giving him control over public access to that work, courts concluded early on that creators' rights should not be absolute.⁶² Underlying the idea of "fair use" is the recognition that some uses of copyrighted works should not be considered infringement because of the social benefits they offer.⁶³ The doctrine of fair use balances the furtherance of knowledge, literature, and the arts with the copyright holders' potential ability to make a living off of their artistic works.⁶⁴

At common law, fair use was an immeasurable concept with undefined limits.⁶⁵ Courts defined it very broadly and sometimes contradictorily.⁶⁶ One commentator summarized fair use as the golden rule: "Take not from others to such an extent and in such a

59. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that 2 Live Crew's song "Pretty Woman" was a parody of the original song by Roy Orbison and, therefore, constituted a fair use).

60. See *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 98 CIV. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687 (S.D.N.Y. Oct. 1, 2001) (holding that the use of movie clips in a news broadcast reporting the death of the actor in the clips constitutes a fair use).

61. Other defenses to copyright infringement that have been suggested for guitar tabs will not be discussed in this Note. Most notably, various First Amendment arguments insist that certain works should be granted fair use status under copyright law. See ROBERT C. LIND, COPYRIGHT'S LAW 162 (2002) ("Several courts have addressed the issue of whether a defense based on the First Amendment protection of expression, separate from the fair use defense, should be recognized. To date, no court has adopted such a defense, though a compelling set of facts may persuade a court of the need for such a defense."). Although interesting, this argument falls outside the scope of this Note.

62. See *Campbell*, 510 U.S. at 575 (quoting U.S. CONST. art. I, § 8, cl. 8) ("[S]ome opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[to] promote the Progress of Science and useful Arts.'").

63. See KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES 22 (1993).

64. See LEON E. SELTZER, EXEMPTION AND FAIR USE IN COPYRIGHT 31 (1978).

65. See NIMMER & NIMMER, *supra* note 37, § 13.05.

66. *Id.*

manner that you would be resentful if they so took from you.”⁶⁷ Alternatively, some courts equated fair use with whether the new use showed substantial similarity with the old.⁶⁸

The Copyright Act of 1976 codified fair use for the first time.⁶⁹ Intending to summarize judge-made fair use principles, the Act constitutes one of the most important additions to copyright law.⁷⁰ The statutory definition of the fair use exception seeks to balance the rights of the creator of a copyrighted work with the need to advance science and the arts.

B. Statutory Fair Use

Title 17 of the United States Code outlines the copyright laws for the United States. Section 107 defines fair use:

Notwithstanding the provisions of sections 106 and 106A [which outline the rights of a copyright holder], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is *not an infringement of copyright*.⁷¹

Although the statute lays out specific areas that have a presumption of fair use, no use of copyrighted material is *per se* “fair.” The statute requires a case-by-case analysis of all fair use claims.⁷²

To help the court in its analysis, Section 107 lays out four factors to consider when analyzing fair use claims:

67. *See id.* § 13.05[A] (quoting Joseph McDonald, *Non-infringing Uses*, 9 BULL. COPYRIGHT SOC'Y 466, 467 n.355 (1962)).

68. *See id.* § 7.03, at 452.

69. *See* 17 U.S.C. § 107 (2000).

70. NIMMER & NIMMER, *supra* note 37, § 7.03, at 452.

71. 17 U.S.C. § 107 (emphasis added).

72. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.” (citation omitted)).

- (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.⁷³

For a finding of fair use, all four factors need not favor the defendant,⁷⁴ and no one factor is dispositive in the court's analysis.⁷⁵ A court must evaluate the alleged fair use under the totality of the circumstances.⁷⁶

Although the four factors delineate fair use for the courts, judicial findings resulting from the application of this test have been inconsistent.⁷⁷ Because the factors are general in nature, reasonable minds often differ regarding any or all of the four factors.⁷⁸ Although fair use defenses are commonly employed to defend against claims of copyright infringement, the outcomes vary unpredictably. In order for guitar tab sites to avoid a finding of copyright infringement, they must be analyzed under this unpredictable doctrine and, with any luck, be deemed a fair use.

VI. IF GUITAR TABS WENT TO COURT...

If a guitar tab website owner took his fair use claim to court, he would have an uphill battle against traditional thinking to prove fair use. Traditionally, a subject like guitar tabs would not trigger

73. 17 U.S.C. § 107.

74. See *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991).

75. See *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 98 CIV. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687, at *19 (S.D.N.Y. Oct. 1, 2001).

76. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.").

77. See *Fin. Info., Inc. v. Moody's Investors Serv., Inc.*, 751 F.2d 501 (2d Cir. 1984) (reversing the district court's finding of fair use, as well as rejecting all four factors relied upon by the district court in reaching its conclusion).

78. NIMMER & NIMMER, *supra* note 37, § 13.05[A][5].

notions of fair use because the two uses are so similar.⁷⁹ Substantial similarity favors a finding that the new work constitutes infringement.⁸⁰ Guitar tabs are undoubtedly similar to the original songs and, therefore, are unlikely to constitute fair use under the substantial similarity test. Additionally, courts have been reluctant to rule in favor of fair use where the copyrighted work was “merely retransmitted in a different medium.”⁸¹ Both of these traditional views could be applied to guitar tabs and result in a finding against fair use.

There are several other significant obstacles that a website owner would need to overcome. Several prominent copyright cases regarding issues of song use⁸² and fair use on the Internet have produced unfavorable results for defendants arguing fair use.⁸³ The courts had strong reason to rule against fair use in these cases, however. For example, a fair use finding would have been inappropriate in *UMG Recording*, where entire CDs were being transferred into MP3 format and redistributed by the websites.⁸⁴ Similarly, *Napster* featured software that encouraged the same direct copying seen in *UMG Recording*, only the copies were transmitted in different forms across the Internet to millions of users.⁸⁵ Both of these Internet cases involved direct copying with almost no change in the purpose, function, or form of the underlying work.

Guitar tabs are distinguishable from those cases; they change the purpose, function, and form of the original composition. Instead of taking a song meant to entertain and copying it for further entertainment purposes, guitar tabs take an oral entertainment medium

79. See SELTZER, *supra* note 64, at 24 (“Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the ‘ordinary’ use of it. When copies are made for the work’s ‘ordinary’ purposes, ordinary *infringement* has customarily been triggered, not notions of fair use.”).

80. See *supra* note 68 and accompanying text.

81. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

82. See *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962) (“Whatever may be the breadth of the doctrine of ‘fair use,’ it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a ‘fair use’ merely because the infringer had no intent to infringe.”).

83. See *UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00-CIV. 472 (JSK), 2000 WL 710056, at *1 (S.D.N.Y. Nov. 14, 2000) (“Defendant’s copyright infringement was clear, and the mere fact that it was clothed in the exotic webbing of the Internet does not disguise its illegality.”).

84. See *id.*

85. See *Napster*, 239 F.3d at 1004.

and recreate it in the form of a visual teaching aid. These distinguishing characteristics give guitar tab website owners one of the strongest arguments for fair use seen in recent years. Considering traditional thinking and the nuanced issue of guitar tabs, however, the fair use argument may still not prevail. Such a loss may be dangerous for the Internet in the long run. A finding of fair use in a guitar tabs case would be instrumental in protecting the educational use of materials on the Internet that are based on copyrighted works.

If a guitar tab website owner does take his claim to court, guitar tabs, like all works that claim to be fair use, must be evaluated by the four factors of the fair use test. Even considering that interpretation under these factors is unpredictable and that one court's infringement is another court's fair use,⁸⁶ there are strong arguments under each of the four factors that use of a song for the creation of guitar tabs constitutes a fair use.

VII. GUITAR TABS AS FAIR USE

A. Guitar Tabs as Fair Use: The Purpose and Character of the Use

The first factor of the fair use test instructs the court to consider the "purpose and character" of the defendant's use of the copyrighted material.⁸⁷ The Supreme Court has delineated three elements to this factor: (1) whether the use is for a commercial or nonprofit purpose,⁸⁸ (2) whether the use is one set out in the preamble of Section 107,⁸⁹ and (3) whether the use is transformative.⁹⁰ Each of these elements will be debated if the music industry takes a website owner to court, but careful consideration of the issues should reveal a fair use in the purpose and character of guitar tabs. When analyzing the above elements, a court should find that guitar tab websites have a nonprofit purpose and are an educational use set out in the preamble to Section 107; but a court may not find that they are transformative. These findings should

86. See *supra* notes 77-78 and accompanying text.

87. 17 U.S.C. § 107 (2000).

88. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

89. See *id.* at 578-79.

90. See *id.* at 579.

encourage a ruling for fair use. The analysis for each element will be discussed below.

1. Guitar Tab Websites Are a Commercial Use With a Nonprofit Purpose

Although Section 107 specifically directs courts to consider the commercial or nonprofit purpose of a use, this is only one element in a court's consideration of the "purpose and character" factor.⁹¹ "[T]he 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."⁹² If, however, a use is commercial, that fact will go against a finding of fair use.⁹³

Whether guitar tab websites are commercial or nonprofit for the purposes of copyright law is debatable. The music publishing industry claims that these sites are commercial,⁹⁴ but ascertaining whether guitar tab websites are commercial enterprises is difficult. All the sites are privately owned, so, unlike publicly-held corporations, the owners have no disclosure requirements for their yearly statements.⁹⁵ Discovering how much revenue the sites generate is almost impossible.⁹⁶

The owners of the guitar tab sites claim that they do not generate any revenue. Cathal Woods, the creator of one of the first guitar tab websites, Olga.net, claims that in the fourteen years that he has run the site, "we've never taken a penny."⁹⁷ Woods claims that any and all profits that Olga.net makes from advertising are used to pay for bandwidth and a legal defense fund.⁹⁸ A similar tale is told by Robert Balch, the publisher of GuitarTabs.com: "Even though the

91. *See id.* at 584.

92. *Id.*

93. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

94. *See Morning Edition*, *supra* note 10 (quoting Jacqueline Charlesworth) (describing "sites that have hundreds of guitar tabs or sheet music—often with lyrics—where they're running ads and the owner of the site is basically making money off other peoples' copyrighted work").

95. *See Tedeschi*, *supra* note 5.

96. *Id.*

97. *Id.*

98. *See id.*

site gets two million page views a day, Balch says he runs just enough ads to cover the fees he pays for server space.”⁹⁹

If the story told by website owners is true, running a guitar tab website more closely resembles running a nonprofit organization than a commercial enterprise. Granted, websites are generally considered commercial ventures because they have the potential to make revenue through advertising.¹⁰⁰ Guitar tab websites are no exception; they have the potential to be profit-making enterprises, even if they are not currently being operated as such. These facts tend to go against a finding of fair use.

It is possible, however, for guitar tab websites to be nonprofit, and the fact that the owners have not filed for nonprofit tax status should not bar the court from judging the nonprofit *purpose* of the use over its facial commercial aspects. In *Kelly v. Arriba Soft Corp.*,¹⁰¹ the website owner was using the plaintiff’s copyrighted photographs as an informational and indexing tool. The court found that “while such use of Kelly’s images was commercial, it was more incidental and less exploitative in nature than more traditional types of commercial use.”¹⁰² Such use “only slightly” weighed against a finding of fair use.¹⁰³ Because guitar tab website owners do not try to make, and are allegedly not making, significant profits from guitar tabs, the commercial potential of the sites should weigh only slightly against a finding of fair use.

Similarly, guitar tabs themselves do not always have commercial value. Only about 25 percent of all songs composed are made into sheet music.¹⁰⁴ The music industry does not consider the other 75 percent to have a sufficient commercial value to justify their publication.¹⁰⁵ Yet guitar tabs are made available online for almost

99. See *Morning Edition*, *supra* note 10.

100. See generally *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (discussing the commercial aspects of the Napster and Grokster programs as well as the Internet as a whole).

101. 336 F.3d 811 (9th Cir. 2003).

102. *Id.* at 818.

103. *Id.*

104. See Tedeschi, *supra* note 5. Similarly, only 2 percent of songs are available as online tablatures. Bob Tedeschi, *Hoping To Move Guitar Notation Into the Legal Sunshine*, N.Y. TIMES, Apr. 2, 2007, at C1.

105. See *id.*

every song, including songs by little-known artists.¹⁰⁶ The fact that guitar tab websites feature all tabs, including those that the music publishing industry does not consider to have commercial value, furthers the inference that guitar tabs and the websites that feature them have a noncommercial purpose. This noncommercial use furthers the presumption in favor of fair use.

2. Guitar Tabs Are a Fair Use as Set Out in the Preamble to Section 107

The purpose and character of guitar tabs as a teaching tool also encourages a finding of fair use because its use is one of the “fair uses” set out in the preamble to Section 107. The preamble lists criticism, comment, news reporting, teaching, scholarship, and research as examples of fair use.¹⁰⁷ When a copyrighted work is being used for one of the purposes stated in the preamble, it creates a presumption in favor of fair use.¹⁰⁸ The intent behind the preamble’s list is to “distinguish[] between ‘a true scholar and a chiseler who infringes a work for personal profit.’”¹⁰⁹

The use made of guitar tabs on the Internet fits several of the examples in the preamble to Section 107, specifically teaching, scholarship, and research. Guitar tab websites are self-proclaimed learning environments, whose use of guitar tabs is primarily to teach people how to play guitar.¹¹⁰ “It’s teachers educating students The teachers here don’t even get paid nor do the students have to pay this website to access the lessons.”¹¹¹ Guitar tab websites use

106. *See id.* The list of available tabs for little-known artists is almost endless but includes some of the author’s favorite musicians like Lucy Kaplonsky, Kristen Hall, and Matt Nathanson.

107. 17 U.S.C. § 107 (2000).

108. *See* Video-Cinema Films, Inc. v. Cable News Network, Inc., 98 CIV. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687, at *19 (S.D.N.Y. Oct. 1, 2001) (“[W]here the Defendants’ use is for one of the purposes set forth in the statute, there is a strong presumption this factor favors the alleged infringer.” (citing *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992))).

109. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (quoting *Wainwright Secs. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977)).

110. White, *supra* note 11 (noting that “[w]ebsites [are] used by millions of aspiring musicians to learn the guitar”); *GuitarZone.com*, *supra* note 15 (“This website, among other things, helps users teach each other how they play guitar parts for many different songs.”).

111. Letter from Rob Balch, Manager of Guitar Tab Universe, to Guitar Tab Universe visitors (July 17, 2006), *available at* http://www.guitarzone.com/w/Main_Page.

tabs to teach future musicians and serve as a source for finding new songs to play and new techniques to practice. These sites have no intention of being “chiselers” who infringe copyrighted works for personal profit.¹¹² Instead, their goal is to help guitar scholars learn their trade or hobby more easily.

Although the intent of guitar tab websites is to teach, they still may not receive a presumption in favor of fair use. Schools and universities also have the primary purpose of education, but they are tightly restricted in what uses they make of copyrighted works by the “Guidelines for Educational Uses of Music.”¹¹³ The Guidelines dictate that teachers may only make photocopies of or changes to music: 1) for emergency copies to replace copies that were already purchased, 2) for excerpts that are not used for performance, or 3) for small editorial changes to purchased music. Teachers are forbidden from making copies of music for the purpose of performance or in lieu of purchasing copies of the music.¹¹⁴ Clearly, an educational or teaching purpose is not a free pass to use copyrighted works. The defendant must still establish a fair use under all four factors.

The goal of the first factor of the fair use test is to gauge the intent or motive of the accused infringer. From the statements of website owners, and from the setup of the sites themselves, the true motive of guitar tab websites is to teach people how to play guitar. Because that use is set out in the preamble to Section 107, it should encourage a presumption in favor of fair use.

112. See *Guitarnoise.com, Guitar Noise Forums—OLGA Offline*, <http://www.guitarnoise.com/forums/viewtopic.php?t=26207> (last visited Mar. 30, 2008) (describing how the site owner of OLGA.net created the site with the legally tenuous understanding that tabs were not infringement. He is quoted as saying, “I have long been of the understanding that an original, by-ear transcription of a song, which is a duplicate of no copyrighted work and which generally deviates substantially from the work on which it is based is the property of its transcriber, and not the original composer of the song.”).

113. See H.R. REP. NO. 94-1426, at 70-74 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5684-88. Congress created these Guidelines in association with the music publishing industry to allay the fear that making photocopies of educational works would reduce the value of the copyrighted works and discourage the creation of educational material. *Id.*

114. NIMMER & NIMMER, *supra* note 37, § 13.05[E][1]. Such concerns are not as prominent with guitar tabs and will be discussed in more depth under the “market effect” factor of the fair use test. See *infra* Part VII.D.

3. *Guitar Tabs Can Be, but Are Not Usually, Transformative*

The last element that courts consider when evaluating the “purpose and character” factor of the fair use test is whether the use is transformative. Transformative uses either retain parts of the original work when creating a new work or give a new character, expression, or meaning to the old work.¹¹⁵ A transformative use makes the new work distinct and distinguishable from the old.¹¹⁶ Courts are considerably more likely to find fair use when the purpose or character of the new use is transformative.¹¹⁷ Lack of a transformative use, however, is not fatal to a finding of fair use.¹¹⁸

The arguments for whether guitar tabs are transformative are similar to those for whether guitar tabs warrant their own copyrights. Guitar tabs could be viewed as transformative because they take the entirety of a musical composition—featuring several instruments, rhythms, and other sound effects—and parse it down to a simple line of chords or finger motions to be played on the guitar. A similar argument was made in *Antioch Co. v. Scrapbook Borders, Inc.*, in which the defendant took copyrighted stickers and put them into scenic depictions to give consumers ideas of how to use them in scrapbooks. The defendant claimed that the idea books were instructional and that “such a use is an educational, and therefore, productive use, which ‘result[s] in some added benefit to the public beyond that produced by the first author’s work.’”¹¹⁹ This argument ultimately failed and would probably fail with guitar tabs, as well.

Guitar tabs are not transformative. They are not very distinct from the original work, and if done well, they should result in sounds that are indistinguishable from the original song when played correctly on the guitar. The definition of “transform” is “to change in structure, appearance or character.”¹²⁰ Guitar tabs are hardly transformative in this way, as they are meant to mimic the

115. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

116. *Id.*

117. See *id.* (“[T]he 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.”).

118. *Id.*

119. *Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980, 989 (D. Minn. 2003) (citation omitted).

120. LANGENSCHIEDT’S POCKET MERRIAM-WEBSTER ENGLISH DICTIONARY 764 (1997).

original composition's sounds. It logically follows that a court would view the small changes that tablature creators make to the sound of the underlying song as insufficient transformation to render guitar tabs transformative for fair use purposes.¹²¹

Although the tabs themselves may not be transformative, it does not mean they do not constitute a transformative *use*. Compare guitar tabs to the facts of *Kelly v. Arriba Soft Corp.*¹²² In *Kelly*, the defendant was sued for placing thumbnails of the plaintiff's photographs on his website.¹²³ Although the pictures were exact, though smaller, copies of the original, the court found the thumbnails to be a transformative use.¹²⁴ Emphasizing the different purposes of the works, the court noted that one was an "artistic work[] intended ... to engage the viewer in an aesthetic experience" whereas the other use was unrelated to any aesthetic function.¹²⁵ This analysis is directly analogous to guitar tabs, which are also copies of the musical composition but are used for a separate, non-aesthetic purpose. The *Kelly* court found its fact situation to be "inapposite" to cases where "[c]ourts have been reluctant to find fair use when an original work is merely retransmitted in a different medium" because "the resulting use of the copyright[ed] work in those cases was the same as the original use."¹²⁶ An example of such an inapposite situation is the reproduction of CDs into MP3 format,¹²⁷ which involves merely a retransmission of an artistic work into a new medium. Guitar tabs, like the thumbnails in *Kelly*, serve a different function on the Internet than the artistic expression function of their underlying works.¹²⁸ Therefore, because a

121. On this element, I respectfully dissent from the opinion that "[a] more detailed tab, even though it may include the entire song, should be afforded greater protection than a tab that simply lists the basic chords for the song, since the detailed tab has a transformative purpose." Gary, *supra* note 2, at 855. In fact, more detailed tabs are less transformative because they are better and more accurate imitations of the original composition. Tabs that are less detailed, for instance those that take complicated guitar pieces and transform them into a simple series of chords, are more transformative because they are more clearly distinguishable from the original song.

122. 336 F.3d 811 (9th Cir. 2003).

123. *Id.* at 814-16.

124. *Id.* at 819.

125. *Id.* at 818.

126. *Id.* at 819.

127. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

128. *See Kelly*, 336 F.3d at 819.

guitar tab is not superseding a musical composition but, rather, has created a different purpose for the song, a guitar tab is transformative.¹²⁹

*Nunez v. Caribbean International News Corp.*¹³⁰ represents another example of a court finding a transformative use with exact copies. The First Circuit found that copying a modeling portfolio photograph and using it in a news article was a transformative use.¹³¹ By taking an artistic photograph and transforming it into news, the defendant created a new meaning or purpose for the work.¹³² Similarly, guitar tabs would also be transformative because they take an artistic work and give it new meaning by transforming it into a teaching tool. Although the decision of whether guitar tabs are transformative is a close call, precedential support exists in favor of a finding that they are transformative in nature.

In sum, the first factor of the fair use test creates presumptions both in favor of and against a finding of fair use for guitar tabs. Guitar tab websites are technically a commercial use, which creates a presumption against fair use. Website owners do not make money from guitar tabs, however, nor do they *want* to make money from them. Guitar tab sites may technically be commercial, but the purpose and intent behind them is nonprofit. Additionally, guitar tabs are used for teaching, a purpose included in the preamble to Section 107. This gives them a presumption in favor of fair use. This presumption is weakened, however, by the non-transformative nature of guitar tabs, though it could be strengthened by their transformative use. Under the “purpose and character” factor, there is no clear determination of whether guitar tabs are or are not a fair use. The same situation will arise with the second factor of the fair use test under which courts consider the nature of the copyrighted work.

B. Guitar Tabs as Fair Use: The Nature of the Copyrighted Work

Courts use the second factor of the fair use test to determine how much protection the underlying copyrighted work deserves. Works

129. *See id.*

130. 235 F.3d 18 (1st Cir. 2000).

131. *See id.*

132. *Id.*

that have yet to be published and works that are creative rather than functional are subject to more copyright protections than other works.¹³³ The songs that guitar tabs are based on will be evaluated under both of these elements.

1. Guitar Tabs Are Based on Previously Published Works

Copyrights give their owners several exclusive privileges, including the right of first sale.¹³⁴ Courts generally accord great respect to this right and give a greater level of copyright protection to unpublished works, making fair use claims involving unpublished works more difficult.¹³⁵ In contrast, courts provide more leeway to fair use claims on works that have already been published.¹³⁶

Guitar tabs are based on works that have already been published. To make a guitar tab, a musician listens to the original song to determine the correct finger placements. Therefore, guitar tab creators must own or have obtained a copy of the song in order to make the tablature. If copies of the song are being dispersed to the public, the song has been published.¹³⁷ Because the artist has already made a profit by selling the work and has opened his ideas to the public for critique and use, courts give published works, like songs on the radio, less protection than unpublished compositions. Because guitar tabs use published works, they are entitled to more leeway with respect to their use of the original song and courts should be more willing to accept fair use arguments. Although this element of the “nature of the copyrighted work” factor goes in favor of a fair use finding, the next element does not: whether the copyrighted work is creative or functional.

133. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (“[T]he scope of fair use is narrower with respect to unpublished works.”); *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 98 CIV. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687, at *23 (S.D.N.Y. Oct. 1, 2001) (“Creative works are entitled to greater copyright protection than factual works.”).

134. See *Harper*, 471 U.S. at 552-53.

135. *Id.* at 550-51.

136. See *Video-Cinema*, 2001 U.S. Dist. LEXIS 25687, at *23 (“Since Defendants did not usurp the first publication rights ... they enjoy a slightly wider degree of latitude in making their fair use claim.”).

137. See 17 U.S.C. § 101 (2000) (“‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”).

2. *Guitar Tabs Are Based on Creative, Not Functional, Works*

Copyright law affords greater protection to creative works as opposed to functional works.¹³⁸ This is part of copyright law's balance between the copyright holder's rights and the continuing desire to progress science and the arts.¹³⁹ Functional works tend to contain methods or sequences that could assist other scientists or artists in furthering their own work. Therefore, copyright law has acknowledged a greater need to disseminate these works quickly into the market.¹⁴⁰ The opposite is true for artistic and creative works. Guitar tabs are based on creative works—songs, which warrant a higher degree of copyright protection.¹⁴¹ Although guitar tabs themselves are functional in nature, the fact that they are based on creative works makes fair use claims more difficult.

As with the “purpose and character” factor of the fair use test, the “nature of the copyrighted work” factor can be interpreted either for or against a finding of fair use. One element—the previous publication of the work—enhances the fair use argument, while the other element—the creative nature of the work—undermines it. Considering the altruistic motives of guitar tab websites, their educational purpose, and the previous publication of the underlying work, there are several strong presumptions in favor of fair use. These presumptions will be less evident in the next factor of the fair use test: the amount and substantiality of the copyrighted work used.

C. Guitar Tabs as Fair Use: The Amount and Substantiality of the Copyrighted Work Used

The third factor of the fair use test considers how much of the copyrighted work the new use acquires. “Every book in literature, science and art, borrows, and must necessarily borrow, and use

138. See *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 545 U.S. 91 (2005) (“The more artistic protection is favored, the more technological innovation may be discouraged.”).

139. See *supra* note 29 and accompanying text.

140. See *Harper*, 471 U.S. at 563 (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

141. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (“[T]he Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes.”).

much which was well known and used before.”¹⁴² This borrowing must, of course, have a limit. Courts use the third factor to determine what amount of “borrowing” is acceptable under copyright law, hence a fair use, and what amount is infringement.¹⁴³ Courts consider two elements under the third factor: (1) whether the use copies a substantial portion or the “heart” of the copyrighted work, and (2) whether the copying was reasonable in relation to its purpose.¹⁴⁴

1. Guitar Tabs Copy a Substantial Portion or the “Heart” of the Copyrighted Work

When considering the “amount and substantiality” factor, courts first determine how much of the copyrighted work is used by the new work.¹⁴⁵ Congress did not define in the Copyright Act what constitutes a substantial portion of a work or the “heart” of a work, choosing instead to leave those determinations to the courts.¹⁴⁶ One court described the substantial portion element as a distinction test: “The test of infringement is whether the work is recognizable by an ordinary observer as having been taken from the copyrighted source.”¹⁴⁷ This test is only one of several that courts use to interpret this element. Because no clear standards for what qualifies as a substantial portion have emerged, judges can, and do, differ on what constitutes infringement and what constitutes fair use under the third factor.¹⁴⁸ A work does not become fair use, however, simply because it uses an insubstantial portion of the original work.¹⁴⁹

142. *Id.* at 575 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436)).

143. *See id.* at 586-89.

144. *See Video-Cinema Films, Inc. v. Cable News Network, Inc.*, No. 98 CIV. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687, at *25 (S.D.N.Y. Oct. 1, 2001).

145. *See Harper*, 471 U.S. at 564.

146. *Compare id.* at 564-66 (majority opinion), *with id.* at 598-602 (Brennan, J., dissenting).

147. *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962) (citation omitted).

148. *Compare Harper*, 471 U.S. at 566 (majority opinion) (finding the new use to take “a meager, indeed an infinitesimal amount of Ford’s original language”), *and id.* at 598 (Brennan, J., dissenting) (finding the use to be insubstantial because it used only 300 of the 200,000 words in the underlying work), *with id.* at 565-66 (majority opinion) (finding the use to be substantial since it made up 13 percent of the infringing work).

149. *See id.* at 565.

Guitar tabs have few fair use arguments under this element. In order to teach people how to play a song, guitar tabs must copy a substantial portion of that song. A bystander may look at guitar tabs and argue that they only copy a few measures or lines of a song, thus their use must be considered insubstantial. But most songs involve a simple melody repeated over and over, so a few lines of a guitar tab are often enough to capture an entire song. There is also the problem of guitar tabs including lyrics as an illustration of the song's rhythm.¹⁵⁰ Between the melody and lyrics, guitar tabs include a substantial portion of the underlying work.

Substantial differences, however, exist between a song played by the artist and the sound rendered by following the guitar tabs. Guitar tabs contain only the melody of a song; they cannot possibly encapsulate the other complex features of recorded music. One melody out of many sounds is not necessarily a substantial portion of a song but may well be the foundation of the song. Because the "substantial portion" test also inquires into whether the portion used is the "heart" of the work—which the melody of a song would be—this is likely to be an unfavorable inquiry for guitar tabs.

Although guitar tabs copy a substantial portion or the "heart" of the underlying song, a finding that they cannot be fair use does not automatically follow. "[U]nder certain circumstances, a court will conclude that a use is fair even when the protected work is copied in its entirety."¹⁵¹ A court may overlook the copying of a substantial portion of the underlying work when arguments for the other three factors of the fair use test are convincing. It may also rule in favor of fair use if, despite using a substantial amount of the underlying work, the portion of the work used is reasonable in relation to the new work's purpose.¹⁵²

2. Guitar Tabs Are Reasonable Copying in Relation to Their Purpose

Under the third factor, courts consider whether the quantity of the material used was "reasonable in relation to the purpose of the

150. The legal issue of whether the lyrics in and of themselves are copyright infringements will not be broached by this Note.

151. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001).

152. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003).

copying.”¹⁵³ Guitar tabs must acquire a substantial portion of a song in order to teach musicians how to play that song. This amount of taking of the original work, however, is reasonable in relation to the teaching purpose of guitar tabs.

This reasonableness element often involves a question of fairness.¹⁵⁴ Is it fair for guitar tabs to acquire a whole song for the purpose of teaching? Musicians typically want their music to be sung and played by their fans.¹⁵⁵ Because the fans are not performing their songs publicly or for profit,¹⁵⁶ the musician loses none of his profitable rights under the Copyright Act,¹⁵⁷ and the popularity of the songs increase from the use of tabs. For musicians to encourage this behavior from their fans and then allow music industry representatives to sue fans for infringement is arguably more unfair than it is for tablature creators to make tabs based on the musicians' songs. Although guitar tabs reproduce a substantial portion of the songs on which they are based, that taking is reasonable in relation to their teaching purpose and is not unfair to musicians who make almost no profit from the sheet music anyway.¹⁵⁸ This argument creates another presumption in favor of a finding of fair use.

An argument could be made against fair use that these particular songs do not need to be copied in order to teach people to play guitar. For example, one could use works from the public domain to learn to play guitar instead of popular songs that are still under copyright. In fact, public domain works are commonly used to teach students the rudimentary elements of playing guitar.¹⁵⁹ Guitar

153. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

154. *See id.* at 589.

155. *See* SELTZER, *supra* note 64, at 29.

156. *See* Thomas Chesney, “other people benefit. i benefit from their work.” *Sharing Guitar Tabs Online*, 10 J. COMPUTER-MEDIATED COMM. 5 (2004), available at <http://jcmc.indiana.edu/vol10/issue1/chesney.html> (discussing how the large majority of survey responses reflected that tabs are used for playing guitar for pleasure, to improve guitar skills, and to document songs that cannot be found elsewhere, while no responses reflected a use for public performance).

157. The profitable rights comprise the rights to reproduce, distribute, and perform the song. *See generally* Copyright Act, 17 U.S.C. § 106 (2000).

158. *See infra* Part VII.D for a discussion on whether musicians lose any market power by the making of guitar tabs.

159. For example, the first song that the author learned to play on the guitar was “Ode to Joy,” a work that has been in the public domain for some time.

technique and style has increased in complexity dramatically in the last century, however, especially with the development of the blues, jazz, and the electric guitar.¹⁶⁰ Hammers, slides, power chords, and other techniques that were not frequently used before suddenly became a necessary element of every guitar player's retinue.¹⁶¹ Because copyright now encompasses the seventy years past the author's death,¹⁶² almost every song written in the last century is still under copyright. If only public domain works could be used to teach guitar, today's guitar players would be dramatically limited in the level and complexity of techniques they could learn because works available in the public domain are unlikely to employ these new techniques. It is not only necessary and reasonable that guitar tabs take the entirety of the underlying songs, but also that they take modern songs. This necessity should weigh in favor of a finding of fair use. The next factor of the fair use test, the effect on the market, also encourages a court to make a finding of fair use.

D. Guitar Tabs as Fair Use: The Effect of the Use on the Market for the Copyrighted Work

Courts consider the last factor of the fair use test as the most important.¹⁶³ Under the fourth factor, fair use has been defined as a "use that is necessary for the furtherance of knowledge, literature, and the arts and does not deprive the creator of the work of an appropriately expected economic reward."¹⁶⁴ This factor considers "the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."¹⁶⁵ It investigates whether the new work adversely affects the copyright holder's ability to make a profit from his copyright.¹⁶⁶ Courts consider not

160. Ger Tillekens, *The Key to Quiet Desperation: Modulating Between Misery and Madness*, in RUSSELL REISING, *SPEAK TO ME: THE LEGACY OF PINK FLOYD'S THE DARK SIDE OF THE MOON* 111 (2006) (discussing how the guitar technique in just one modern song broke from the past and revolutionized the way the guitar is played today).

161. *Id.*

162. 17 U.S.C. § 302.

163. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) ("This last factor is undoubtedly the single most important element of fair use.").

164. SELTZER, *supra* note 64, at 31 (footnote omitted).

165. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901)).

166. See *Harper*, 471 U.S. at 568.

only the harm the new work may cause to current markets for the original work, but also whether widespread use of the new work could harm potential markets for the original.¹⁶⁷ Courts distinguish, however, between an infringement, which supersedes the market for the original work, and a fair use, which is allowed to suppress the market for the original work.¹⁶⁸ This factor is often hotly debated.

Courts may consider the following elements in determining the effect on the market: (1) the overall effect the new use will have on the market; (2) the likelihood that copyright holders will license the new use; and (3) whether a reasonable copyright holder would consent to the new use.

1. Guitar Tabs Do Not Supersede Sheet Music Nor Do They Provide a Substitute For It

The music publishing industry alleges that guitar tab websites damage their market for sheet music.¹⁶⁹ They claim that guitar tabs are depriving musicians “of the ability to make a living.”¹⁷⁰ Considering the nominal profits that musicians make from their sheet music,¹⁷¹ this claim appears somewhat fallacious. The market for sheet music, however, has unquestionably decreased over the last fifteen years, a fact that requires a careful consideration of whether guitar tabs have harmed the sheet music market and whether they should be considered a fair use.

As described in Part I, guitar tabs are not the same as sheet music. Sheet music, which can be played by any instrument, contains rhythm notations and represents a complete and accurate portrayal of a song’s composition. In contrast, guitar tabs provide none of these benefits. If a person wants to learn the true composi-

167. *See Campbell*, 510 U.S. at 590.

168. *See id.* at 592.

169. *See Tedeschi*, *supra* note 5 (“[B]efore these sites started operating in the early ’90s, the most popular printed tablatures typically sold 25,000 copies in a year. Now the most popular sell 5,000 copies at most.”).

170. Ian Youngs, *Song Sites Face Legal Crackdown*, BBC NEWS, Dec. 12, 2005, <http://news.bbc.co.uk/1/hi/entertainment/4508158.stm>.

171. *See Woods v. Bourne Co.*, 60 F.3d 978, 984-85 (2d Cir. 1995) (showing that, due to the setup of recording contracts, sheet music plays only a negligible role in court considerations because performance revenues can reach \$85,000 for one song, while only nominal unspecified profits come from sheet music reprints).

tion of a song, they will not go to a guitar tab website.¹⁷² Although musicians may use guitar tabs to learn to play their guitars, they will purchase the sheet music when they want to learn the accurate composition of a particular song.¹⁷³ A similar analysis was relevant in *Kelly v. Arriba Soft Corp.*,¹⁷⁴ in which a website owner was being sued for showing thumbnails of an artist's photographs. The court emphasized that the images were "smaller, lower-resolution images that served an entirely different function than Kelly's original images" and that "users are unlikely to enlarge the thumbnails and use them for artistic purposes."¹⁷⁵ Guitar tabs are also smaller, lower-resolution versions of their underlying songs that are unlikely to be used to replace the original composition. If the court found such a situation to be evidence of fair use in *Kelly*, then a court should find the analogous situation with guitar tabs to be a fair use. Since guitar tabs do not replace sheet music or stop guitarists from buying sheet music, guitar tabs do not supersede the market for sheet music. Consequently, a presumption in favor of fair use for guitar tabs is not unreasonable.

The fact that guitar tabs encourage the purchase of sheet music furthers the presumption in favor of fair use. Courts are more likely to find a fair use where the new use increases the market for the original work.¹⁷⁶ Guitar tabs increase demand in the music market, not only for sheet music, but also for the original song. A musician must know the original song in order to play a guitar tab correctly, therefore he must listen to the song. Whether that musician buys the CD or listens to the song on the radio, listening to the song is an increased use of the original work and an increase in the demand for it in the music market. Also, guitar tabs increase the desire for sheet music: "[P]ublishers can't dispute the fact that the popularity of playing guitar has exploded because of [guitar tab websites]....

172. See Statement of Peter Allen, Site Operator of Olga.net, available at <http://www.guitarnoise.com/forums/viewtopic.php?t=26207> ("The notion that a musician serious enough to spend \$30 on a sheet music book would instead settle for a by-ear tablature interpretation seems unlikely to me.")

173. See *id.*; see also Chesney, *supra* note 156, at 6 (showing that less than 1 percent of guitar tab users use tabs to avoid buying published tablature).

174. 336 F.3d 811 (9th Cir. 2003).

175. *Id.* at 818.

176. See *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, No. 98 CIV. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687, at **29-30 (S.D.N.Y. Oct 1, 2001).

And any person that buys a guitar book during their lifetime, that money goes to the publishers."¹⁷⁷ Guitar tabs encourage people to learn to play guitar. When those people become competent players of their instruments, they often become the music publishing industry's biggest customers. By removing guitar tabs from the Internet, music publishers could be hurting the sheet music market and their own profits.

The music publishing industry could also be hurting itself by shutting down guitar tab websites. Guitar tabs are often used by musicians who cannot read musical notation. One of the best explanations for the decrease in the market for sheet music may be that fewer people today know how to read musical notation, and, therefore, there is less demand for the product. In many communities, schools have cut art and music programs because of budgeting concerns.¹⁷⁸ Consequently, more children today are growing up without an education in music or a basic understanding of musical notation. These children are then unable to use sheet music when they decide to take up an instrument like the guitar. Instead, youths will turn to sources like guitar tabs, where they can learn to play their instruments without having to also learn the musical scale.

Music publishers could claim that guitar tabs keep these young musicians from being forced to learn musical notation and depresses the market for sheet music. Yet, there is no reason to think that musicians would take this extra step. In fact, many musicians would probably just make their own tablatures by ear, a method of teaching guitar that has been used for centuries.¹⁷⁹ Musicians will then take longer to learn guitar techniques, including actual musical notation, and longer to become a customer of the music publishing industry. Guitar tab websites simply speed up this learning process and encourage guitarists to become paying customers sooner. Thus, guitar tabs appear to do more good than harm regarding the sale of sheet music.

Guitar tabs also cannot be solely responsible for the drop in sheet music sales. Sheet music can be purchased for a number of instru-

177. Tedeschi, *supra* note 5 (quoting Robert Balch, the publisher of Guitar Tab Universe).

178. Joseph Van Harken, *Budgets Cut Student Experience*, CNN.com, Aug. 20, 2003, <http://cnn.com/2003/EDUCATION/08/13/sprj.sch.cuts>.

179. *See infra* note 219.

ments, not just guitar. A drop of 20,000 copies per song¹⁸⁰ can hardly be attributed only to musicians who purchased sheet music to play their guitars. That number implies that not only guitarists, but also pianists, violinists and the like are not purchasing as much sheet music as in the past. A loss in demand from musicians playing a variety of instruments can hardly be attributed to guitar tabs, which can only be used with the guitar.¹⁸¹ So, while music publishers claim that guitar tabs are the cause of their loss in profits, the truth may be that the music publishers are hurting themselves by not adapting to changing situations in the market.

Furthermore, courts consider the consequences of widespread use upon the market as part of this factor of the fair use test.¹⁸² Guitar tabs are already in widespread use.¹⁸³ Any alleged harm to the sheet music or tablature market is already at its peak. It would be awkward for the music publishing industry to claim that widespread use of guitar tabs have damaged its market when it recently signed a licensing deal to sell guitar tabs online,¹⁸⁴ implying that there is currently a thriving market from which publishers can profit online despite free guitar tab websites. One of the major reasons that the court in *Napster* ruled against a finding of fair use was a survey showing that college students were using Napster to avoid purchasing music, creating a barrier of entry for music publishers striving to sell their music online.¹⁸⁵ The recent deal between Musicnotes.com and the Harry Fox Agency suggests that guitar tabs do not function as a barrier to the online tablature market for music publishers. That fact, combined with evidence that guitar tab users are not using tabs to replace sheet music,¹⁸⁶ distinguishes guitar tabs from other alleged infringements that

180. See *supra* note 169.

181. The music publishing industry claims that the harm to the sheet music market is exclusively from guitar tab websites. The possibility that tabs for other instruments are impacting the sheet music market is beyond the scope of this Note.

182. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

183. See *supra* note 17.

184. Tedeschi, *supra* note 104 (describing the recent licensing deal between the Harry Fox Agency, a major music publisher, and Musicnotes.com to publish tablature online).

185. See *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1016 (9th Cir. 2000). In *Napster*, the court assumed that “[h]aving digital downloads available for free on the Napster system necessarily harms the copyright holders’ attempts to charge for the same downloads.” *Id.* at 1017 (emphasis added). An analysis of guitar tabs exposes the falsity of this assumption.

186. See Chesney, *supra* note 156, at 10-11.

have come before the court, such as those in *Napster*. Given that customers continue to purchase sheet music and licensed online tablature despite the widespread use of free guitar tabs on the Internet, courts should find that guitar tabs do not damage potential markets, but rather fulfill a separate and scholarly function on the Internet.

Guitar tabs do not supersede or replace the demand for sheet music. They may suppress the market somewhat—because they no longer require guitarists to learn musical notation and buy sheet music—but the fair use doctrine tolerates some market suppression.¹⁸⁷ In addition to the element of current market demand, a court will also consider whether guitar tabs injure any potential future markets for music publishers under the “market effect” factor.

2. *Harm to Potential Markets and the Licensing of Guitar Tabs*

The Copyright Act allows a copyright holder to control the making of derivative works.¹⁸⁸ Derivative rights are often considered an “important economic incentive to the creation of the originals.”¹⁸⁹ Music publishers could have a strong argument under this element of the “market effect” factor by claiming that there is a potential market for them in the licensing of guitar tabs for publication on the Internet.¹⁹⁰ Considering the millions of guitarists currently using guitar tab websites,¹⁹¹ there is clearly a market for the online dissemination of musical compositions. This argument against a fair use finding is strongly undercut, however, by the nominal profits that musicians make from the sales of their sheet music and the

187. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985) (noting that “[f]air use ... is limited to copying by others which does not *materially* impair the marketability of the work which is copied” (emphasis added)).

188. See 17 U.S.C. § 106 (2000).

189. *Campbell v. Acuff-Rose Music*, 510 U.S. 589, 593 (1994).

190. The music publishing industry recently bolstered this argument by signing a deal with Musicnotes.com to sell tablature online. See Tedeschi, *supra* note 104. Although at first this deal appears to shatter the fair use argument, it does not. Publishers are only licensing 2 percent of their songs for online tablature. *Id.* They claim that “for the remaining songs in Famous Music’s catalog—and the vast majority of the music publishing industry’s collective catalog—there is insufficient demand to justify the costs of publishing tablature.” *Id.*

191. See *supra* note 17 and accompanying text.

apparent unwillingness of music publishers to license the ability to make and sell guitar tablature on the Internet.¹⁹²

The sale of online tablature adds almost no inducement for the creator of music. As noted above, musicians make almost no money from the sale of their sheet music.¹⁹³ Their money comes primarily from record sales, concert ticket sales, and licensing a song to movies or television. With so many ways to make large amounts of money as a musician, the negligible profits from the sale of sheet music or online tablature can hardly offer an economic incentive to create songs.

Furthermore, when courts consider the harm to potential markets, they balance the copyright holder's economic right against the likelihood that copyright holders will license their works for that potential market or use.¹⁹⁴ This does not imply that courts will impose an obligation on artists to license their work.¹⁹⁵ Copyright holders are free to curb the market for a derivative work by refusing to license that use of their property.¹⁹⁶ As with all rights under copyright law, however, the right of refusal is balanced against the public welfare.¹⁹⁷

In the case of guitar tabs, music publishers have refused to license songs for unofficial online tablature.¹⁹⁸ This reality greatly contrasts with other Internet cases like *Napster*¹⁹⁹ and *Grokster*,²⁰⁰ in which the dissemination of sound recordings was interfering with the music companies' own attempts to sell music online. Guitar tabs create no such interference. Although a limited number of websites

192. Compare *supra* note 190, with *infra* note 198.

193. See *supra* note 171 and accompanying text.

194. See *Campbell*, 510 U.S. at 592.

195. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001).

196. See *id.*

197. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 580 (1985) (Brennan, J., dissenting).

198. See Tedeschi, *supra* note 104 (claiming music publishers "have always rejected out-of-hand any requests about licensing"); *Morning Edition*, *supra* note 10 ("They flat-out want no discussions, want no licensing deals, nothing."); Letter from Rob Balch, *supra* note 111 ("[T]o date, not one sheet music publisher has ... express[ed] interest in any type of dialogue or collaboration whatsoever."). But see *supra* note 190 (noting that the music industry recently signed a deal to sell tablature online).

199. *A&M Records*, 239 F.3d at 1004.

200. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

have licenses to sell digital versions of sheet music and tabs,²⁰¹ no music publisher has shown a willingness to sell a license for unofficial guitar tabs.²⁰² This refusal impedes the ability of musicians who cannot read sheet music to learn to play the guitar. Although the lack of licensing may not stop non-music readers from playing the guitar altogether, it will assuredly obstruct the flow of knowledge that is currently taking place on the Internet.

If the fair use doctrine's goal is to allow uses that further knowledge without depriving copyright owners of their economic incentives, no better case meets this goal than the case of guitar tabs. Yet, the determination of fair use is not complete. Although this element has been called a "legal fiction,"²⁰³ many courts look favorably upon uses where the reasonable copyright holder would consent to the use.

3. The Reasonable Copyright Holder Would Consent to the Making and Posting of Guitar Tabs

During fair use analyses, courts often inquire whether the reasonable copyright owner would consent to the new use.²⁰⁴ This question is subjective and could be argued either for or against fair use in any particular case. With guitar tabs, however, most arguments appear to lean toward a finding of fair use. Guitar tabs increase the audience for musicians' work at little to no cost to the musician.²⁰⁵ This hidden benefit of an increased audience is probably more valuable to musicians than are the nominal profits from selling their sheet music, because a bigger audience increases record and concert ticket sales, which is how musicians make most of their profits. Secondly, actual musicians have already spoken out

201. See Tedeschi, *supra* note 5.

202. See *Morning Edition*, *supra* note 10.

203. See NIMMER & NIMMER, *supra* note 37, § 13.05 ("It is sometimes suggested that fair use is predicated on the implied or tacit consent of the author. This is manifestly a fiction, for a restrictive legend on a work prohibiting copying in whole or in part gives no greater protection than the copyright notice standing alone.").

204. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985).

205. See *Grokster*, 545 U.S. at 929 n.8 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 223-26 (2003) (Stevens, J., dissenting) ("[T]he widespread distribution of creative works through improved technologies may enable the synthesis of new works or generate audiences for emerging artists.")).

in favor of guitar-tab websites.²⁰⁶ Unless these musicians are somehow “unreasonable,” their testimony implies that the average musician would consent to the use of their music for the making of guitar tablature.²⁰⁷

The “market effect” factor presents several arguments in favor of a finding of fair use for guitar tabs. Guitar tabs do not supersede or substitute for the current sheet music market. In fact, guitar tabs may help to revitalize that dying market by increasing interest in playing the guitar. Furthermore, guitar tabs do not harm the potential market of the derivative work. Because music publishers appear to have no plans to license unofficial guitar tabs or market them on the Internet, the guitar tab websites are not harming their future prospects. Finally, the testimony of some musicians illustrates that the reasonable copyright holder would consent to the use of their songs for the making of guitar tabs. All of these elements strongly encourage a finding of fair use under the market effect factor. Considering that this fourth factor of the fair use test is the most important,²⁰⁸ this should make it more likely that courts will consider guitar tabs a fair use.

Although the analysis of all four factors of the fair use test is now complete, the fair use argument is not yet resolved. The four factors provided no dispositive answer to whether guitar tabs are a fair use or a copyright infringement. In such a situation, courts may consider policy rationales beyond the literal language of the fair use test to determine if guitar tabs are indeed a fair use.

VIII. THE IMPORTANCE OF CONSIDERING GUITAR TABS A FAIR USE

Broader social reasons beyond the four factors of the fair use test exist in support of treating guitar tabs as a fair use. First, there is a question of the reasonableness or fairness of the music publishing industry bringing a copyright infringement suit. Basic business

206. See Tedeschi, *supra* note 5 (“I guess in a way I might be losing money from these sites, but as a musician I look at it more as a service,” said Mr. Happoldt, [from the band Sublime] who now owns an independent record company, Skunk Records. ‘And really, those books just don’t sell that much for most people.’”).

207. See *supra* note 204 and accompanying text (noting that one element of the market effect standard is “whether a reasonable copyright holder would consent to the new use”).

208. See *Harper*, 471 U.S. at 566.

sense dictates that the music industry wants fans to sing and play its songs because such activity increases the demand for artists' present and future work. If the music industry brings suit against a guitar tab website, it essentially would be suing fans for the very behavior that the music industry wishes to encourage. Leon Seltzer has captured this concept in his book on fair use, *Exemptions and Fair Use in Copyright*:

What the author fashions out of his intellect and sensibilities he *expects* to be used by other minds and other sensibilities. That is why he does it. He hopes that people will recite his poems, that other thinkers will cite his work and rely on it, that students will learn from him, that the world will take note of what he has wrought, and that the private reader will copy out his words and sing his songs. And for such use he expects neither to be asked nor to be paid.²⁰⁹

Artists' expectations are, of course, tempered by their need to make a living from their copyrighted works.²¹⁰ But artists' desire to have their songs sung and played by the public has created societal expectations that such a use is allowed and even expected from fans and future musicians for the furtherance of the musical arts.²¹¹ It seems contradictory for copyright law to allow copyright holders to encourage fans to use copyrighted works and then sue those fans for copyright infringement vicariously through suits against online guitar tab providers. Through their attack on guitar tab websites, the music industry has created a new phenomenon: copyright entrapment. This phenomenon is contrary to justice and fairness and the ideals of the American judicial system, and should encourage a court to find fair use for guitar tabs purely to protect the public from the unfairness of the music industry's actions.

Even if a court is not convinced that guitar tabs are fair use under the four-factor test or because of copyright entrapment, the court should find alternative public policy arguments convincing.

209. See SELTZER, *supra* note 64, at 29.

210. See *id.* at 29-30 ("But somewhere shortly beyond that he has economic expectations appropriately deriving from what society offered him in the copyright scheme.").

211. See *id.* ("Similarly, society does not intend that the 'exclusive right' language shall bar appropriate use of his work by others in the furtherance of progress of knowledge and the arts.").

Copyright law is not intended “to maximize an author’s control over his or her product.”²¹² Rather, the goal of copyright law is to protect the public welfare.²¹³ In the case of guitar tabs, the public welfare is best served by a finding of fair use. Copyright law is intended to “promote the progress of [s]cience and useful [a]rts”²¹⁴ and to be an inducement for artists to create artistic works. Finding guitar tabs to be an infringement does nothing to induce artistic creation. If anything, a finding of infringement will deter the progress of many future musicians. Copyright law is not intended to protect rights to the extent that it impedes learning; rather, it is meant to increase the “harvest of knowledge.”²¹⁵

The flexible nature of the fair use doctrine is intended for such a situation as arises in the context of guitar tabs. The fair use doctrine allows courts to “avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that the law is designed to foster.”²¹⁶ Courts have considered these public policy arguments in copyright cases in the past,²¹⁷ and guitar tabs present a new opportunity to allow flexibility with the copyright statute in order to avoid a rigid application of the law that would restrict learning and creativity rather than foster it.

Additionally, if guitar tabs are found to be an infringement, that decision could have broad implications extending far beyond guitar tab websites. The way that guitar tab websites teach students, through the imitation of the masters or professionals, is a method of education that teachers have been using for centuries.²¹⁸ This method is used not only in music but in art and creative writing as well. How often at art museums can a visitor see students sitting with their sketchbooks, diligently drawing imitations of master-

212. *Harper*, 471 U.S. at 580 (Brennan, J., dissenting).

213. *See id.*

214. U.S. CONST. art. I, § 8, cl. 8.

215. *Harper*, 471 U.S. at 545.

216. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

217. *See Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 98 CIV. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687, at *32 (S.D.N.Y. Oct. 1, 2001) (considering whether “the public would be hindered by denying Defendants’ fair use defense”).

218. *See* GuitarZone.com, Statement Regarding Legality of Tabs, July 17, 2006, http://www.guitarzone.com/w/Statement_Regarding_Legality_of_Tabs (“This is the way music teachers have behaved since the first music was ever created. The difference here is that the information is shared by way of a new technology: the Internet.”).

pieces? If one of those students were then to place that drawing on the Internet accompanied by an explanation of how to mimic the brushstrokes or style of the artist, would that be copyright infringement? Instinctively, most people would say “no.” But if guitar tabs are found to be an infringement, then the answer would be a resounding “yes.” If guitar tabs are found to be copyright infringements, then any originator of a work that is based on copyrighted material who posts his creation online may be violating copyright law. This includes imitation drawings by art students and the fledgling works of beginning poets who imitate the masters in order to learn their craft. A finding of infringement for guitar tabs could be applied to many other areas and drastically limit the amount of discussion and sharing that takes place online.²¹⁹ For this reason, and the many others discussed above, guitar tab websites should be protected under the fair use doctrine as learning environments that post educational materials based on copyrighted works.

CONCLUSION

Guitar tabs and guitar tab websites should be considered a fair use both under the statutory requirements and for public policy reasons. Analysis under the four factors of the fair use test demonstrates that guitar tabs deserve many presumptions in favor of fair use. Under the first factor, guitar tab websites are technically commercial entities, but act as not-for-profit organizations. The sites also have a purpose that is included in the examples of fair use found in the preamble to Section 107—teaching, research, and scholarship. Under the second factor, guitar tabs are derived from previously published materials, which get less copyright protection than unpublished works. Under the third factor, the fair use test demonstrates that guitar tabs copy a substantial amount of the underlying work, but that the copying was reasonable in relation to the educational purpose of guitar tabs. The fourth factor elucidates how guitar tabs do not supersede or substitute for the current sheet music market. In fact, guitar tabs may help to revitalize that

219. One of the concerns of the court in *Metro-Goldwyn-Mayer v. Grokster, Ltd.*, 545 U.S. 913 (2005), was that “imposing liability ... could limit further development of beneficial technologies.” This concern is even more prevalent with guitar tab websites.

market. Also, guitar tabs do not harm the potential market of a derivative work, as music publishers have no interest in creating guitar tabs or marketing them on the Internet. Finally, there is evidence that the reasonable copyright holder would consent to the use of their songs for the making of guitar tabs. In sum, all four factors and their elements support a finding of fair use.

Public policy considerations also encourage a finding of fair use. The music industry should not be allowed to practice copyright entrapment. Such an outcome contradicts the ideals of justice and fairness that are the foundation of the American judicial system. Also, the flexibility of the fair use doctrine is intended for situations like this, where a rigid application of the statute would restrict learning and creativity rather than foster it. A finding of infringement in this case would allow music publishers to establish not only a monopoly over the music industry, but a monopoly over the ability of the public to learn to play musical instruments as well. Finally, a finding of infringement for guitar tabs could impact other learning environments on the Internet and greatly reduce the amount of educational material that appears on the web. In contrast, a finding of fair use for guitar tabs would encourage learning as well as the development of future artists and scientists.

Guitar tabs have brought an interesting question before today's legal world: Who is copyright law intended to protect, the public or the artist? In many ways, copyright law through the years has protected the scientist and the artist so they can make a living from their work. Yet, at the same time, this protection has always considered the interests of the public—America is a better place thanks to the works that have been created under the protection of copyright law. Guitar tabs present the rare situation in which protecting a copyright holder's rights may not induce artistic works nor enhance the artistic environment in America. For this reason and the many others noted above, guitar tab websites do not infringe on copyrights and should be protected under the fair use doctrine.

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