

2007

A Reason for Musicians to Fret: Copyright Infringement in Online Guitar Tablature

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Recommended Citation

Laura E. Gary, A Reason for Musicians to Fret: Copyright Infringement in Online Guitar Tablature, 9 *Vanderbilt Journal of Entertainment and Technology Law* 831 (2020)
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A Reason for Musicians to Fret: Copyright Infringement in Online Guitar Tablature

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Welcome to the post-*Grokster* age, guitar players, where sharing tips on how to play your favorite songs can land you in court for copyright infringement. In the summer of 2006, the debate about sharing songs over the Internet took a more familiar and old-fashioned turn when the National Music Publishers' Association (NMPA) and the Music Publishers' Association of the United States, Inc. (MPA) began targeting certain websites for posting unauthorized

copies of sheet music.¹ The NMPA and the MPA went after a specific kind of sheet music: guitar tablature, commonly referred to as guitar tab. In July of 2006, Rob Balch, the manager of GuitarTabUniverse.com received a letter from a law firm representing the NMPA and the MPA.² Several other guitar tab website owners received similar letters.³ These “takedown” letters informed the website owners,⁴

[Y]our website . . . makes available tablature versions of copyrighted musical compositions owned or controlled by members of the NMPA and MPA, without permission of the publishers. . . . The versions of these publishers’ musical works that you post on your website are not exempt under copyright law . . . Therefore, you needed, but did not obtain, permissions from the copyright owners to make a tablature version of those songs and to post them on your site. Under the circumstances, both the transcriber of the compositions and you as the owner of the website are copyright infringers.⁵

Guitar tab is a rough system of notation designed to teach amateur guitarists how to play popular songs.⁶ Unlike file-sharing services, where users download exact copies of copyrighted works, guitar tabs are not exact copies of the musical work.⁷ In fact, they are often unrecognizable as actual sheet music, because they employ a rough system of notation using dashes, numbers, and letters.⁸ Six lines represent the six strings on the guitar. Numbers located on those lines indicate where the guitarist should place his fingers on the neck of the guitar. Add the lines and the numbers together, and a chord results. That chord is identified by a letter (i.e., A, B, or C), and

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

2. See Guitar Tab Universe, Letter from Ross J. Charap, http://www.guitarzone.com/w/Main_Page (last visited Oct. 17, 2006) [hereinafter Letter from Ross J. Charap]; Guitartabs.com, <http://www.guitartabs.com/nmpa.php> (last visited Oct. 17, 2006).

3. See Guitartabs.com, <http://www.guitartabs.com/> (last visited Mar. 20, 2007); Online Guitar Archive, <http://www.olga.net/> (last visited Mar. 20, 2007).

4. The “takedown” letters were in accordance with the Digital Millennium Copyright Act, 17 U.S.C. § 512 (2000). The “takedown” provision applies to website owners who have infringing material on their website. Takedown letters give website owners a safe harbor (time to take down the infringing material), so they will not be found liable for contributory infringement. Issues of contributory infringement will not be discussed in this note.

5. Guitartabs.com, NMPA Letter, <http://www.guitartabs.com/nmpa.php> (last visited Mar. 30, 2007).

6. *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> [hereinafter NPR].

7. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

8. NPR, *supra* note 6 (referring to guitar tablature as “quick and dirty sheet music”).

the chords are then combined with the lyrics to instruct the aspiring guitarist on how to play the entire song.⁹

So far, the targeted guitar tab websites have responded to the takedown letters by simply shutting down.¹⁰ As Rob Balch stated in his letter “To all ‘Guitar Tab Universe’ visitors” posted on his website, “I’m now ‘worried’ about working around tabs at all.”¹¹ From both website owners and guitar tab users and creators, the reaction has been one of disbelief and indignation.¹² Balch claimed that “an attack on this website is really an attack on every one of you who have told someone . . . how you play a song on guitar.”¹³ Peter Allen, owner of the website Guitartabs.com, colored the NMPA and MPA’s takedown letter as an attempt by their lawyers “to use corrupt, recently-manipulated and poorly-tested copyright law.”¹⁴

The response of guitar tab users, though, is most indicative of the popular view of guitar tabs. Two themes run throughout the posts on user message boards: that guitar tabs are primarily an educational tool and that guitar tabs are the creator’s interpretation of a song, not a direct copy of the song itself.¹⁵ Additionally, the guitar tabs posted on the Internet are usually inaccurate transcriptions of the song. Guitar tabs are created by an amateur musician listening to the song and then noting his interpretation of how the chords in that song are played.¹⁶

Although the NMPA and the MPA are targeting both website owners and creators of guitar tabs, this note will focus solely on the issue of direct copyright infringement in guitar tablature as it relates to the creators and users of guitar tabs. The NMPA and MPA’s theory is that guitar tabs are unauthorized derivative works; and, therefore, the creators of guitar tabs have directly infringed upon the copyright holder’s exclusive right “to prepare derivative works based upon the

9. See *infra* Part I for an example of a guitar tab.

10. See Tedeschi, *supra* note 1, at C1; Guitar Tab Universe, <http://www.guitarzone.com/gotourl.php?fileid=11874231&server=6> (directing guitar tab users to other sites that have not yet shut down access to their tabs).

11. Guitar Tab Universe, Main Page, http://www.guitarzone.com/w/Main_Page (last visited Oct. 17, 2006).

12. *Id.*; Guitartabs.com, NMPA Letter, *supra* note 5.

13. Guitar Tab Universe, Main Page, *supra* note 11.

14. Guitartabs.com, NMPA Letter, *supra* note 5.

15. Posting of Gibson123 to Guitarzone.com GTU Forum, <http://www.guitarzone.com/forum/index.php?s=dd623ba51299795316ae4559d7f2e44d&showtopic=163367&st=20> (July 17, 2006, 05:56 PM).

16. Out-Law.com, *Guitar Instruction Sites Shut Down By Music Industry*, THE REGISTER, Aug. 29, 2006, http://www.theregister.co.uk/2006/08/29/guitar_sites_under_fire/.

copyrighted work.”¹⁷ Although no legal action has yet been taken, it is likely that at a trial, the guitar tab creators would first contest the claim that a guitar tab is an infringing derivative work. Alternatively, even if guitar tabs are found to be derivative works, the guitar tab creators may still raise the defense of fair use. On his website, Balch characterizes trade in guitar tabs as “teachers educating students . . . covered as a ‘fair use’ of the tablature.”¹⁸

The website owners have correctly noted that there are no cases dealing directly with infringement in guitar tabs, so there is no legal precedent on point.¹⁹ Additionally, it is unclear whether this issue will ever go to trial. Although some guitar website owners claim to still be deciding whether to challenge the takedown letters, most websites have already shut down their guitar tab access.²⁰ However, many more guitar tab websites have taken their place, which increases the likelihood that the NMPA and MPA will press the issue and take infringers to court, given the MPA President Lauren Keiser’s desire to “throw in some jail time” for infringers to make sure the MPA’s message is clear and effective.²¹ Exactly how courts should resolve this issue if and when it comes to trial is the subject of this note.

Part I of this note will specifically address guitar tablature and how it differs from more traditional methods of copying musical works. Part I will also discuss derivative works and fair use in detail, setting out the statutory provisions and the relevant case law establishing and analyzing both these claims. Part II addresses the lack of legal precedent for copyright infringement in guitar tabs and devises a possible solution to the question of whether or not guitar tabs infringe copyrighted musical works. Specifically, this note concludes that the appropriate answer to that question is that guitar tabs are infringing derivative works, but that they are protected by the defense of fair use.

17. 17 U.S.C. § 106 (2000).

18. Guitar Tab Universe, Main Page, *supra* note 11.

19. Tedeschi, *supra* note 1, at C1.

20. See Mike Hughlett, *Music Industry Frets Over Popular Guitar Websites*, CHI. TRIBUNE, Dec. 8, 2006, at C1 (noting that mounting a legal challenge “requires a whole bunch of money and a whole bunch of time and energy”).

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

I. OPENING RIFFS: GUITAR TABS AS INFRINGING DERIVATIVE WORKS AND THE DEFENSE OF FAIR USE

The debate over copyright infringement in unauthorized sheet music is not a new phenomenon.²² Bootleg “fake books” were common among jazz musicians.²³ The first bootleg fake book was published in 1949, and the music industry responded strongly against such unauthorized copying of their musical works.²⁴ The result was a 1968 criminal prosecution, where the court declined the opportunity to substitute the popularity and public acceptance of fake books for criminal laws prohibiting copyright infringement.²⁵ It is the combination of “bootleg” sheet music with changes in technology that presents the interesting legal question of whether guitar tabs infringe on the underlying musical work.

A. Introductory Lessons: A Guitar Tab Primer

Guitar tab is sheet music for musicians who cannot read sheet music. Rather than using notes and time signatures to indicate how to play a song, guitar tab uses numbers and letters to indicate where the fingers should be placed on the guitar to form certain chords.²⁶ A guitar consists of six strings that reach from the neck to the body of the guitar. A guitarist holds the guitar by the neck and strums on the strings at the body of the guitar. Chords are formed when the guitarist holds down strings on frets.²⁷ Guitar tab visually mimics the formation of chords on an actual guitar, and it visually instructs the guitarist on where to place his fingers on the neck.²⁸

22. See *U.S. v. Slapo*, 285 F. Supp. 513 (S.D.N.Y. 1968).

23. Fake books, like guitar tabs, provided a simplified version of a standard song. In the case of fake books, the simplified version consisted of “the most familiar phrases of a pop-song melody, with lyrics below the melody, and chord symbols . . . above the melody.” Berry Kernfeld, *Pop Song Piracy, Fake Books, and a Pre-history of Sampling*, Address at University of California Washington Center: Copyright and the Networked Computer: a Stakeholder’s Congress 3 (Nov. 6, 2003), available at <http://www.personal.psu.edu/bdk4/PREHISTORY.pdf>.

24. *Id.* at 4.

25. *Slapo*, 285 F. Supp. at 513-14; Kernfeld, *supra* note 23, at 4.

26. NPR, *supra* note 6.

27. The neck of the guitar is divided up and down into frets, which provide visual and tactile reminders for the exact position of fingers.

28. *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339 (D. Ohio 1969), provides a detailed explanation of guitar playing:

On a guitar, the strings are tuned to the following notes of the scale, proceeding from the lowest to the highest: E, A, D, G, B, E. The lowest string is normally referred to as the sixth string, and the other strings are numbered accordingly from lowest to highest. In normal play, four to six strings are strummed together

In guitar tab, six lines represent the six strings on the guitar. Numbers are placed on the lines accordingly to indicate where on the neck of the guitar the fingers should be placed. For example, if a chord is played by holding down the D string on the fifth fret, a number "5" will appear on the "D" line. After instructing users how to play the chords of the song, the guitar tab will then pair the chords with the lyrics of the song. This pairing is the only way that guitar tab can indicate any sort of rhythm or timing. The same notation can also be used to describe guitar solos. To illustrate, the following is a guitar tab for the opening chords of Led Zeppelin's "Stairway to Heaven:"²⁹

```

E-----5-7-----7- | -8-----8-2-----2- | -0-----0----- | ----- |
B-----5-----5----- | ---5-----3----- | ---1---1---1--- | -0-1-1----- |
G--5-----5----- | ---5-----2----- | ---2-----2----- | -0-2-2----- |
D-7-----6----- | -5-----4----- | -3----- | ----- |
A----- | ----- | ----- | -2-0-0-0-0--/8-7- |
E----- | ----- | ----- | ----- |

```

The simple nature of guitar tabs, as illustrated above, allows them to be easily created as text files, which explains the popularity of guitar tabs on the Internet.³⁰ A Google search of "guitar tabs" results in over one million hits.³¹ Before shutting down its website, GuitarTabUniverse.com received over two million page views a day.³² When Balch decided to shut down GuitarTabUniverse.com in July of 2006, Ultimate-Guitar.com received 1.4 million visitors that month.³³ Not only are guitar tabs easy to create for anyone who has an ear for music and a computer, but they are also extremely easy to upload onto

to form chords, the strumming finger normally running from the lowest to the highest string played. The fingers of the left hand depress various of the strings at different points on the neck of the guitar to form the individual notes of the chords. At the end of the neck farthest away from the box is a bar called the nut. The strings are tied off past the nut, and the strings are suspended between the nut and the bridge, which rests on the box near the other end of the strings. The neck of the guitar is divided into nineteen parts by small bars known as 'frets' running across the width of the neck. There are thus 18 frets. Movement from one fret to another up the neck of the guitar toward the box will raise the tone of the note played by one-half step on the musical scale for each fret crossed.

Id. at 342.

29. UltimateGuitar.com, *Stairway To Heaven Tab*, http://www.ultimate-guitar.com/tabs/1/led_zeppelin/stairway_to_heaven_tab.htm (last visited Feb. 11, 2007).

30. Matthew Mirapaul, *Tablature Erasa: Guitar Archive Closed by Lawyers*, *Cybertimes*, *New York Times on the Web* (June 6, 1996), <http://partners.nytimes.com/library/cyber/mirapaul/0606mirapaul.html>.

31. Google Search, <http://www.google.com/> (search for "guitar tabs") (last visited Oct. 17, 2006).

32. NPR, *supra* note 6.

33. Tedeschi, *supra* note 1, at C1; Google Search, *supra* note 31.

the Internet. A guitar tab creator simply clicks on a link to "Submit your tab" and then pastes his tab into the corresponding window.³⁴ There are even websites whose sole purpose is to direct you to other guitar tab websites where tabs can be found, free of charge.³⁵

Not all guitar tab websites are free; some websites provide tabs and sheet music licensed by music publishers for a fee. Musicnotes.com contains downloadable sheet music and guitar tab.³⁶ Most of the guitar tabs available on Musicnotes.com costs \$4.65 per tab.³⁷ Compared to the \$0.99 per song downloads available on music downloading sites such as iTunes, this is a hefty price to pay for a guitar tab that is available for free all over the Internet.³⁸ However, officially licensed guitar tab websites may have to charge around five dollars for a song because the MPA estimates that it could cost around eight hundred dollars to produce, license, and format tablature for downloading.³⁹ Because of the high costs of producing officially licensed guitar tabs, music publishers have chosen to create sheet music (including guitar tab) for less than twenty-five percent of music currently available.⁴⁰ Finding official tab for an independent artist might prove to be an impossible task.⁴¹ Thus, unofficial, free guitar tab websites cater to a market "for songs that have little or no commercial value."⁴²

Although guitar tabs are an easy way for amateur musicians to learn how to play both popular songs and songs that have little commercial value, given the fact that guitar tabs are created by amateur musicians themselves, they are often incorrect interpretations of the song. Guitar tab users lament the proliferation of inaccurate guitar tabs, either because they instruct users incorrectly on how to play the chords, or because they simply tell the users to play the wrong chords.⁴³ The ability to rate the quality of the

34. UltimateGuitar.com, Submit Your Tab, <http://www.ultimate-guitar.com/submit/tabs.php> (last visited Feb. 12, 2007).

35. GuitarTabs.net, <http://www.guitartabs.net/> (last visited Feb. 12, 2007).

36. Jim Bessman, *Words & Music: 'Stateless Peoples' Find A Musical Home*, BILLBOARD, Apr. 2, 2005.

37. Musicnotes.com, <http://musicnotes.com> (click "browse sheet music") (last visited Feb. 12, 2007).

38. *Id.*

39. Tedeschi, *supra* note 1, at C1.

40. *Id.*

41. Jonathan Opp, *Music Publishers Seek To Silence Guitar Tablature Sites*, REDHAT MAGAZINE, Sep. 23, 2006, <http://www.redhat.com/magazine/023sep06/features/olga/>.

42. Tedeschi, *supra* note 1, at C1.

43. Interview with Scott Gary, Musician (Sept. 21, 2006).

guitar tabs on free websites or to report “bad” tabs is a testament to the volume of incorrect tabs.⁴⁴

If guitar tabs are copies of copyrighted sheet music—sheet music that is available for a fee at licensed websites—then what defenses do guitar tab creators have against a claim of copyright infringement? Unofficial guitar tab websites have picked up on the language of “interpretation” as a defense to copyright infringement.⁴⁵ They claim that the guitar tabs on their websites are only interpretations because the tab is not being physically copied from a book of sheet music or official guitar tabs. Instead, the guitar tab creator is sitting down with a recording of the song, listening to it, and transcribing what he thinks are the correct chords.⁴⁶ The unofficial guitar tab websites emphasize this method of transcribing guitar tab, perhaps in the belief that it is not copyright infringement if the creator is not making an actual, physical copy of the copyrighted material. For example, the requirements for submitting your tab to Ultimate-Guitar.com include refraining from submitting “copyrighted material or tabs from official tab books” and vouching that the tab is “ear-transcribed (you listen to the song, then tab out how you think it is played).”⁴⁷ Whether or not this is a viable defense to a claim of copyright infringement will be discussed in Part II.

B. Copyright Infringement in Music

Copyright infringement in guitar tablature presents a different question from the infringement found to have occurred in *Napster* and *Grokster*.⁴⁸ *Napster* and *Grokster* are the infamous file-sharing cases in which users of peer-to-peer file-sharing networks downloaded and shared illegal copies of copyrighted songs.⁴⁹ In both *Napster* and *Grokster*, the infringement was a direct copy of the sound recording.⁵⁰ The peer-to-peer services were subsequently found liable for contributory infringement by the Ninth Circuit and the Supreme

44. UltimateGuitar.com, Report Bad Tab, http://www.ultimate-guitar.com/report_bad_tab.php?id=425900 (last visited Feb. 12, 2007).

45. Jonathan Duffy, *Discord Over Guitar Sites*, BBC NEWS MAGAZINE, Sept. 1, 2006, http://news.bbc.co.uk/2/hi/uk_news/magazine/5305520.stm.

46. *Id.*

47. UltimateGuitar.com, Submit Your Tab, *supra* note 34.

48. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

49. See *Grokster*, 545 U.S. 913; *Napster*, 239 F.3d 1004.

50. *Grokster*, 545 U.S. at 919-20; *Napster*, 239 F.3d at 1011.

Court, respectively.⁵¹ In the music file-sharing cases there was no question that direct infringement had occurred because the music files were exact copies of the sound recordings.⁵² With respect to guitar tabs, however, there is an issue as to whether direct infringement has occurred. As mentioned earlier, guitar tabs are not direct copies in the way that digital music files and photocopies of sheet music are direct copies.⁵³ Nor are guitar tabs exact copies of musical works, because they are often incorrect. As the guitar tab creators and users emphasize, these are “interpretations” of a song—not direct copies.⁵⁴

Copyright in music can take one of two forms: a copyright in the musical work or a copyright in the sound recording.⁵⁵ As the Ninth Circuit acknowledged in *Newton v. Diamond*: “Sound recordings and their underlying compositions are separate works with their own distinct copyrights.”⁵⁶ The distinct copyrights for these two works are found in Section 102(a) of the Copyright Act of 1976.⁵⁷ One of the elements necessary for a copyright infringement action (indeed, the predicate element to any infringement action) is “ownership of a valid copyright by the plaintiff.”⁵⁸ Because a popular song consists of two different copyrights—the musical work and the sound recording—music publishers will need to prove that they own a valid copyright to the work that has been copied by guitar tab creators.⁵⁹ If guitar tab creators copy the sound recording, as opposed to the underlying

51. As mentioned, contributory infringement in guitar tablature will not be analyzed in this note. See *supra* note 4. Put briefly, a contributory infringer is one “who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.” 3-12 NIMMER ON COPYRIGHT § 12.04.

52. *Grokster*, 545 U.S. at 925-26; *Napster*, 239 F.3d at 1011.

53. MuSATO, <http://www.guitarzone.com/musato/> (last visited Feb. 12, 2007).

54. *Id.*

55. 17 U.S.C. § 102 (2000). Sound recordings are further defined in Section 101 as “works that result from the fixation of a series of musical, spoken, or other sounds.” *Id.* § 101. Of course, a copyright owner could hold rights to both the musical work and the sound recording.

56. *Newton v. Diamond*, 388 F.3d 1189, 1191 (9th Cir. 2003). See *infra* text accompanying notes 111-114.

57. Musical works are copyrightable under Section 102(a)(2) of the Copyright Act and sound recordings are copyrightable under Section 102(a)(7).

58. *Napster*, 239 F.3d at 1013 (“Plaintiffs must satisfy two requirements to present a prima facie case of direct infringement: (1) they must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106.”); Daniel Fox, Comment, *Harsh Realities: Substantial Similarity in the Reality Television Context*, 13 U.C.L.A. ENT. L. REV. 223, 227 (2006).

59. 17 U.S.C. § 102(a)(2), (7).

musical work, then music publishers will not be able to prove ownership of the copyright that has been infringed.⁶⁰

Assuming the ownership element is established, copyright infringement occurs when an individual violates one of the six exclusive rights given to copyright holders.⁶¹ The Copyright Act lists these rights in Section 106.⁶² One of these rights is the right “to prepare derivative works based upon the copyrighted work.”⁶³ A derivative work is defined in Section 101 as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”⁶⁴ The takedown letter sent by the NMPA and MPA’s lawyers states, “U.S. copyright law specifically provides that the right to make and distribute arrangements, adaptations, abridgements, or transcriptions of copyrighted musical works . . . belongs exclusively to the copyright owner of that work.”⁶⁵ The takedown letter uses exact language from the definition of “derivative works:” “arrangements,” “adaptations,” and “abridgements.”

The NMPA and the MPA are claiming that guitar tabs are unauthorized derivative works.⁶⁶ To prove infringement by the creation of an unauthorized derivative work, the NMPA and the MPA must show that the guitar tab creators had access to their works, and they must show a substantial similarity between their copyrighted works and the unofficial guitar tab.⁶⁷ Access can be established with proof of widespread dissemination of the plaintiff’s work.⁶⁸ Substantial similarity, however, is a much more elusive concept.

60. See *id.* (noting that separate copyrights exist in the sound recording and the underlying musical work).

61. *Id.* § 106.

62. *Id.*

63. *Id.* § 106(2).

64. *Id.* § 101.

65. Letter from Ross J. Charap, *supra* note 2.

66. Tedeschi, *supra* note 1.

67. Fox, *supra* note 58, at 227.

68. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482-83 (9th Cir. 2000).

C. Derivative Works

1. Substantial Similarity

Before a work can be deemed a derivative work, there must be a showing of substantial similarity between the two works.⁶⁹ The Courts of Appeals vary in their formulation of the test for substantial similarity.⁷⁰ The Second Circuit, in *Arnstein v. Porter*, bifurcated substantial similarity into evidence of access and evidence of improper appropriation.⁷¹ The Ninth Circuit, in *Sid & Marty Krofft Television Productions v. McDonald's Corp.*, bifurcated substantial similarity into an extrinsic and an intrinsic test.⁷² The extrinsic test looks to substantial similarities in ideas, and it does not depend on the observations and conclusions of a trier of fact.⁷³ The intrinsic test looks for substantial similarities in expression, and it relies on "the response of the ordinary reasonable person."⁷⁴ What both tests share, however, is a reliance on the ordinary lay observer (or listener, in the case of music) to determine whether enough similarities exist between the two works so that unlawful copying has occurred.⁷⁵ Courts have struggled with quantifying how much similarity constitutes "substantial" similarity, and a precise definition has escaped them.⁷⁶

2. Originality

In addition to being substantially similar to the copyrighted work, a derivative work must also add something of substance and

69. See *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984).

70. Compare *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) with *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). See also *Fox*, *supra* note 58, at 223, 230-34.

71. 154 F.2d at 468.

72. 562 F.2d at 1164.

73. *Id.* "In no case does copyright protection for an original work of authorship extend to any idea. . . ." 17 U.S.C. § 102(b) (2000).

74. *Krofft*, 562 F.2d at 1164.

75. Compare *Arnstein*, 154 F.2d at 473 ("The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.") with *Krofft*, 562 F.2d at 1164 ("The test to be applied whether there is substantial similarity in expressions shall be labeled an intrinsic one—depending on the response of the ordinary reasonable person.")

76. 4-13 NIMMER ON COPYRIGHT § 13.03.

originality “making the piece to some extent a new work . . .”⁷⁷ The requirement that a derivative work must contain some original work in addition to the previously copyrighted material is found in its definition: “A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship . . .”⁷⁸ The original material that the derivative work’s author contributes must “recast, transform or adapt the pre-existing work.”⁷⁹

Courts in the past have held derivative musical works, especially musical arrangements, to a higher standard of originality.⁸⁰ In a nineteenth century copyright case, *Jollie v. Jacques*, the court stated that for a musical composition to be copyrighted it must be “a new and original work; and not a copy of a piece already produced, with additions and variations which a writer of music with experience and skill might readily make.”⁸¹ Even as late as 1958, courts held such musical additions as harmonies and musical interludes to be *de minimis* contributions, not rising to the requisite level of originality required for copyright.⁸² However, more recent decisions have treated musical arrangements like any other copyrightable work by holding them to a low standard for originality.⁸³

In general, the threshold for originality is very low. Originality “means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.”⁸⁴

77. *Woods v. Bourne Co.*, 841 F. Supp. 118, 121 (S.D.N.Y. 1994), *aff’d in part, rev’d in part*, 60 F.3d 978 (2d Cir. 1995).

78. 17 U.S.C. § 101. But see Alan L. Durham, *Consumer Modification of Copyrighted Works*, 81 IND. L.J. 851 (2006), where the author noted that:

[S]ome have argued that even an infringing derivative work must exhibit some degree of originality. Others, referring to the first sentence of the definition which omits any reference to originality, argue the contrary. The Seventh Circuit Court of Appeals, acknowledging support for each point of view in “both cases and respected commentators” found it unnecessary to take sides. Indeed, the standard for “originality” is so low that it would be rare for any form in which a work might be recast to fail to be original.

Id. at 859 (citations omitted).

79. 4-13 NIMMER ON COPYRIGHT § 13.03(A) (2006).

80. Joel L. Friedman, *Copyright and the Musical Arrangement: An Analysis of the Law and Problems Pertaining to This Specialized Form of Derivative Work*, 7 PEPP. L. REV. 125, 132 (1979).

81. 13 F. Cas. 910, 914 (C.C.N.Y. 1850) (No. 7437); Friedman, *supra* note 80, at 133.

82. *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681, 683 (S.D. Cal. 1958); Friedman, *supra* note 80, at 135.

83. *See Consol. Music Publishers v. Ashley Publ’ns*, 197 F. Supp. 17 (S.D.N.Y. 1961); *Desclee & Cie., S.A. v. Nemmers*, 190 F. Supp. 381 (E.D. Wis. 1961).

84. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

In the case of musical arrangements, courts have considered fingering and phrasing marks to be original.⁸⁵ In *Consolidated Music v. Ashley*, the plaintiff added fingering and phrasing marks to public domain musical compositions.⁸⁶ Interestingly, these markings—considered by the court to be original additions and therefore constituting a derivative work—“would probably not have affected the ‘sound’ of the work” (i.e., “there would have been little or no audible difference if the additional matter had been omitted altogether”).⁸⁷ Courts appear to have returned to the minimum threshold for originality in musical derivative works; one court has even held that the arrangement and presentation of chord charts is a copyrightable work.⁸⁸

D. Fair Use

Balch proclaims on his website, “[Guitar tab is] teachers educating students and [is] covered as a ‘fair use’ of the tablature.”⁸⁹ An organization has even sprung up in response to the takedown letters, the Music Student and Teacher Organization, whose slogan is “Fighting for the freedom to fairly use tablature in online education.”⁹⁰ Fair use is the main defense to an allegation of copyright infringement, and as these statements show, it is a defense that the guitar tab website owners, creators, and users are already claiming. Fair use is a common law doctrine, but it has been loosely codified in Section 107 of the Copyright Act, although the House Report emphasizes that “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”⁹¹ Section 107 lists four factors that should be considered when deciding whether the infringing use of a copyrighted work is fair.⁹² Before the four factors are even listed, though, Section 107 provides examples of what would constitute fair use, including purposes such as teaching.⁹³

85. Friedman, *supra* note 80, at 135.

86. 197 F. Supp. at 17.

87. Friedman, *supra* note 80, at 135.

88. *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339, 346 (N.D. Ohio 1969).

89. Guitar Tab Universe, Main Page, *supra* note 11.

90. MuSATO, *supra* note 53.

91. H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

92. These factors are: “(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.” 17 U.S.C. § 107 (2000).

93. *Id.*

The first factor in the fair use analysis is the purpose and character of the use. In *Campbell v. Acuff-Rose Music, Inc.*, the most recent Supreme Court case addressing the issue of fair use, the Court looked to whether the infringing work “merely ‘supersede[d] the objects’ of the original creation” or whether the work was transformative and added “something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁹⁴ If an infringing work is transformative, then the other factors will be less significant in weighing against a finding of fair use.⁹⁵ The superseding/transformative distinction drives the first factor more so than a commercial/non-commercial distinction.⁹⁶ Nevertheless, a transformative use is not required for a finding of fair use.⁹⁷

The next two factors are fairly straightforward. The second factor, the nature of the copyrighted work, turns on whether the copyrighted work lies “closer to the core of intended copyright protection.”⁹⁸ For example, creative works are more deserving of copyright protection than factual works.⁹⁹ Factual works are given less protection than inventive works.¹⁰⁰ The third factor, the amount and substantiality of the portion used, asks whether the portion taken from the copyrighted work goes to the “heart” of the copyrighted material.¹⁰¹ For example, in *Harper & Row*, the amount of the work taken was only a few quoted sentences from President Ford’s memoir—a small percentage of the total book, quantitatively. However, the quotations taken referenced Nixon’s resignation and eventual pardon, which the Court determined was the heart of the book, and so the taking was qualitatively substantial.¹⁰² Courts differ on whether the substantiality of the portion taken should be measured not only qualitatively, but also quantitatively.¹⁰³

The fourth and final factor in the fair use analysis is “the effect of the use upon the potential market for . . . the copyrighted work.”¹⁰⁴

94. 510 U.S. 569, 579 (1994).

95. *Id.*

96. *Id.*

97. Alan J. Hartnick, *The Defense of ‘Fair Use’: A Primer*, 15 *TOURO L. REV.* 153, 167.

98. *Campbell*, 510 U.S. at 586.

99. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

100. *Id.*

101. *Harper & Row*, 471 U.S. at 547 n.2.

102. *Id.* at 564-65.

103. Hartnick, *supra* note 97, at 170.

104. 17 U.S.C. § 107 (2000).

This factor was once considered the most important factor, but it has since given way to the first factor's search for a transformative use. In considering this factor, courts should look to the potential harm to any derivative markets for the copyrighted work.¹⁰⁵ The court will also return to the first factor in its analysis of the fourth factor because if an infringing work is found to be transformative, there is less likelihood for market harm to the copyrighted work.¹⁰⁶

II. CREATING HARMONY: FAIR USE AS A DEFENSE TO COPYRIGHT INFRINGEMENT

A. Direct Infringement

As trade associations representing music publishers, the NMPA and MPA can only legally represent the interests of those publishers, and their interests are only in the musical works.¹⁰⁷ The Copyright Act bifurcates rights in recorded songs into two distinct works of authorship: musical works and sound recordings.¹⁰⁸ Thus, a dispute over copyright infringement in guitar tabs might turn on whether the NMPA and MPA argue the correct copyright to the work being infringed. In other words, are guitar tab creators copying the performance as embodied in the sound recording or the underlying musical composition?

1. Sound Recordings versus Underlying Compositions

Unofficial guitar tab is not generally copied from a book of tabs or transcribed from sheet music. The process usually involves a creator sitting down with a recording of the song and transcribing what he believes to be the correct guitar part.¹⁰⁹ Guitar tab creators argue that "in many cases the guitar tabs do not represent the song from which they came but rather the guitar part recorded during the making of a recording of the song."¹¹⁰

105. Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 690 (2004).

106. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590-91 (1994).

107. See NMPA, NMPA Mission Statement, <http://www.nmpa.org/aboutnmpa/index.asp> (last visited Feb. 12, 2007).

108. 17 U.S.C. § 102 (listing "musical works" and "sound recordings" as separate categories of "works of authorship").

109. MuSATO, *supra* note 53.

110. *Id.*

In *Newton v. Diamond*, the Ninth Circuit distinguished between copyrighted elements in a sound recording and copyrighted elements in the musical composition.¹¹¹ In *Newton*, the rap group the Beastie Boys obtained a license to use portions of a sound recording in one of their songs. The artist captured in the sound recording argued that the Beastie Boys were also required to obtain a license to use his underlying musical composition.¹¹² The court, in its analysis, correctly noted that, in a case for copyright infringement of an underlying musical composition fixed in a sound recording, the court “must remove from consideration all the elements unique to [the artist’s] performance.”¹¹³ In *Newton*, the artist had written down a score for his music, which made it easier to distinguish the musical composition elements from the performance elements.¹¹⁴ Sheet music or scores for popular music are created only after the song has been fixed in a recording; thus, sheet music developed after the recording incorporates portions of the recorded performance.

Unofficial guitar tabs do incorporate elements of the recorded performance. Instead of providing the bare bones notes for a song, some guitar tabs will include instructions on how to mimic the original guitarist’s performance.¹¹⁵ For example, in one unofficial version of the solo from “Stairway to Heaven,” the creator provides notation for performance elements such as sliding the finger up the neck of the guitar, bending the strings on the guitar, and using vibrato.¹¹⁶ If guitar tab creators are mimicking the performance embodied in the sound recording, then they would not be infringing upon the musical composition.¹¹⁷

However, the musical composition for popular rock songs usually includes performance elements because the guitarist’s performance often *is* the musical work. Official sheet music and guitar tabs also include notations for performance elements. A “Guitar Notation Legend,” located on the back page of guitar tab books, provides an even wider range of performance notation than the

111. 388 F.3d 1189 (9th Cir. 2004).

112. *Id.* at 1190.

113. *Id.* at 1193.

114. *Id.* at 1194.

115. UltimateGuitar.com, Stairway to Heaven Tab, *supra* note 29.

116. *Id.* The notation for each of these performance elements is, respectively, “/,” “b,” and “v.”

117. Nor would they be infringing upon the sound recording. Section 114 provides, “The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.” 17 U.S.C. § 114 (2000).

unofficial guitar tabs.¹¹⁸ Such notations include slides, bends, and vibratos, and also pick scrapes, muffled strings, and palm mutings.¹¹⁹ The inclusion of performance aspects, such as whether to scrape the pick along the strings of the guitar, emphasizes the fact that, in rock songs, musical compositions include the sounds created while performing on the guitar. Additionally, unlike classical music, most rock songs are not penned in sheet music format before being recorded; they are created on the guitar and so the performance of the guitar becomes intertwined with the musical composition.¹²⁰ Even though guitar tab creators may be listening to the song they are transcribing rather than looking at sheet music, the guitar part they are ear-transcribing is the musical composition, and not solely the performance embodied in the sound recording.

B. Derivative Works

The right of the copyright holder to prepare derivative works is a separate right, and with that right come separate requirements for determining whether that right has been infringed.¹²¹ The music publishers must prove that there is substantial similarity between the unofficial guitar tabs and their copyrighted musical works. They must also prove that the unofficial guitar tabs meet the originality requirement for copyrightable works.

1. Substantial Similarity

The test for substantial similarity in musical arrangements, whether it follows the Second Circuit or Ninth Circuit, usually involves whether a “lay listener” would be able to distinguish one piece from the other.¹²² This standard has also been described as “whether there is a resemblance noticeable to the average hearer.”¹²³ Most guitar tabs aim to recreate the musical composition, which is highlighted by the fact that guitar tab websites encourage users to report “bad” tabs, i.e., tabs that do not accurately transcribe the

118. See, e.g., WEEZER, GUITAR RECORDED VERSIONS 80 (1995).

119. *Id.*

120. About.com, Writing Better Songs, Part III – Writing an Effective Melody, <http://guitar.about.com/library/weekly/aa103199.htm> (“Generally, the process of writing a song is much different nowadays. Many times, songs will be born out of a guitar riff, or a groove.”) (last visited Feb. 12, 2007).

121. 17 U.S.C. § 106.

122. John R. Zoesch III, Comment, “Discontented Blues”: Jazz Arrangements and the Case for Improvements in Copyright Law, 55 CATH. U. L. REV. 867, 890-91 (2006).

123. *Id.* at 891.

musical work.¹²⁴ Tabs that differ from the original musical work are usually the result of the creator's mistakes in ear-transcribing the song.¹²⁵ Even though the guitar tab website owners claim that unofficial tab "generally deviates substantially from the work on which it is based,"¹²⁶ the substantial similarity standard that courts apply to musical arrangements would most likely support a finding that mistakes and other such variations that occur during the ear-transcription of a musical work would not be noticeable to the average hearer. Guitar tabs and the musical works on which they are based are substantially similar to the lay listener.

2. Originality

A derivative work must contain some original elements apart from the copied work to make it the required "original work of authorship."¹²⁷ Despite the generally low threshold for creativity and originality in copyrightable works, courts have, historically, required a greater degree of originality when determining whether musical arrangements qualify as derivative works.¹²⁸ Yet more recent decisions have returned to the minimal threshold for originality.¹²⁹

Guitar tabs most likely possess the minimal degree of originality needed for a copyrighted work. When a creator transcribes a song, he is doing more than merely mechanically reproducing the sounds he hears. He must necessarily make a judgment call, which involves a minimum degree of creativity. He may hear the notes E and G, but he may have to creatively imagine which strings are being played and which frets are being held down to create these notes.¹³⁰ Some minimal degree of originality will necessarily exist when a guitar creator transcribes his interpretation of the guitar part. The guitar player adds at least as much original material as the arranger

124. See, e.g., UltimateGuitar.com, Report Bad Tab, *supra* note 44.

125. Guitartabs.com, NMPA Letter, *supra* note 5.

126. *Id.*

127. 17 U.S.C § 101 (2000).

128. See *Cooper v. James*, 213 F. 871 (N.D. Ga. 1914) (likening an arranger to a mechanic); *Jollie v. Jacques*, 13 F. Cas. 910, 913 (C.C.N.Y. 1850) (No. 7437) (defining originality in arrangements as "additions and variations which a write of music with experience and skill might readily make").

129. See *Consol. Music v. Ashley Publ'ns, Inc.*, 197 F. Supp. 17 (S.D.N.Y. 1961) (fingering and phrasing markings are more than a trivial variation and are thus sufficiently original); *Desclee & Cie., S.A. v. Nemmers*, 190 F. Supp. 381 (E.D. Wis. 1961) (rhythmic markings are original).

130. The notes E and G could be played a number of different ways on the guitar.

who adds rhythmic marking or fingering and phrasing marks—additions that would constitute the requisite originality.¹³¹

In the context of derivative works, originality must consist of a substantial variation from the copied work, “not merely a trivial variation.”¹³² This raises the interesting question of whether a mistake in transcribing the guitar part would be merely a trivial variation. Guitar tab creators strive for accuracy in their tabs, so as to reproduce the musical work as exactly as possible. If the purpose of guitar tabs is to educate users on how to play certain songs, it would defeat that purpose to create a tab that is deliberately a substantial variation.¹³³ Variations in guitar tabs are the result of unintended mistakes. For example, one guitar tab version of Weezer’s “Undone—The Sweater Song” tabs out the opening notes to the song:¹³⁴

```

E-----
B-----0-----0-----0-----0-----
G-----3-----3-----3-----3-----
D-----0-----0-----0-----0-----
A-----3-----5-----3-----
E---3-----

```

The official guitar tab reads:¹³⁵

```

E-----
B-----0-----0-----0-----0-----
G-----3-----3-----5-----3-----
D-----2-----2-----4-----2-----
A-----3-----5-----3-----
E---3-----

```

131. See *Consol. Music*, 197 F. Supp. 17; *Desclee*, 190 F. Supp. 381.

132. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976). See also *Alfred Bell, Inc. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951).

133. *MuSATO*, *supra* note 53.

134. *UltimateGuitar.com*, *Undone The Sweater Song Tab*, http://www.ultimate-guitar.com/tabs/w/weezer/undone_the_sweater_song_ver5_tab.htm (last visited Feb. 12, 2007).

135. *WEEZER*, *supra* note 118, at 31.

One does not need a background in music to identify the differences between these two tabs, but how substantial is the variation between holding down the second fret on the D string (“2”) and playing that string open (“0”)? The variations between the two guitar tabs seem trivial, but the variations in the actual sounds of the two musical works may indeed be substantial. It would be the difference between a D note in the unofficial version and an E note in the official guitar tab. In the context of guitar solos, or opening notes such as these, this could indeed be a substantial variation. Courts, when looking to whether a mistake in transcribing is a substantial variation, should consider whether it is a mistake that could be distinguished when the song is being played. Mistakes that occur in the construction of a guitar chord may not be so substantial as to allow an ordinary listener to distinguish the variations.

C. Fair Use

Even if guitar tabs are derivative works, the guitar tab creators have a valid fair use defense. Users and creators have already picked up on the language of Section 107: “[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, [or] teaching . . . is not an infringement of copyright.”¹³⁶ Balch’s website contains a link to the newly-formed Music Student and Teacher Organization (MuSATO), whose name and battle cry emphasize the use of guitar tabs for purposes of teaching.¹³⁷

MuSATO explains that online guitar tabs are analogous to the method used by guitar teachers and students during an in-person lesson.¹³⁸ When giving an in-person guitar lesson, the teacher may listen to a song the student brought in and then instruct the student how to play that song on the guitar.¹³⁹ Sometimes, the guitar teacher may even write the chords down on a piece of paper so the student can practice at home.¹⁴⁰ Online guitar tab, according to MuSATO, is no different; its purpose is to educate guitar players. When a guitar tab creator posts an ear-transcribed guitar tab online, he is playing the role of teacher, and the Internet community of guitar tab users is benefiting educationally from his posting.

136. 17 U.S.C. § 107 (2000) (emphasis added).

137. MuSATO, *supra* note 53 (“Fighting for the freedom to fairly use tab in online education.”).

138. *Id.*

139. *Id.*

140. *Id.*

Although the explicit examples of fair use provided by Congress remain important considerations, they are not the sole determinants of whether an infringement is fair use. The four factors laid out in Section 107 are a judicial balancing test, and it is the weight of these factors rather than the label of “educational” or “teaching” alone that a court will look at in determining whether a use is fair. Additionally, even if guitar tabs are used primarily for purposes such as teaching, teachers are not given *carte blanche* to infringe copyrights. There are specific limits on how many copies a teacher can make for classroom use.¹⁴¹ The claim alone that guitar tabs are used for teaching purposes, given the fact that guitar tabs are widely disseminated over the Internet with no restrictions on the quality or quantity of tabs being produced, would not be enough to sustain a finding of fair use. Nevertheless, this claim should be kept in mind when analyzing guitar tabs under each of the four factors in the fair use analysis.

1. Purpose and Character of the Use

Whether guitar tabs are deemed to be a fair use may very well turn on the transformative nature of guitar tabs. In *Campbell v. Acuff-Rose Music*, the Supreme Court placed the first factor, “the purpose and character of the use,” at the forefront of fair use analysis.¹⁴² Although the first factor encourages the court to consider “whether such use is of a commercial nature or is for nonprofit educational purposes,” the Court emphasized that this “is only one element of the first factor enquiry into [the work’s] purpose and character.”¹⁴³ Instead, the Court chose to rely on a transformative/superseding distinction rather than a commercial/noncommercial distinction.¹⁴⁴ A transformative use “adds value to the original,” so that the original work is “transformed in the creation of new information, new aesthetics, *new insights and understandings*.”¹⁴⁵ A derivative work with a transformative purpose would “add something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁴⁶

141. H.R. REP. NO. 94-1476, at 66-72 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680-5686.

142. 17 U.S.C. § 107 (2000); *Campbell v. Acuff-Rose Music Corp.*, 510 U.S. 569, 579 (1994).

143. 17 U.S.C. § 107; *Campbell*, 510 U.S. at 584.

144. *Campbell*, 510 U.S. at 579.

145. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (emphasis added).

146. *Campbell*, 510 U.S. at 579.

The very process of transcribing popular songs into guitar tab is transformative. A guitarist must sit down with a recording of the musical composition. He listens to the guitar part embodied in that composition. Not having the sheet music or official tab in front of him, he must write down the chords and the notes as he hears them. Invariably, given his expertise (or perhaps his limitations) as a musician, he will impose his idiosyncratic musical fingerprint onto the tab. One guitarist may hear the opening chord to Weezer's "Say It Ain't So" as C sharp minor; another guitarist may hear it as just C sharp.¹⁴⁷ One guitarist may hear a slide on "Stairway to Heaven"; another guitarist may hear a bend.¹⁴⁸

Numerous guitar tabs for one popular song thus do not merely supersede the original composition by repackaging or republishing the work¹⁴⁹; they bring individual insights to the original composition. A market where only one official guitar tab existed would not stimulate artists but would, in fact, limit the number of artistic expressions of songs available. Only the guitar tab for Bob Dylan's "All Along the Watchtower"¹⁵⁰ would be available for guitar enthusiasts, and it would fail to capture the expressive elements that Jimi Hendrix's later performance added to the original Bob Dylan composition.¹⁵¹ The guitar tab creator's particular musical inclinations will add new expressions or meanings to the musical work.

One solution to consider is affording greater protection under a fair use defense to more detailed guitar tabs. Ironically, "[t]he more detailed the tab is, the more likely it's a violation."¹⁵² In the context of fair use, however, only a detailed guitar tab would have the necessary individual imprint necessary for the transformative purpose. Guitar tabs that just list the chords for the song and give no visual indication as to how to form those chords would merely supersede the musical work. Tabs that strive to interpret every note would be transformative because the creator would be attempting to transcribe his interpretation of a particular performance. An official guitar tab

147. For the "official" interpretation, see WEEZER, *supra* note 118, at 42.

148. Slides and bends are different ways of manipulating the guitar's strings. Moving the finger up the neck of the guitar produces a slide sound. Moving the string towards the guitarist produces a bend sound.

149. Leval, *supra* note 145, at 1111.

150. BOB DYLAN, *All Along the Watchtower*, on JOHN WESLEY HARDING (Columbia Records 1967).

151. XFM Online, Best Cover Versions Ever Named, <http://www.xfm.co.uk/Article.asp?id=55694> (last visited Feb. 12, 2007). See also JIMI HENDRIX, *All Along the Watchtower*, on ELECTRIC LADYLAND (MCA Records 1968).

152. NPR, *supra* note 6.

could not possibly attempt to capture every guitarist's interpretation of the song; online guitar tabs promote this transformative purpose.

Finally, it is important to note the non-commercial nature of guitar tabs. Unofficial guitar tabs are traded freely over the Internet: creators are not paid for their transcription efforts, and users are not charged to access guitar tabs on the unofficial sites. *Napster* suggests that even if no money is changing hands, infringing works can still have a commercial nature because "repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use."¹⁵³ This dicta in *Napster*, however, is highly dependent upon the facts of file-sharing.¹⁵⁴ In *Napster*, unauthorized copies of sound recordings were being traded peer-to-peer to replace, or supersede, legitimate copies of those same recordings.¹⁵⁵ Because the unauthorized copies were exact copies, they did replace sound recordings, and thus supplanted the market for legitimate recordings.¹⁵⁶ Guitar tabs, however, are not exact copies of musical compositions, and they do not inherently supersede the original composition. Thus, the trade in guitar tabs is not a commercial use. In fact, the proliferation of incorrect guitar tabs may drive users to purchase official guitar tabs to ensure accuracy. This will be discussed in more detail under the fourth factor of the fair use analysis.

2. Nature of the Copyrighted Work

Musical compositions are creative works. The goal of copyright law is to protect the expression of creative works as opposed to factual ones.¹⁵⁷ Creative, or inventive, works are the core of copyright protection.¹⁵⁸ Because the works at issue here are paradigmatically creative works, this factor would favor the music publishers.

3. Amount and Substantiality of the Portion Taken

Guitar tab creators do not reproduce the entire musical composition; they only notate the recorded guitar part. Thus, guitar tabs leave out other essential parts of the musical composition. As already discussed, it is impossible to show rhythm with a guitar tab,

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

154. *Id.*

155. *Id.*

156. *Id.*

157. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

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

other than by pairing the chords with the lyrics to the song to indicate where a chord change should occur. There is no indication of strum patterns, time signatures, or other essential components of a musical work. Additionally, guitar tabs do not notate drums, bass, piano, or any of the other musical instruments that were incorporated into the musical composition.¹⁵⁹ Because guitar tabs only reproduce one instrument from the copyrighted work out of the many instruments utilized to create a popular song, one could argue that they do not take a substantial amount of the musical composition.

For a popular song, however, the guitar part is often the heart of the work. Imagine Lynard Skynard's "Free Bird"¹⁶⁰ without its signature solo. Most importantly, guitar tabs reproduce the entire guitar part from the song. There are, of course, some exceptions. The simple nature of guitar tabs encourages creators to specialize, supplying a growing demand for particular guitar parts: just the solo; just the chorus; just the opening riff to Black Sabbath's "Iron Man."¹⁶¹ Even these exceptions, however, fit within *Harper & Row's* discussion of the heart of the work.¹⁶² Just as President Ford's quotations concerning the resignation and eventual pardon of President Nixon were the heart of his memoir,¹⁶³ the memorable guitar hook from a rock song would constitute the heart of that song.

The amount of the musical work appropriated must be considered in light of the transformative purpose of user-created guitar tabs. "[T]he extent of permissible copying varies with the purpose and character of the use."¹⁶⁴ Even though guitar tab creators often take the heart of the musical work—the famous solo or the recognizable riff—and usually the entire guitar part, this substantial taking is necessary to effect the transformative purpose of providing infinite idiosyncratic interpretations of popular songs. What makes a song unique and identifiable is its "heart," or (as a songwriter might call it) its "hook." The transformative purpose of guitar tabs lies in their highly personal, highly individualized interpretations of the "hook." A personalized interpretation of a song would lose its transformative power if it was limited to a smaller portion of the entire guitar part, or if it was limited to everything except the world-famous solo. Limiting guitar tabs to small portions of the song would

159. Amateur bass players may find separate bass guitar tabs online.

160. LYNARD SKYNARD, *Free Bird*, on (PRONOUNCED LEH-NERD SKIN-NERD) (MCA Records 1973).

161. BLACK SABBATH, *Iron Man*, on PARANOID (Warner Brothers Records 1972).

162. *Harper & Row*, 471 U.S. at 564-65.

163. *Id.*

164. *Campbell*, 510 U.S. at 586-87.

limit the transformative potential of the creator's individual interpretation, rendering the work less transformative and more superseding.

A court analyzing a claim of fair use for guitar tabs should look to the transformative nature of the tab. 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. Additionally, another factor the court should consider is whether the guitar tab copies the entire musical work or only one portion, such as the guitar solo. Tab of the guitar solo may be afforded greater protection because, even though it is the heart of the work, it is taking no more of the work than necessary to fulfill its transformative function. A guitar tab creator eager to add his interpretation to a famous solo would need to copy the entire solo, but any copying outside of the solo that is incidental to the transformative function (such as the chords for the verse and chorus simply to round out an otherwise incomplete tab) would not be a fair use.

4. Effect on Potential Market

The NMPA and the MPA claim that unofficial, infringing guitar tabs have had an actual effect on the market for official guitar tabs.¹⁶⁵ They cite the decline in sales for printed tabs as evidence of this actual harm: since the arrival of unofficial guitar tab websites in the early 1990's, sales for printed tabs have decreased from 25,000 copies a year to 5,000 copies a year.¹⁶⁶ Obviously, guitar tab is a derivative market that music publishers would like to exploit.¹⁶⁷ Yet less than twenty-five percent of available music ends up as sheet music or guitar tab because the price to produce guitar tabs, and especially the price to produce guitar tabs that can be downloaded, is prohibitive.¹⁶⁸ Unofficial guitar tabs fill a niche in the market "for songs that have little or no commercial value" and also for easily accessible guitar tabs that could be prohibitively expensive to officially produce.¹⁶⁹

The transformative purposes of guitar tabs weigh this factor in favor of guitar tab creators and against the publishers. Unofficial guitar tabs do not harm the market for completely accurate guitar

165. Tedeschi, *supra* note 1, at C1.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

tabs because the proliferation of inaccurate guitar tabs drives serious guitarists concerned with accuracy to purchase official tabs.¹⁷⁰ As one user explained, “[A] service like that—with fully licensed music/tab offered at a low per song rate—might actually benefit guitar players by providing the correct music/tab and not the garbage that we currently sift through.”¹⁷¹ Additionally, unless music publishers are considering entering the market for infinite ear-transcribed interpretations of a single musical composition (which, given the cost involved in creating one guitar tab, \$800,¹⁷² is unlikely), unofficial guitar tabs do not harm that potential market.

D. Progression and Resolution

Although many guitar tab website owners and creators profess their desire to fight the music publishers, a defeatist attitude pervades the websites and forums discussing the NMPA and MPA’s takedown letters.¹⁷³ Attempts to negotiate with the MPA for licensing agreements have failed.¹⁷⁴ Calls to MPA President Keiser are not returned.¹⁷⁵ The success the music industry has had in shutting down file-sharing networks may only serve to reinforce this attitude, even though infringement in guitar tabs presents a more nuanced case than does the exact copying of sound recordings in mp3 format.¹⁷⁶

With ear-transcribed guitar tabs, the solution is not to create an iTunes for tabs, where, for a low price, aspiring musicians can download the official sheet music for popular songs. iTunes and other such pay sites for downloadable music have been successful because sound recordings are interchangeable. The Green Day song you downloaded through Grokster is the same Green Day song you can now get on iTunes. Ear-transcribed guitar tabs are, for the most part, not interchangeable. One person’s interpretation could differ significantly from another person’s interpretation of the guitar part to

170. *But see* Hughlett, *supra* note 20 (quoting a guitar tab user who finds errors in guitar tabs helpful because they point him in the right direction, not necessarily to a pay tab website).

171. Tedeschi, *supra* note 1, at C1.

172. *Id.*

173. *See, e.g.*, Guitar Tab Universe, Main Page, *supra* note 11 (“Luckily, I’m fairly confident that if I alone listen to a song and then figure out how to play it by ear, I will then be able to enjoy using that knowledge to practice and improve my guitar playing skills. Is that what is necessary for everyone to do? Work these things out alone? What a sad situation.”).

174. NPR, *supra* note 6.

175. MuSATO, *supra* note 53.

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

the song, yet both interpretations could sound similar to the actual composition. Additionally, the existence of numerous covers of a single song would present similar problems for both music publishers and consumers. Returning to the example of “All Along the Watchtower,” the music publisher who holds the rights to the original Bob Dylan composition could release a guitar tab for the song. But most amateur guitarists searching for “All Along the Watchtower” guitar tab would be interested in the Jimi Hendrix performance because of the particular expression Jimi Hendrix puts in his signature guitar playing. The music publisher would be under no obligation to produce a “Jimi Hendrix version” of the song, although he could produce one if he so chose.¹⁷⁷

If the solution does not lie in creating an “iTab,” then it must lie in judicial application of the fair use doctrine. This solution presupposes that copyright infringement in guitar tabs will eventually come to trial. By finding transformative uses for certain ear-transcribed guitar tabs, the court would promote the progress of the useful arts.¹⁷⁸ What could be more useful than ensuring that aspiring musicians have access to numerous interpretations of musical compositions, encouraging them to pursue their craft and build upon the works of others? At the same time, courts could find that other kinds of guitar tabs are not fair use: for example, tabs that list only the basic chords of the song or tabs that rely too heavily on the reproduction of copyrighted lyrics to instruct users. These tabs would fall into the category of superseding uses, and would not be entitled to the protection of fair use. Transformative uses, as discussed before, would include highly detailed tabs and guitar tabs that take only the minimal amount of the original work necessary to effect the transformative purpose—for example, tabbing out only the solo to a song rather than tabbing out the solo and providing chords for the rest of the song.

Practical problems, such as how website owners would actually police their websites and take down non-fair use tabs, would surely arise, and these practical problems might prove insurmountable, given the number of guitar tabs floating around on the Internet. But creators, users, and website owners have already developed systems to monitor the quality of guitar tabs, namely, ratings and reporting bad tabs. These extant systems could be used to ensure that the

177. The exclusive right in sounds recordings does not prohibit imitation. 17 U.S.C. § 114(b) (2000).

178. U.S. CONST. art. I, § 8.

transformative purpose of ear-transcribed guitar tabs is allowed to flourish on the Internet.

Realistically, there is no bright-line test to distinguish fair use guitar tabs from illicit guitar tabs. This note suggests that certain tabs may be more transformative than others, more readily qualifying as a fair use of the copyrighted work. Yet there is no easy way to distinguish between clear fair use and clear infringement. Because of the impracticability of policing every guitar tab posted on the Internet and the difficulties inherent in distinguishing permissible from impermissible guitar tabs, courts should hesitate to hold any guitar tab creator liable for infringement. The risk of labeling all guitar tabs as infringing derivative works is too great. The transformative and educational nature of guitar tabs should be encouraged. The music publishers have the ability to supply a demand for accurate guitar tabs; they do not have the incentive to ensure that there are multiple interpretations of songs available on the Internet.¹⁷⁹

III. OUTRO: CONCLUDING THOUGHTS

The Internet is a battlefield, and the war is over intellectual property rights. Sheet music may seem antiquated in the time of file-sharing and streaming audio, but its digital transformation into guitar tab has created a new battle. Guitar tab users and creators feel threatened by music publishers who are wielding the weapon of infringement lawsuits, a weapon that has taken down giants such as *Napster* and *Grokster*. But this same weapon is also a shield that guitar tab creators can use to defend their own intellectual property—their guitar tab interpretations of popular songs. Even if guitar tabs are derivative works, guitar tab creators have a strong fair use claim because of the transformative nature of guitar tabs. Because no two musicians are the same, no two guitar tabs may be the same. The possibility of infinite individual variations on one song weighs in favor of a finding of fair use.

The powerful weapon the music publishers are wielding, however, may make it impossible for guitar tab creators to raise their defense of fair use. The threat of a lawsuit, especially in a legal landscape where *Napster* and *Grokster* are the leading cases on copyright infringement of music over the Internet, has encouraged many guitar tab website owners to simply shut down their sites. As of March 2007, no lawsuit over guitar tabs has been filed. No website owner is currently willing to risk the costs of a trial and the possibility

179. See *supra* Part II.C.4.

of an adverse judgment in order to raise the defense of fair use. The music publishers may effectively eliminate unlicensed guitar tabs by just threatening legal action. If this issue never goes to trial, guitar tab users might want to start signing up for guitar lessons.

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