THE UNLITIGATED CASE: A STUDY OF THE LEGALITY OF GUITAR TABLATURES

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ABSTRACT

Guitar tablature Web sites have been the subject of recent cease-and-desist letters, forcing most to shut down. Litigation has been side-stepped with the arrival of new creative means to continue operation. The case that may have gone to court is discussed here, ranging from the appropriate legal claims of copyright infringement to the fair-use-defense arguments that would have been made. Policy solutions are considered to resolve the tension between the public's desire to use such tablatures and the copyright owners of the original artists.

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"An attack on this website is really an attack on every one of you who have told someone (in person, or via the written word, telephone, or e-mail) how you play a song on guitar. And who, especially among small websites, has the deep pockets to fight the NMPA/MPA?" [1]

I. INTRODUCTION

Rob Balch may consider himself to be a facilitator of online music education, but others consider him to be a copyright infringer. [2] Balch ran Guitar Tab Universe, an online repository of guitar tablature, an annotation system that reduces to simple text how to play songs. The text represents the fingerings a guitarist may use to play a song. Figure 1 below is an example of such a tablature, or “tabs” as they are also known as.

Figure 1: Example of Guitar Tablature [3]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The text is easily written and displayed using typewritten characters and can be posted online, downloaded and printed with ease. These tabs most often only have one part of the song--for instance, the guitar solo, the bass part, or the chorus. The user commonly looks for the tabs of a song that he already has heard or has a recording of; and using the tabs as a guide, he is able to reconstruct the playing of the song in an approximate form.

Balch started the site in 1999 while he was in college and learning how to play guitar. Eventually the site averaged 360,000 unique visitors per month. The advertising revenue he generated was enough to cover the costs of running the site. [4] In early 2006, the Music Publishers' Association and the National Music Publishers' Association sent cease-and-desist letters to several large sites, including OLGA.net and MxTabs as well as Guitar Tab Universe. Many acquiesced and closed down. [5] Site owners cited problems with finding legal resources to fight the court action as well as difficulties their internet service providers faced themselves from threatened action. [6] Meanwhile, in March of 2007, MusicNotes, an online music publisher, and the Harry Fox Agency, which represents 31,000 music publishers, reached an agreement to create a new online repository that had the blessing of the music industry. [7] The new site is the reincarnation of a formerly popular tab site, MxTabs, [8] which is owned by MusicNotes. [9]
Using advertising revenue generated by the site, money is split between MusicNotes and the Harry Fox Agency as well as the copyright holders of the songs on the Web site. [10] Thus, litigation was, at least temporarily, avoided. However, the threat still looms. The age-old tension between rewarding artists while recognizing fair uses of their works by musicians and tabbers [11] continues to simmer beneath the surface.

This Note considers the case that may have been litigated. What would have happened if sites such as Balch's or MxTabs decided not to give in? Would there have been viable claims of copyright infringement? Would the guitar tablature Web sites have been able to fend off the suits? This hypothetical lawsuit would address the novel question of copyright interests and guitar tablatures. In some ways tabs have analogs to existing and established creative works, but in other ways they represent a new idea in the burgeoning digital age. The next section looks at the first step in any copyright litigation, asking whether there is a viable claim of copyright infringement followed up with a section on the defense to such a claim, known as the fair use doctrine. Concluding that there is sufficient gray area that suggests that either or both interests may prevail, suggestions to resolve the conflict are proposed.

II. ARE GUITAR TABS SUBJECT TO CLAIMS OF COPYRIGHT INFRINGEMENT?

The Supreme Court has articulated two necessary elements for a claim of copyright infringement to prevail: (1) ownership of a valid copyright, and (2) copying of constituent elements that are original. [12] Beyond that, specific consideration may be given to the different rights alleged to have been violated. Different circuits have produced varying interpretations of these elements; however, all of them still boil down to the same substantive analysis, with the main difference being that they merely examine the issues in different orders. The various inquiries are examined here. But, it is necessary to first recognize that there are two different routes of analysis, depending on the characterization of the original work. Courts have recognized that musical works may be broadly broken down into two different groups: the sound recordings of the music and the underlying musical composition. [13] Consequently, the analysis of copyright infringement needs to take into account both of these characterizations. Figure 2 at the end of this section summarizes these different theories.

Figure 2: Theories of infringement dependent on original work characterization

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

A. Sound recordings (17 U.S.C. § 102(a)(7))

The scenario for these works is that a music enthusiast listens to music and is able to figure out the appropriate guitar tabs or chords that go with the song and writes the tab.

1. Was there a valid copyright?

The first question in assessing whether there is a valid copyright is to determine if works fall under protection of copyright laws. That is, did the alleged copyright holder have ownership of a valid copyright? The songs range from the contemporary popular songs of John Mayer to the Beatles to the public domain songs, such as *Jingle Bells*. [14] The Copyright Act includes music works explicitly:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories ... (2) musical works, including any accompanying words .... [15]

Section 106 of the Copyright Act lists the various rights that protected works have. In this case, there is no question that most of the music that is associated with the tabs that are disputed have valid copyrights attached to them. This is a reality of litigation generally; expensive costs to bring suit in American courts act as a deterrence against frivolous suits if such a basic threshold inquiry is not met. Consequently, the plaintiffs-to-be generally will be more cautious in bringing suit. The real disputable right of interest is thus the derivative work right.
2. Derivative work rights (17 U.S.C. § 106(2))

One set of protected rights regarding musical works are derivative work rights. [16] The Copyright Act defines “derivative” as “a work based upon one or more preexisting works ... in which [the] work may be recast, transformed, or adapted.” [17]

Tabs are mostly created through the process of entabulation. [18] This process is “somewhat akin to a transcription of the music, but the transcriber has additionally made assessments about how the notes might best be played on a guitar.” [19] Oftentimes then, the produced tab is not an exact copy of the original work. The tablature by its very nature is a condensed interpretation of the original work.

The tablatures here are derivative works because they certainly are based on preexisting works. The admittedly crude translations of the fingerings represent a new form that is the result of it being recast, transformed or adapted. The tabs represent a written form of the sound recording, though it may have mistakes or include only a part of the original work. Therefore, the original sound recording has experienced a transformation and a recasting, satisfying the Copyright Act's definition of derivative.

The Act, however, limits the scope of the derivative work right. It specifically notes that, “[t]he exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” [20] The derivative work right therefore seems to be limited strictly to a subsequent sound recording and not any other medium. Thus, tablatures that are prepared from listening to the work itself and preparing them by ear are not derivative works protected under the Copyright Act. As such, copyright holders would be unlikely to prevail in litigation based solely upon this theory.

Copyright holders may, however, have an argument based on the original intent of Congress. The United States Annotated Code Service comments that the codification of a limitation on the derivative works rights was directed towards the purpose of not limiting subsequent artists to work off the original work. “However, in view of the expressed intention not to give exclusive rights against imitative or simulated performances and recordings, the Committee adopted an amendment to make clear the scope of rights under section 106(2) [section 106(2) of this title] in this context.” [21] Therefore, it would seem as though the language suggests a limitation to sound recordings as a medium. Therefore, the limitation was not really meant to allow tabbers to create tabs without abandon. But a closer examination of the House's Judiciary Committee's Report to Congress on the suggested changes that were eventually codified imply something else entirely.

The only commentary the Report makes regarding the derivative works right does not relate to the need to preserve imitative or simulated performances and recordings.

To be an infringement the ‘derivative work’ must be ‘based upon the copyrighted work,’ and the definition in section 101 refers to ‘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.’ Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause. [22]

This commentary does not refer to what the Annotated Code claims is the rationale for limiting the derivative works right. Instead, the editors most likely looked to a few paragraphs before the one regarding derivative works, which does discuss the need to limit such exclusive rights, but in the context of reproduction rights. [23] Therefore, though the Congressional intent behind the statutory provision is unclear based on this legislative history, the plain reading of the statute's language simply does not prohibit tabbers that produce tabs for sites such as Balch's from doing their work.
B. Musical works (17 USC § 102(a)(2))

The alternative theory of the case is more promising for would-be plaintiffs. First, the same two-part analysis discussed earlier is also applicable here. The appropriate theory that the music publisher industry would pursue then is one that the guitar tablatures are infringing off of the underlying music work itself, which is a protected work under § 102(a)(2). [24] The scenario here would be that the tabber infringed upon the § 102(a)(2) work, which has to be the sheet music of the work itself, since only works that are “fixed” may be copyrighted. [25] Furthermore, the original musical work is made up of both the musical notes and the lyrics, according to the scope of coverage under § 102(a)(2) as well as case law. For instance, in Broadcast Music Inc. v. Moor-Law, Inc., the United States District Court of Delaware noted that the established rule in the case of copyright infringement of musical works, “focus should be placed on music and lyrics taken together.” [26] More often than not, the lyrics are part of the guitar tablatures, with the lyrics running along the bottom of each fingering tab to give context to what the fingerings refer to. Therefore, the original work that is considered is the total musical composition, including the musical notes and the lyrics, which in the case of guitar tablatures, oftentimes do have valid copyrights attached to them.

Musical compositions have valid copyrights at the same time any sound recordings are published, thanks to the 1976 amendments to the Act, simplifying the inquiry into whether or not there is a valid copyright. [27] The second part of the analysis however is not so straightforward.

1. Was there an impermissible form of copying here?(17 USC § 106(1))

The second element considers whether or not the copying is impermissible. Courts have recognized that there are two means in which the copying may have taken place: direct copying or an inferred copying. [28] Most often, it is not the case or it is impossible to prove the first case of actual copying of the work. Instead, most courts confront the second case of whether or not there was “inferred copying,” which is an inquiry into access to the work and of substantial similarity. [29] In the case of guitar tablatures, it is likely that all the works had some sort of music score published. In the last century, music publishing revenue derived primarily from the sale of printed music. [30] This form of the music declined with the advent of radio and phonorecords. These new vehicles for music consumption became the major revenue generators for artists and music companies. [31] Only now with the advent of the Internet and other creative means has sheet music made a resurgence in the market. [32] Therefore, it is reasonable to say that most if not all of the guitar tabs in question all have corresponding published print music in existence. The case of works that may not have published print music is addressed in a later section. [33]

Courts are often plagued with the question of substantial similarity. The substantial similarity analysis centers on whether the work resembles the original, and whether it was directly copied or independently created. [34] There are differences in the exact wording and formulation of the test to determine whether there has been impermissible copying. But in the end all the tests inquire whether the offending work crosses a line, unfairly takes the original works' labors, and can be seen to be much like the original work. These tests come in different flavors: the so-called abstract, filtration and comparison test (AFC), [35] the ordinary observer test, [36] the extrinsic/intrinsic test, [37] and the total concept and feel test. [38]

All of these tests would result in a court finding that the pieces would be substantially similar. After all, the intention of a listener going through the entabulation process is to create a representation of the original music. Any departures from the original work are not intentional and may be merely judgment calls by the tabber as to what the appropriate fingering should be or simply poor tabbing abilities. For instance, music chords or specific fingerings for a song may be generalized to another key or something that is close enough to the original that a lay listener would not be able to pick out the difference. In Arnstein v. Porter, the Supreme Court rejected the use of expert witnesses to determine substantial similarity. [39] Instead, the lay hearer's judgment was used. [40] Similarly, with guitar tabs, an ordinary observer, would not only expect, but realize if the tabs are anywhere close to approximating the original work as one that meets the threshold of substantially similar to the original work. [41]

There is no case law on point that mirrors the fact situation for guitar tabs. But, based on the articulation of these tests, tabs are substantially similar to their original-work counterparts. A claim of copyright infringement based on the exclusive right of reproduction therefore seems val
2. Derivative work rights (17 U.S.C. § 106(2))

Another characterization of the tablatures may be made: they are derivative works that have transformed the original work. [42] The major difference here is that the limitations of § 114 do not apply here. Consequently, these tabs are not shielded from the scope of protection of § 106(2). A claim of infringement on the derivative work right would be proper.

III. SAVING TABS: THE FAIR USE DEFENSE

Despite having a claim of infringement, guitar tabs may still be legal and survive litigation. Fair use is a complete affirmative defense that would rebut this claim of infringement. [43] The Copyright Act lays out several statutory factors that are to be considered in a fair use defense. They 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. [44] The most recent Supreme Court application and clarification of the fair use doctrine is Campbell v. Acuff-Rose. [45] There the Court restated that the four statutory factors are not the exclusive ones to use. [46] Additionally, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.” [47] Because the Court has not articulated what other factors may be considered these four factors are discussed each in turn.

A. Purpose and character of the use

The first factor asks what the purpose and character of the use of the tabs is. “The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” [48]

There are three steps in assessing this factor. First, one notes what the purpose and character of the use is. Second, one considers the commercial nature if any of the purpose and use and third, one considers the nonprofit educational purpose.

1. The actual purpose and character of the use of guitar tablatures

There are two parties of interest that facilitate the creation of the guitar tablatures: the original tabbers and the individuals who put tabs on Web sites. Though there is no documentation or study of why these tabbers do what they do, it seems from casual empirical observation that the tablatures in these online databases are created by amateur music enthusiasts; they are not paid for their tablatures, and seem to only gain thanks and prestige in the guitar-tab online community. The creation of the work is the source of the reward and purpose of the writing of the guitar tablature.

The managers of the online sites may have interests that converge with these tabbers, with many of them being tabbers themselves or new learners of the guitar. Balch himself was learning how to play guitar when he created his Web site. [49] Balch's fulltime job at the time was a technology consultant; he did not run his site as a full-time job. He considers it to be a hobby, and covers the costs of running the site by ad revenue. [50] For site owners such as Balch then, it is not for monetary gain either, but for the contribution and furtherance to the community of guitar tablature learners.

2. Commercial nature of the use

The question of commercial nature generally deals with the question of whether the use's nature is harmful to the economic sphere of the original works' owners. [51] But merely being commercial is not determinative of whether the subsequent work is a fair use of not. [52] The Supreme Court in Campbell rejected any presumption that a commercial use would make the use unfair. [53]
In *Campbell*, the Court framed the factor in terms of whether there was a transformative effect in the new creative work. [54] “The goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” [55] Here in the case of guitar tablatures, there certainly is a transformative effect, since these new works are derivative works. The Court also suggests that the amount of transformation that takes place can weigh against the commercial purpose of the use. The transformation from the original sheet music to the guitar tablature as an accessible form of music is a significant one that would push against what little commercial gain any of the guitar tabbers would receive. For instance, tabbers are not making any money off of their tabs—they tab for personal pleasure of adding to the public database of knowledge and to educate others. However, the guitar tab site owners may be profiting by managing the site and gaining advertisement revenues.

This kind of gain, though non-monetary, may still be a consideration in the commercial context. In *Weissmann v. Freeman*, [56] the Second Circuit considered a case where two medical researchers coauthored a syllabus that was distributed at presentations they gave. [57] The plaintiff prepared an updated syllabus on her own which the defendant (her previous co-author) used in talks on his own. [58] A copyright-infringement suit followed. The Court held that though the defendant did not stand to get monetary gain, he “stood to gain recognition among his peers in the profession ... Particularly in an academic setting, profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure.” [59] But guitar tablatures are distinguishable from the academic situation in *Weissman*. The academic prestige and reputation has a direct link to the future career advancement of the researchers; guitar tabbers cannot hope for any career advancement by becoming well-known for their tablatures. They instead gain the non-economic benefit of gratitude from their fellow tabbers.

Consequently, any commercial benefit or purpose on the part of the tabbers is mitigated by the nature of the work and the community.

3. Nonprofit educational purpose

The explicit qualification of nonprofit educational purposes is unique among the four factors to consider for fair use. The scope of these purposes was discussed by the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.* [60] There the Court condensed all nonprofit uses together in its analysis of what nonprofit uses meant exactly in the qualifying clause. [61]

Many of the sites mentioned thus far, expound on the uses for only educational use. Many of the postings by the site visitors are beginner guitar enthusiasts who are learning chords and musicology; they have not developed the ear to be able to recreate the guitar parts from listening to the songs on their own. It may be argued that these novices can certainly buy the original sheet music that has the complete and accurate chords for the songs they are trying to learn. But a counterargument may be made that the goal of their learning the songs is only for the limited chord accompaniment. Furthermore, the monopoly over sheet music can force consumers to deal with an unfair and potentially stagnant market. [62] Thus the use of tabs may be described as educational, which many of the guitar tab Web sites have described themselves as. [63] These Web sites may be generating some money from advertising revenue, but it seems that they are not making large sums of cash, a factor that would most likely weigh in favor of the tabbing community.

**B. The nature of the copyrighted work**

The next factor asks about the nature of the copyrighted work. There are two major inquiries related to this factor: the first seeks to favor more expressive and creative works over the factual and informational works, and the second seeks to disfavor unpublished works. [64]

1. Expressive works and informational works
The Supreme Court noted that this factor “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” [65] It recognizes that creative works deserve “thick protection.” [66] In *Campbell*, the Court recognized that the song in question was as work that “falls within the core of copyright's protective purpose.” [67] Musical works certainly are creative in nature and the song in *Campbell* is merely an example of the creative works that copyright law attempts to protect. Consequently, the original works in question here are expressive works and would merit weighing in favor of the original works' copyright holders in a fair-use analysis.

2. Unpublished and published works

The fact that the original work was unpublished was a consideration that the courts struggled with in their assessment of this factor. In a series of cases, discussion of this aspect of an original work prompted Congress to address how this would affect the analysis of this factor. [68] And though the right of an author to publish first is well-recognized and would weigh against fair use as a viable defense, [69] Congress explicitly addressed that issue by adding a sentence in 1992 to § 107 of the Copyright Act: “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of the above factors.” [70] While some may interpret this to mean that the unpublished nature of the original work should weigh against the creation of tablatures, there is a strong countervailing interest in the public to have tablatures to benefit from being able to play the music. This is a policy that the Supreme Court has articulated in other copyright cases. First Amendment principles have also been articulated. For instance, in *Sega v. Accolade*, the Court lambasted against a complete monopoly over source code for video games, noting that such a monopoly, “defeats the fundamental purpose of the Copyright Act--to encourage the production of original works by protecting the expressive elements of those works while leaving the ideas, facts, and functional concepts in the public domain for others to build on.” [71] In the First Amendment context, the expression of ideas and the marketplace of ideas that flourishes with open information would be halted by keeping such information locked up. [72] Ready access to such tablatures would be useful in the development and inspiration of further works.

Therefore, though the case law prior to the 1992 amendment to the Copyright Act would suggest that the unpublished nature of the work would weigh strongly in favor of the original work's copyright holders, the lack of subsequent case law addressing the new amendment at this time suggests that this issue of unpublished versus published is not as critical as it once was now.

C. Amount and substantiality used

The third factor is an interesting question however. It deals with the amount and the nature of the portion of the original work that is used. Consequently, this factor may be broken down into a quantitative as well as a qualitative assessment. [73]

1. Quantitative assessment

Existing case law notes that there is no bright-line rule as to when too much copying is too much in analyzing a fair-use defense. [74] A reading of the various positions that cases take suggest that the only rule that can be drawn on this question is that the factor is influenced by the direction that the other factors point to. [75]

Arguably the amount used is not the whole of the song in many cases, since it is only for the guitar part--there are other instruments, lyrics and other nuances that are not otherwise captured by the tabs. The amount is certainly less than the whole, but is it so much that it crosses the line? The information is incomplete and does not allow for a complete reverse engineering of the original work. Instead, tabs may be thought of as merely notes taken at a lecture. They are not a complete transcript of the original performance, and represent enough information to trigger the memory of the performer to play the music. In some ways this question would turn to the question of substantial similarity as discussed and examined above. [76]

2. Qualitative assessment
Instead, the analysis of this factor may turn on assessing the qualitative nature of the portion used. In *Harper & Row*, the Supreme Court found that though only 300 words were taken from a 200,000-word unpublished manuscript, the portion used was "essentially the heart of the book." [77] But in *Campbell*, the Court noted that even if the copying work did borrow from the "heart" of the original lyrics it was not fatal to a fair use defense. [78] Though the Court considered this use as copying with parody, it highlights the specific case-by-case basis for considering this and all other factors of fair use. Here, if the purpose is educational then tabs would necessarily have to take the heart of the original work, just as parodying a song would require taking the heart of the original work as well. And because the guitar tablature does not even capture the entire original work, it is even more suggestive that it is taking just enough to satisfy the educational purpose.

This factor would therefore weigh in favor of the guitar tab community.

D. Effect and use on market for or value of copyrighted work

This final factor has often been pointed to as the most important of the four factors by many courts. [79] The rationale of the factor is stated succinctly by the Supreme Court in *Sony*:

> The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain rewards that Congress intended him to have. But a use which has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. [80]

> Consequently, the analysis of this factor may be broken down into two parts: the analysis of the markets that are affected, and the analysis of the potential benefits of incentivizing future creativity. In a sense then, the factor requires a balancing of the benefit that the public will derive from guitar tabs, versus the personal gain that the copyright owner himself may gain if the fair use is denied. [81]

1. Markets affected by the new work

The market involved is not only the existing market contemplated by the copyright owner, but also the potential future market. [82] The market in question can be framed in a variety of ways. The existing market of sheet music that some amateur guitarists would normally go to in order to purchase their needed music could be a market that is harmed. Admittedly they probably have suffered some effect from users that may want to just learn the few chords of a catchy song's chorus rather than buy a complete detailed publication. [83] But some tabbers can't read staff music, which is invariably what many of these sites and vendors have. So, arguably there is no market that is being harmed since there is no extant service to these consumers.

On the other hand, if the market is characterized as the yet unrealized market of selling these tablatures through either online means or even traditional printed publications, then there is a possible argument for the music industry. There are sheet-music sites that are in operation. [84] To make the jump to guitar tablatures would be a small one since these operations have the structure to have these transactions take place already. In *Pacific & Southern Co. v. Duncan*, [85] the defendant sold videotapes of portions of televised news reports to persons who had appeared in those segments. The news stations themselves were not selling these tapes. The Eleventh Circuit found that this factor weighed against the defendant because the television stations could have sold the tapes themselves if they desired. [86] Therefore, even if the existing copyright owner is not presently in the market, if it has the potential to enter the market and that market is affected by a third party, then this factor would weigh in favor of the original works' copyright holders. Similarly here, the music industry would have this factor weigh in their favor even if they were not selling guitar tablatures.

2. Incentivizing future creativity

This factor is framed partially on the policy of incentivizing future creative development. The idea relates back to incentivizing the original works' copyright holders to want to create new works, since they will be ensured by the copyright system of their economic returns on their current and existing works. But are these original artists really being harmed? There is no harm to the sound recording industry arguably because the tabbers and their users have
E. An unclear outcome

It would seem that there is an unclear situation of whom would necessarily win. The tabbing community and the property minimalists have strong fair use arguments, but the music recording and music publishing communities have successfully made a prima facie case with some strong arguments in the fair use arena. Rather than suffering through an expensive trial, some solutions may be proposed to resolve the problem.

There has been an outcry by some in the online community [87] claiming that the guitar tablature sites fall under copyright law's fair use exception. Meanwhile, overseas sites, such as Ultimate-Guitar are based in Russia and have benefited from the shutdown of the U.S.-based sites. [88] They have opened up their own tablature sites and are operational today as others have closed down.

IV. TOWARDS A SOLUTION

The tablature lobby may successfully win with a fair-use defense due to the novel issues the scenario raises. Therefore, in order to satisfy the overall policy goals of what I call the maximalist protection group (those that want complete protection for all works, including the tangential derivative works) and the minimalist protection groups (those that believe that the amount of protections given should be the least possible to ensure incentives to create and labor) [89] requires specific policy formulations and creative legal instruments to satisfy all parties.

A. Legislative clarification in Title 17

The first possible solution is to simply clarify within Title 17 whether tablatures are allowed to be protected under the Act. Congress may be loath to create such narrow legislation however, and instead a generalized Act that either side can lobby and push through Congress may be appropriate. An example is the Visual Artists Rights Act (VARA). [90] Creating a federal preemption scheme, [91] the property maximalists were able to score a victory protecting sculpturists and other visual artists. If the music industry were able to mount enough legislative support, they could pass some sort of similar act limiting fair-use exceptions to effectively prevent tab sites from starting up.

But this may be senseless since the Internet does not stop at borders so easily. [92] Consider the Russian sites that continue to mention tablature sites. Absent any other pressure, they will remain. This situation may be contrasted from the “All of MP3” site that recently was subject to targets that eventually brought the site down to being free. [93] After credit cards refused to process transactions involving the site amid legal battles, the site changed its business model--although it may still be illegal and irk the music industry here in America. [94] Regardless, it is apparent that “All of MP3” represents the difficulties involved with international law and intellectual property regimes. Like Jefferson remarked, knowledge truly is like a candle's light: “[h]e who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.” [95]

Legislative reform may not be as useful then in this situation. The best approach for the music industry may be to instead try other creative solutions.

B. Creating added value: industry tablature Web sites

If the fear is lost revenue, perhaps embracing the distribution of tablature may be a solution. Music copyrights are rising the fastest among the creative works, attributable to the development of technologies that surround it. [96] Why not embrace this situation and include guitar tabs? The industry can provide more accurate tablatures packaged with all the revenue-capturing devices of online advertising, thus adding value and gaining respect from the guitar-playing community. For instance, on such a Web site, there could be links to the complete song recording or to the
video for purchase. Or it could be a retooling of the concept of the library. Users could have other songs suggested to them perhaps, similar to the Apple iTunes model of market analysis of similar interests. [97] All of this may be done with a subscription plan. The result is the industry entering into the marketplace that they claimed they were losing money from and creatively benefiting the entire music community. Best of all for the music industry is that the fair use argument is significantly weakened. Finally, the fourth fair-use factor may be significantly affected since there is a presence in the derivative works’ market.

C. Tablature Web sites can create licensing regimes with recording industry

Another solution may be to create licensing agreements with these various Web sites. Many sites already have a loyal following as well as the benefits of name recognition. Why not “settle” and ask for contractual arrangements for revenue sharing? As described above, one such venture has appeared: MxTabs. On its Web site, some users derided the venture by calling it a sellout and comparing it to Napster--the online peer-to-peer music sharing company that similarly went under after legal action shut it down, [98] only to resurface as a paying site with ties to corporations such as Microsoft. It remains to be seen how successful this venture will be, especially since the venture is relying on the Harry Fox Agency to ask its copyright holders to license the guitar tablatures to the site, and none have agreed to as of the date of this writing. [99]

Yahoo Inc. has ventured similarly into the license-market for song lyrics, trying to add value to its online music section. [100] With 400,000 songs, it seeks to give the free service to the public and support itself by advertising revenue while sharing what it makes with copyright holders. [101] Like MxTabs, it remains to see how successful such a venture will be.

D. The case for litigation

The above suggestions are made to avoid litigation with an assumption that society would benefit from not having to bear the costs of expensive litigation. But perhaps litigation would assist in clearing any ambiguities in the situation at hand. The American legal system is a costly one to foray into, but it is through courts oftentimes that legislation is clarified and new laws are made. If each gray area of the legal arena were to be settled, very soon courts would not exist and case law would be very bare. In addition to unclarified laws, there is an asymmetry of which cases will be considered in the public forum.

Take the example of online lyrics Web sites. These have existed just as long as guitar tablature sites. Yet they have not been subject to the same cease-and-desist action that the tab sites have experienced recently. Why is this? It is possible to suggest that it has to do with the economic returns on suing such sites. By themselves, the lyrics are not the entire work which is required in assessing the copyright infringement. [102] But the guitar tablatures include both the underlying music as well as the lyrics, which would lead to a viable claim and consequently money. None of the tablature sites to date have directly challenged the music industry, even though there is a strong fair-use-defense argument. Many simply do not have the money to respond to litigation and consequently shut down. Litigation on their behalf would air out the arguments and give them a fair day in court.

V. CONCLUSION

In the spring of 2007, Balch renamed the site as Guitar Zone, and restructured the site to be an educational one using Wiki technology to allow its community of users to upload their own tabs as necessary. [103] He himself has declined to pursue a lawsuit, but has made his previously famous site into one that he hopes fits even more into the educational exception of fair use. However, he may have unwittingly moved into another arena of contention--the question of contributory infringement. [104] Who knows what the future of his new site will hold?

By continuously bypassing litigation or any sort of judicial action, the case of guitar tablatures remains unresolved. A definitive answer would be more judicious and economical than the uncertainty that remains.

expressed here are solely the author's. The author wishes to thank Prof. Raymond Ku for his thoughts and kindness in the preparation of this Note. Also, the author wishes to dedicate this Note to the memory of his brother Jack, who's soulful strumming on the guitar will never be forgotten. The author received his J.D. in 2007 from the Case Western Reserve University School of Law.


[4]. Hughlett, supra note 2.

[5]. For a sample letter, see http://www.olga.net/, which is the Web site of OLGA, the Online Guitar Archive, one of the largest guitar tablature repositories online.

[6]. Hughlett, supra note 2.

[7]. Bob Tedeschi, Hoping to Move Guitar Notations Into the Legal Sunshine N.Y. Times, Apr. 2, 2007. The Harry Fox Agency is also recognized as one of the best places to research where licenses for music works. It represents more than 60% of all music publishers in the United States. Al Kohn & Bob Kohn, Kohn on Music Licensing 16 (2002).


[9]. Tedeschi, supra note 7.

[10]. Id.

[11]. I use the term “tabber” as a neutral term to describe the alleged infringers in this Note.


[13]. Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 475 n.3 (6th Cir.2003) (citing 17 U.S.C. § 102(a)(2),(7)).

[14]. Balch had some public domain songs such as Jingle Bells on his site. He took the entire site down though, perhaps out of frustration or belief that determining which songs have valid copyright would have been too exhausting. Hughlett, supra note 2.


[17]. Id. (emphasis added).

[19]. Id.


[23]. Id. at 61 (“As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author’s ‘expression’ rather than merely the author’s ‘ideas’ are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114.”).

[24]. “[M]usical works, including any accompanying words” are works protected under the Copyright Act. 17 U.S.C. § 102(a).

[25]. 17 § U.S.C. 102(a) “[a copyrightable work must be] fixed in a tangible medium of expression;” See also 17 U.S.C. § 101 (defining “fixed” as “when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”).


[27]. The history involving the question of when a musical work is published extends back to an old Supreme Court case involving piano rolls. In White-Smith Music Publishing Co. v. Apollo, 209 U.S. 1 (1908), the Court held that the recording of a musical work in a piano roll was not a publication of the musical work. Congress responded with its 1909 mechanical recording provisions. The Copyright Act of 1909 § 1(e) (1909). Eventually, this was explicitly removed by the 1976 Act, by changing the requirements for fixation of the work. “This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as White-Smith Publishing Co. v. Apollo Co under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.” H.R. Rep No. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665 (citation omitted).

[28]. Three Boys Music Corp. v. Michael Bolton, 212 F.3d 477, 481 (9th Cir. 2000), cert. denied, 531 U.S. 1126 (2001) (“Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had “access” to the plaintiff’s work and that the two works are “substantially similar”).

[29]. See Swirsky v. Carey, 376 F.3d 841, 844 (9th Cir.2004) (noting that the element of copying is “rarely the subject of direct evidence”).

[30]. KOHN, SUPRA NOTE 7, at 622.

[31]. Id.

[32]. Id. at 635-36.

[33]. Infra section III.A.


[37]. *E.g.* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir.1977).

[38]. *E.g.* Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir.1970).

[39]. Arnstein, 154 F.2d at 468 ("On that issue ... the test is the response of the ordinary lay hearer; accordingly, on that issue, 'dissection' and expert testimony are irrelevant.").

[40]. *Id.*

[41]. An affirmative defense to a claim of copyright infringement under this theory may be the inadequacy of the tablature itself of the tabber himself. There is no element requiring a demonstration of willfulness to create a copy. The jurists that developed the substantial similarity doctrine and legislators of the Copyright Act were probably cognizant of the difficulty in utilizing a subjective inquiry into the state of mind of an alleged infringer. Arguably, this may have been a much simpler inquiry, as it would have dispensed with the similarly subjective inquiry of what a lay person's opinion of the subsequent work to the original work, which is the legal test for copyright infringement liability.

[42]. *Infra* at section II.2.


[45]. Campbell, 510 U.S. at 576-78.

[46]. *Id.* at 577-78.

[47]. *Id.* at 578.


[50]. *Id.*


[52]. Twin Peaks Prod. v. Publ'ns Int'l, 996 F.2d 1366, 1374 (2d Cir. 1993).

[53]. *Campbell*, 510 U.S. at 584.

[54]. *Id.* at 579.

[55]. *Id.* (citations omitted).

[56]. 868 F.2d 1313 (2d Cir. 1989).
[57]. Id. at 1315.

[58]. Id. at 1316.

[59]. Id. at 1324.

[60]. Sony, 464 U.S. at 417.

[61]. Id. at 449. (“[T]he first factor requires that the ‘commercial or nonprofit character of an activity’ be weighed.”).


[63]. See e.g. Balch Letter, supra note 1, (“This website, among other things, helps users teach each other how they play guitar parts for many different songs. This is the way music teachers have behaved since the first music was ever created.”).


[65]. Campbell, 510 U.S. at 586.

[66]. See Feist Publ'ns, 499 U.S. at 340 (noting thin protection for compilations of facts, specifically in this case phonebooks).

[67]. Campbell, 510 U.S. at 586.


[71]. Sega, 977 F.2d at 1527 (citing cases).

[72]. See e.g. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”).

[73]. ABRAMS, SUPRA NOTE 64, § 15:61.

[74]. Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir.1986) (“There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.”).

[75]. ABRAMS, SUPRA NOTE 64, § 15:63.

[76]. Supra at II.B.1.
[77]. 

[78]. 

[79]. 

[80]. 

[81]. 


[83]. In fact, actual present harm to sale of their works need not be shown at the outset to rebut a fair use defense; “it need only be shown that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work.” Amsinck v. Columbia Pictures Indus., Inc. 862 F.Supp. 1044, 1048-49 (S.D.NY 1994).


[85]. 744 F.2d 1490 (11th Cir. 1984).

[86]. Id. at 1496.

[87]. See e.g. MuSATO: Music Student And Teacher Organization, http://www.guitarzone.com/musato/ (last visited February 1, 2009).

[88]. Hughlett, supra note 2.

[89]. I borrow these terms from Prof. Raymond Ku. See Raymond Ku, Grokking Grokster, 2005 WIS. L. REV. 1217 (2005).


[92]. Admittedly, countries may impose technological borders on the Internet, e.g. China and Google's limitation of the use of Internet there by barring certain Web sites. But the United States' free access to information as a liberty will not be overrun anytime soon. Hopefully.


[94]. Id.


[101]. *Id.*

