WHY COPYRIGHT SHOULD SAVE GUITAR TABLATURES

Jason R. Simon*

For years, amateur guitarists have made their own by-ear transcriptions of copyrighted compositions and posted them on the internet as tablatures. This Note explains that tablatures are not fair use of copyright under current U.S. law. While the policy of copyright forbids the current practice of amateur transcription, that policy also supports the practice under more limited circumstances. Tablatures represent how the internet allows consumers of art to share unique interests and educate each other in ways that are beneficial to the creation of art in general. In support of that aim, Congress should protect tablatures and other similar educational uses of art under the limited compulsory licensing scheme that this Note proposes.

INTRODUCTION: THE TABLATURE DEBATE

In August of 2006, the music industry cornered yet another group of alleged copyright infringers on the internet: Guitarists.[1] Just as the music industry had previously alleged that music fans were stealing recorded music online,[2] now music publishers allege that musicians are stealing music notation in the form of guitar tablatures, which help guitarists learn to play songs and are widely available online.[3] The claims actually renew a conflict that predates the issue of web users

---

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2008. The author would like to thank his friends, classmates, and professors for their enthusiastic feedback on this topic and his family for their love and support.

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

2. Brief of Plaintiff-Appellant, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401, 00-16403), 2000 WL 34018845. Indeed, the *Napster* court found the showing of copyright infringement to be strong enough to warrant a preliminary injunction against the defendants. *Napster, Inc.*, 239 F.3d at 1027. It is fair to say a great many people were "stealing" music online around the time of the *Napster* litigation.

3. *See* Rick Romell, *Power chord struggle: Is putting guitar chords online stealing? Sheet music publishers say yes; free tablature sites say no. Now it's up to the courts to decide*, MILWAUKEE J. SENTINEL, Oct. 29, 2006.

sharing digital audio.[4] The conflict began at least ten years ago, when music publishers first threatened the "Online Guitar Archive,"[5] a massive internet archive of tablatures.[6] Today, publishers are renewing their threats, perhaps because the publishers are making an increased effort to sell digital sheet music and their own tablatures online.[7] Counsel for the National Music Publishers' Association and the Music Publishers' Association of the United States sent letters threatening legal action against websites such as the "Online Guitar Archive" and "GuitarZone.com 2.0," formerly "Guitar Tab Universe";[8] in response, those sites closed their archives.[9]

Sites offering tablatures ("tabsites") now find themselves in a difficult situation. If the site managers and guitar players who make and contribute the tablatures ("tabbers") want to keep transcribing and sharing music notation, they will have to be the ones to initiate a court battle, most likely by seeking declaratory relief.[10] Those who share tablatures online comprise no small group,[11] but they may not have sufficient funds to mount a significant legal challenge. Perhaps more importantly, one might ask whether they even have a worthy cause: Are tablatures just another form of quick and easy theft, as is now the accepted legal view of digital music-sharing?

Tablatures, also known as tablature, tabs, or tab, found at online archives or fan sites are homemade music notation so to speak—transcriptions made by individual guitarists, who typically listen to their favorite songs and type up the chords and notes that they can gather by ear.[12] Generally, the tabs are posted as

---

4. *See generally* Jefferson Graham, *Record Labels Cut Deals With File-Sharing Companies*, USA TODAY, Dec. 3, 2004, at 3B (noting that Shawn Fanning, the creator of Napster, developed the program in 1998).

5. The On-Line Guitar Archive, http://olga.net (last visited Jan. 2, 2008) [hereinafter OLGA].

6. Matthew Mirapaul, *Tablature Erasa: Guitar Archive Closed by Lawyers*, N.Y. TIMES ON THE WEB, Jun. 6, 1996, http://partners.nytimes.com/library/cyber/mirapaul/0606mirapaul.html (last visited November 8, 2006).

7. *See* Romell, *supra* note 3.

8. GuitarZone.com 2.0 Homepage, http://www.guitarzone.com/w/Main_Page (last visited Mar. 20, 2008) [hereinafter GZ].

9. Tedeschi, *supra* note 1.

10. *See generally* 9 C.O.A.2d 65, § 48 (2006) (noting that, in a copyright dispute, suing for declaratory relief is appropriate where "one party [has sent] the other a cease and desist notice").

11. One foreign-based tabsite reportedly had 1.4 million visitors in July 2006. Tedeschi, *supra* note 1. Another indicator of the popularity of these sites is the size of their archives. The "Guitar Tab Universe" homepage claimed to have over 60,000 guitar and bass tabs. GZ, *supra* note 8. The popularity of guitar as an instrument has also risen in recent years. *See* Robert Ashton, *Guitar Resurgence Aids Sales Rise for Rock Mags.*, MUSIC WEEK, Aug. 24, 2002, at 3; Adam Levy, *Alternate Tunings – Guitar Essentials*, GUITAR PLAYER, Mar. 2001, at 141 (acoustic guitar).

12. *See* GZ, *supra* note 8. In a message on the homepage, the site manager, Rob Balch, refers to the practice of tabbers listening to music, writing down parts of the song, and sharing them with friends. *Id.* The more objectionable alternative would be for tabbers to look at official tablatures that the music publishers create and then type up the information online. There is apparently no allegation that tabbers are engaging in that

text files and the notation is made up of standard keyboard characters.[13] Tablature differs from the traditional music staff—it gives little, if any, sense of timing, and it functions more like a chord chart. The notation graphically represents the fretboard of the guitar and tells players at which strings and which frets to position their fingers.[14] A typical tab will transcribe the main chords of the song and include some of the lyrics to help indicate whether the guitar parts are played during a chorus, verse, or otherwise.[15] By listening to a song with the chords at hand, a guitarist can figure out the rhythm.[16] Tabs are generally short and leave gaps. Importantly, they are not exact copies of sheet music and tabbers are not scanning printed transcriptions onto the internet.

Publishers create tablatures, too. Mostly, they sell songbooks with transcriptions that contain the traditional staff, including notes that indicate the timing of the music, with the tablature notation below.[17] Official sheet music is more accurate than the average guitar tablature on the internet.[18] While these distinctions can be drawn, the music publishers do not find the proliferation of amateur tablatures to be an innocent practice of devoted hobbyists. They claim that the availability of unauthorized tabs hurts sheet music sales and violates copyright law.[19] Specifically, the publishers argue that the tablature websites and the individuals transcribing the tabs are violating the copyright holders' "[exclusive] right to make and distribute arrangements, adaptations, abridgements, or transcriptions of copyrighted musical works."[20] They also claim that the tablatures constitute derivative works of the original copyrighted works,[21] which are also protected by U.S. copyright law.[22] The publishers see no exception under the copyright law.[23]

---

practice, but either way, the publishers would consider "by ear" transcriptions to be infringing. *See* Tedeschi, *supra* note 1 ("The publishers . . . maintain that tablature postings, even inaccurate ones, are protected by copyright.").

13. Mirapaul, *supra* note 6.

14. *Id.*

15. *See id.*

16. *Id.*

17. An example of such a songbook is NEIL YOUNG, NEIL YOUNG VOLUME 2 (Lenny Carlson, transcriber, 1993). One song in the book is "Ohio," covering eleven printed pages. By comparison an online tablature version of the same song covers about two pages of text, does not contain time signatures, and has incomplete lyrics and melodies. *See* Guitar Tabs "Ohio" by Neil Young, *available at* http://www.azchords.com/y/youngneil-tabs-4803/ohio-tabs-80935.html (last visited Jan. 2, 2008) [hereinafter Neil Young Tab].

18. *See* Tedeschi, *supra* note 1. The article reveals that tabbers themselves find the transcriptions highly inaccurate. *Id.*

19. *Id.*

20. Letter from Ross J. Charap, Attorney, Moses and Singer L.L.P., to Olga.net (June 9, 2006), *available at* http://www.olga.net (follow links 1-6 to the image files).

21. *See* Tedeschi, *supra* note 1.

22. 17 U.S.C. § 106(2) (2006).

23. *See* Letter from Ross J. Charap, *supra* note 20.

On the other side of the dispute, the tabbers and tabsite operators trumpet fair use.[24] While a copyright entitles the holder to a limited monopoly over the protected work,[25] the law recognizes that a "fair use" of the work will not be considered infringing, although it would otherwise be an exercise of an exclusively protected right.[26] One such fair use is a scholarly purpose,[27] and the defenders of tablature claim just that: They argue that tabbers are essentially educators, teaching each other how to play songs on the guitar, just as "music teachers have behaved since the first music was . . . created."[28] Educators are increasingly at odds with copyright restrictions, and naturally, they are a sympathetic voice.[29] Thus, a legal debate backed by opposing ideological forces has emerged, and it is bound to make legal scholars and the public think hard about how to best strengthen the basic purpose of copyright protection: To promote creativity and the public benefit that flows from it.[30]

Part I of this Note establishes a backdrop to the tablature debate by discussing the increasing clash between copyright and the public, which will serve as fodder for policy-based arguments by the tablature interests. Part II seeks to anticipate the arguments that would be made should the tablature dispute become contested in court and argues that, in all probability, a judge would find online tablatures to be infringing works and not a fair use of copyrighted compositions. Part III argues that, in different and limited circumstances, copyright law should permit amateur tabbing under a new compulsory licensing scheme. Amateur tabbing promotes the creative arts and benefits the public; thus, tabbers should be able to distribute their own transcriptions of songs until official transcriptions become commercially available. More fundamentally, this Note argues that copyright should restore a balance in the creative process and allow art enthusiasts to use the internet in a way that furthers the progress of art.

I. LEGAL BACKGROUND: COPYRIGHT AND THE PUBLIC

In recent years, the public has been increasingly exposed to the enforcement of copyright.[31] In arguing just that point, the current Register of Copyrights noted that "technology allows [ordinary consumers] to be copiers and distributors on a scale and with such ease that has never before been present."[32] As

---

24. *E.g.*, GZ, *supra* note 8 (In a letter to website users found on the homepage, the manager of the site alludes to the fair use exceptions to copyright infringement, which are found at 17 U.S.C. § 107 (2006)); Mirapaul, *supra* note 6.

25. 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2006).

26. 17 U.S.C. §§ 106–07. Section 106 sets forth the types of works and class of rights protected by the copyright law, while section 107 sets forth the general principles of fair use. *See id.*

27. *Id.* § 107.

28. GZ, *supra* note 8.

29. *See* sources cited *infra* note 61.

30. *See* 1 NIMMER & NIMMER, *supra* note 25, § 1.03[A].

31. *See* Marybeth Peters, U.S. Register of Copyrights, Copyright Enters the Public Domain, Address at the New York University School of Law (April 29, 2004), *in* 51 J. COPYRIGHT SOC'Y U.S.A. 701, 706–10 (2004).

32. *Id.* at 705.

the public continues to reach further into cyberspace, and as the law continues to keep pace, the public will become more aware of the role of copyright law and may increasingly hold views adverse to the interests of copyright holders.[33] The tablature debate fits squarely into these developments, pitting the corporate publishers against the average guitarist. The publishers claim "theft";[34] the guitarists respond, "greed."[35] In order to give a sense of the development of legal disputes between copyright holders and internet users, this Section discusses some recent highlights in the law.

A. Napster

Perhaps nothing created a copyright shockwave in the lives of ordinary people more than the digital music-sharing phenomenon that began at the turn of the century. The legal conflict and its impact on the public came to the fore in *A & M Records, Inc. v. Napster, Inc.*[36] The defendant provided free software to internet users that allowed them to share (also for free) digital music files stored on each others' hard drives.[37] A great majority of the files being exchanged were copyrighted works,[38] and the practice was widespread. The plaintiffs revealed during litigation that Napster predicted it would have a user base of 75 million people by the end of 2000.[39] In essence, those users provided a massive network of free music—a formidable alternative to the record store.

On appeal, the Ninth Circuit upheld the district court's determination that the practice of sharing copyrighted music online violated copyright law and was not excused as a fair use.[40] The court also found that the plaintiff record companies were likely to succeed in proving that Napster indirectly violated copyright law under theories of contributory infringement and vicarious liability.[41] Under the former theory, the facts showed that Napster was aware of and failed to prevent the infringing activities of its users, although it could have done so; under the latter theory, the facts showed that Napster had a supervisory role in the infringement and stood to benefit financially from it.[42] Napster attempted numerous defenses to

---

33. *Id.* at 709.

34. *E.g.*, Romell, *supra* note 3.

35. *E.g.*, Tedeschi, *supra* note 1 (such was the opinion expressed in the article by former Sublime band member, Mike Happoldt).

36. 239 F.3d 1004 (9th Cir. 2001).

37. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000).

38. *Id.* at 903.

39. *Id.* at 902.

40. *Napster, Inc.*, 239 F.3d at 1014–15.

41. *Id.* at 1020–23. '"[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer.'" *Id.* at 1019 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)). "In the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'" *Id.* at 1022 (quoting Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996)).

42. *Id.* at 1020–23.

limit or avoid liability, including the argument that they were an internet service provider ("ISP") qualifying for limited liability under the Digital Millennium Copyright Act.[43] This defense, and all others, failed. In light of the court's finding that the plaintiffs would likely succeed at trial, the court ordered an injunction to stop Napster from operating its sharing network,[44] and Napster was soon bankrupt.[45] Together, the district court and court of appeals conveyed that Napster and its users were doing something very wrong.[46] Today, most people likely understand the result in *Napster*, and in that sense, the case is not controversial. But the effect nevertheless brought copyright into the daily lives of millions of people, forcing them to face basic issues like the cost and availability of art.

B. The Digital Millennium Copyright Act

The statutory scheme of copyright has also raised public awareness of the law. While numerous controversial amendments to U.S. copyright law have been made in recent years,[47] one particularly relevant development was the enactment of the Digital Millennium Copyright Act ("DMCA") in 1998.[48] The DMCA is an ambitious, question-begging statute.[49] One major goal is essentially to safeguard the protection of copyrighted works: The law provides that "[n]o person shall circumvent a technological measure that effectively controls access to a [protected work]."[50] Other major provisions seek to limit the liability of ISPs, who, because of their own infringing activities or the infringing activities of others on the internet, may be liable for either direct or indirect copyright infringement.[51] With these liability limitations, Congress actually sought to encourage an effective process by which online copyright infringement could be reigned in.[52] In order for ISPs to qualify for limited liability, they must comply with the procedures established by the statute that help copyright holders enforce their rights.[53]

---

43. Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.); *see also* discussion *infra* Part I.B.

44. *Napster, Inc.*, 239 F.3d at 1027.

45. *Week in Review*, L.A. TIMES, Dec. 1, 2002, at 2.

46. Writing for the Ninth Circuit, Judge Beezer explained that "*repeated and exploitative* unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies." *Napster, Inc.*, 239 F.3d at 1015 (emphasis added). Chief Judge Patel, writing for the district court, found that "facilitating the unauthorized exchange of copyrighted music was a *central part of Napster, Inc.'s business strategy from the inception*." *Napster, Inc.*, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000) (emphasis added).

47. *See, e.g.*, Peters, *supra* note 31, at 713. (opining that Congress failed to ensure public access to a broad enough range of copyrighted works when it passed the Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.)).

48. Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

49. *See* 3 NIMMER & NIMMER, *supra* note 25, § 12B.01[C][4].

50. 17 U.S.C. § 1201(a)(1)(A) (2006).

51. 17 U.S.C. § 512 (2006).

52. *See* S. REP. NO. 105-190, at 20 (1998).

53. *See* 17 U.S.C. § 512.

Through the interplay of the terms of section 512 of the Copyright Act,[54] copyright holders can send warning notices to ISPs and prompt them to restrict access to infringing content.[55] Acting on such authority, and in an attempt to rid the internet of unauthorized tablatures, trade groups representing music publishers sent such "takedown"[56] notices to the ISPs of various tabsites.[57] The trade groups also sent cease and desist letters directly to some websites, threatening to notify their ISPs pursuant to the DMCA if the websites did not cooperate.[58] In this manner, the music publishers were able to begin policing tab on the internet.

This is not to say that the DMCA's substantive effect is to prohibit online tablature. Whether or not tablatures violate copyright law is more appropriately decided by the much older doctrine of fair use.[59] On a broader scale, the DMCA provided a more effective procedural mechanism by which music publishers could stop the proliferation of tablature, and in so doing, the consequences of copyright law in action were once again felt across the web by ordinary individuals. That alone may have inspired an increasingly skeptical public to rebel against copyright law. Others have more specifically criticized the DMCA for encouraging copyright holders to violate the privacy of those using copyrighted works[60] and for drastically narrowing the scope of fair use by way of the anti-circumvention

---

54. *Id.*

55. The statute describes possible infringement in four contexts: (1) transitory digital communications (2) system caching; (3) information residing on the ISP's systems or networks at the direction of users; and (4) information location tools. *Id.* § 512(a)–(d). If a service provider, as defined under *Id.* § 512(k)(1)(A)–(B), engages in one of these four types of infringing communications and meets the respective requirements of each subsection, then it may qualify for limited liability—a safe harbor. *Id.* § 512(a)–(d). For example, to qualify for limited liability where the alleged infringement involves linking (i.e. hyperlinks) to infringing content or the presence of infringing materials provided by users, the alleged infringer must comply with an appropriate notice sent by the copyright holder that directs the alleged infringer to remove or restrict the material. *Id.* § 512(d). Thus, the procedure by which the copyright holder can enforce its rights is truly embedded in the statute.

56. Such a notice is part of the notice and takedown procedures of the DCMA by which an ISP can qualify for limited liability if they comply with notice by the content owner that their activities incorporate copyright protected content. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 12 (1998), http://www.copyright.gov/legislation/dmca.pdf; *see also* 17 U.S.C. § 512.

57. *See, e.g.*, GZ, *supra* note 8 (on the homepage, the site manager notes a threat to its ISP); Tedeschi, *supra* note 1 (noting website closures).

58. *See, e.g.*, OLGA, *supra* note 5 (in the letter from counsel, posted as linked images, it is apparent that the trade groups' lawyers first contacted the website and threatened to contact its ISP); GuitarTabs.com, http://www.guitartabs.com/nmpa.php (last visited Jan. 2, 2008) [hereinafter GuitarTabs.com] (on the page, a reproduced letter shows the same).

59. The tablature debate is really about whether the Internet sites and users can defend their activities as fair use of copyright. *See* discussion *infra* Part II.B.

60. Jordana Boag, Comment, *The Battle of Piracy Versus Privacy: How The Recording Industry Association of America (RIAA) Is Using The Digital Millennium Copyright Act (DMCA) As Its Weapon Against Internet Users' Privacy Rights*, 41 CAL. W. L. REV. 241, 243 (2004).

provisions.[61] Thus, the DMCA has increasingly led scholars and the public to scrutinize copyright policy. In the tablature debate, a strong policy-based defense of fair use may be one way that tabbers will successfully argue for continuing to share music notation without the permission of copyright owners, but that defense is highly unlikely to succeed.

II. THE INEVITABLE RESULT OF A COURT BATTLE: ONLINE TABLATURES VIOLATE COPYRIGHT

In the tablature debate, the tabsites have the next move. Unless their operators want to instigate a legal battle by making tabs available again, thereby facing liability, their best option is to sue for declaratory relief.[62] Because the tabsites consider their activities outside the boundaries of copyright protection and want to keep creating and sharing tablatures,[63] declaratory relief is the essential means to avoid liability and ensure public access to tablatures. To prevail, tabsites will need to argue that tablatures do not infringe protected rights in a prima facie sense or that, even if they did, tablatures are a fair use of copyrighted works. This section argues that, should the tablature debate be contested in court, a judge would find that tablatures are an infringement of copyright and are not a fair use of copyrighted works.

A. Tablatures are prima facie infringing works

Those who allege copyright infringement must show that they own a copyright and that some protected interest has been infringed.[64] The music publishers taking issue with tablatures are owners of copyrights to music compositions.[65] A typical bargaining arrangement between those who compose music and the publishers that help composers to realize profits from their works often involves a transfer of whole or part ownership of the copyrights to the music publishers.[66] A music composition "is an intellectual expression of musical notes and sometimes words or lyrics," as distinguished from performances or sound recordings that embody them.[67] Compositions need not exist on paper: It is "possible to copyright a musical work merely by recording it, although the composer is unable or unwilling to reduce the work to written form in conventional musical notes."[68]

---

61. Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1, 7–8 (2004); Jeff Sharp, *Coming Soon To Pay-Per-View: How The Digital Millennium Copyright Act Enables Digital Content Owners To Circumvent Educational Fair Use*, 40 AM. BUS. L.J. 1, 39–42 (2002).

62. *See supra* note 10.

63. *E.g.*, GZ, *supra* note 8.

64. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001).

65. Ross J. Charap, *supra* note 20; Mirapaul, *supra* note 6; Tedeschi, *supra* note 1.

66. Robert E. Allen & Linda A. Newmark, *Music Publishing*, 862 PLI/PAT 661, 670–72 (2006).

67. *Id.* at 667.

68. 1 NIMMER & NIMMER, *supra* note 25, § 2.05[A].

The owner of a copyright in a musical composition has the exclusive right to reproduce copies of the work, make derivative works based on the work, distribute the work, perform the work publicly, and display the work publicly.[69] As noted earlier, representatives of the publishers claim that tablatures violate the copyright holders' rights to prepare derivative works.[70] U.S. copyright law defines the concept as follows:

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."[71]

With so many terms undefined in the statutory language, it is somewhat difficult to identify a unified idea of what it means to infringe this right. What typifies an unauthorized derivative work? Nimmer, the accepted authority on copyright law, explains that derivative works are those that sufficiently borrow from a preexisting work such that they would be infringing works if they were made without authorization.[72] Thus, to say that a work is an unauthorized derivative work is just to say that it is infringing, but this further begs the question as to the fundamental protection afforded by copyright. That analysis will more clearly demonstrate why tablatures violate copyright in a prima facie sense.

Copyright protects an author's artistic expression as opposed to the underlying ideas: "It is the particular selection and arrangement of ideas, as well as a given specificity in the form of their expression that warrants protection under the law of copyright."[73] To prove that another has copied a work requires proof that the alleged copier had access to the preexisting work and that the later work is substantially similar to the first.[74] In the case of tablatures, these elements are clearly present. The tabbers would not deny that they are using others' songs to transcribe those songs in a new form. They are simply aiming to represent the expressive creation of another. Despite this, many tabbers go so far as to claim that the tablatures they make are original works in themselves, deserving their own

---

69. 17 U.S.C. § 106 (2006).

70. Tedeschi, *supra* note 1. In their take down letter to OLGA, counsel for NMPA and MPA also delineate their clients' rights with language similar to that in the statutory definition of derivative works. *Compare* Ross J. Charap, *supra* note 20 (stating that "the right to make and distribute arrangements, adaptations, abridgements, or transcriptions of copyrighted musical works . . . belongs exclusively to the copyright owner"), *with* 17 U.S.C. § 101 (2006) (defined in the text accompanying the next note).

71. 17 U.S.C. § 101 (2006).

72. 1 NIMMER & NIMMER, *supra* note 25, § 3.01.

73. DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10[B][2] (1st ed. 1963). *See generally* Allen & Newmark, *supra* note 66, at 667.

74. 4 NIMMER & NIMMER, *supra* note 25, § 13.01[B].

protection.[75] That claim is not supported by law. A work cannot qualify as an "original work[] of authorship"[76] unless it "owes its origin to the author, i.e., is independently created, and not copied from other works."[77]

The only sense in which a tablature is independently created is not legally relevant to prima facie infringement. Tabbers claim that they transcribe songs by ear rather than looking at a printed version of the composition.[78] It is also true that a guitar composition can be played by using numerous different fingerings or chord positions. But this does not amount to independent creation in the relative sense, because the composition is still protected even if it was never written down,[79] and it is the *expression* that is protected.[80] Also, the originality of a musical work is found in its rhythm, harmony, or melody.[81] When tabbers transcribe songs they are trying to capture these very things rather than create new ones; they strive for accuracy.[82] While one case involving copying of sheet music for piano held that fingering and phrasing can constitute originality,[83] that case was between two transcribers, and the underlying works were compositions that were part of the public domain and not entitled to copyright protection.[84]

Tablatures cannot be saved by arguing that they are not infringing in the first place. Returning to the statutory language that defines derivative works,[85] it appears almost commonsensical that tablatures *are*, by definition, translations, arrangements, abridgements, or condensations of protected works. At a more basic level, tabbers are copying the musical expression of others. By making the transcriptions, the tabbers are infringers for making unauthorized derivative works and reproducing copies of protected compositions.[86] Likewise, the tablature

---

75. Mirapaul, *supra* note 6; *see also* GuitarTabs.com, *supra* note 58. In a letter to visitors, the site manager expresses this opinion. *Id.* Also, the text of tabs routinely begins with a disclaimer that the "file is the author's own work." *See, e.g.*, Neil Young Tab, *supra* note 17.

76. 17 U.S.C. § 102(a) (2006).

77. 1 NIMMER & NIMMER, *supra* note 25, § 2.01[A].

78. *See* GuitarTabs.com, *supra* note 58. The site manager states, "I have long been of the understanding that an original, by-ear transcription of a song, which is a duplicate of no copyrighted work and which generally deviates substantially from the work on which it is based is the property of its transcriber." *Id.*; *see also* GZ, *supra* note 8.

79. *See supra* text accompanying note 68.

80. *See* Allen & Newmark, *supra* note 66, at 667.

81. 1 NIMMER & NIMMER, *supra* note 25, § 2.05[D].

82. *See* Tedeschi, *supra* note 1.

83. Consol. Music Publishers, Inc. v. Ashley Publ'ns, Inc., 197 F. Supp. 17, 18 (S.D.N.Y. 1961).

84. *Id.* at 17.

85. *See supra* text accompanying note 71.

86. Melville Nimmer and David Nimmer note that to infringe the right to prepare derivative works is also necessarily to infringe the reproduction or performance right. 2 NIMMER & NIMMER, *supra* note 25, § 8.09[A]. It is possible to fix a copy of the work in violation of the reproduction right without copying the entire work. *See id.* Thus, tablatures, while not containing all the information that may constitute a musical composition can still violate the exclusive right of the copyright owner to make copies of the work.

websites are infringers for displaying copyrighted works.[87] In this sense, the tablature websites are direct infringers, and proving their infringement would be even easier than proving that internet file-sharing services such as Napster were infringers.[88] Without a valid argument as to why tablatures are non-infringing in a prima facie sense, those who would try to save tabs would have to next turn to the defense of fair use.

B. The tabbers cannot establish a fair use defense

The practice of sharing tabs online appears, at least in some initial respects, to be a fair use of copyrighted works, but it is highly unlikely that a court would find the current state of online tablature sharing a qualifying fair use. As discussed earlier,[89] U.S. copyright law provides for exceptions to copyright holders' otherwise exclusive rights to their works, and certain fair uses of copyrighted works will not violate the law.[90] For example, Congress did not intend to prevent the use of short quotations in news items and scholarly works, or short reproductions by teachers or students in the course of learning.[91] Specifically, the law states that "the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[92] The statute then sets forth a four-part judicial balancing test to govern the fair use analysis.[93] Although many courts limit their discussion to the four factors,[94] those factors are not all inclusive.[95] The determination of fair use is not meant to be a rigid application of law, and "the endless variety of situations and combinations of circumstances that can [arise] in particular cases precludes the formulation of exact rules in the statute."[96] Thus, courts should be sensitive to the underlying policies of copyright. Before turning to the statutorily prescribed fair use factors, it will be helpful to briefly consider those policies and the role of fair use in their fulfillment. To do so will also facilitate the analysis of the fair use factors as applied to tablatures.

---

87. *See generally* 17 U.S.C §§ 101, 106 (2006). As noted *supra* note 86, implicit in the concept of derivative works is the idea that they may be copies without copying the whole.

88. In *Napster*, the copyright owners had to pursue liability by showing that the file-sharing service was liable for indirect copyright infringement. *See supra* notes 41–42 and accompanying text.

89. *See supra* notes 25–27 and accompanying text.

90. 17 U.S.C. § 107.

91. H.R. REP. NO. 94-1476, at 65 (1976).

92. 17 U.S.C. § 107.

93. *Id.* The legislative history reveals that fair use is a judicial doctrine. *See* H.R. REP. NO. 94-1476, at 65.

94. *E.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–94 (1994); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–17 (9th Cir. 2001).

95. H.R. REP. NO. 94-1476, at 65–66.

96. *Id.*

The policy basis for fair use originates in the Copyright Clause of the U.S. Constitution.[97] Our Founders gave Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[98] The language indicates that copyright is not simply about just rewards; instead, its larger role is to promote the progress of the arts. To this end, the remarks of Justice Stevens in *Twentieth Century Music Corp. v. Aiken* are instructive: "The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[99] Courts have realized that the idea of fair use helps achieve that goal, by not insisting that every use of copyrighted works be compensated. Fair use '"permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."'[100]

The *Twentieth Century* case, although not based on fair use, is illustrative of this balancing act required in copyright disputes. There, the plaintiff copyright holders claimed that the defendant restaurant owner had infringed their exclusive rights to publicly perform their songs by setting up speakers in his restaurant so that customers could listen to a radio station's broadcast.[101] The Court rejected the argument that the owner had performed the works, reasoning that the copyright holders intended a public performance of their works by licensing to a radio station, and that each aural perception by a member of the public did not then constitute a performance.[102] To side with the copyright holders would have upset "the balanced purpose of the Copyright Act of assuring the composer an adequate return for the value of his composition while at the same time protecting the public from oppressive monopolies."[103]

The balancing act continues today, especially as the progress of art becomes more synonymous with the role of technology in creating and distributing art. Tablatures pose a fresh challenge to courts trying to uphold the policies underlying copyright. Those policies are crucial to those who seek to save tabs and argue that they are a fair use. Predictably, however, courts will begin their analysis with the four-factor test. Stated succinctly, the four factors are: (1) the purpose of the use; (2) the nature of the protected work; (3) the extent of the portion of the work used; and (4) the effect of the use on the value of the protected work and the potential market for it.[104] Considering these factors both separately and as a whole, the current practice of sharing tabs online is not defensible under federal law.

---

97. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 187–88 (2002).

98. U.S. CONST. art. I, § 8, cl. 8.

99. 422 U.S. 151, 156 (1975) (internal quotation marks omitted).

100. Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980)).

101. *Twentieth Century Music Corp.*, 422 U.S. at 153.

102. *Id.* at 158–60.

103. *Id.* at 151.

104. 17 U.S.C. § 107.

1. The purpose and character of the use

The first factor in a fair use analysis is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[105] In an apparently superficial attempt to comply with that language, tabbers routinely begin their transcriptions with a disclaimer that they are only to be used "for private study, scholarship, or research."[106] But a generic label of "educational" will not end the inquiry. While there are good arguments from both the perspective of the music publishers and the tabbers, this factor weighs against a finding of fair use.

The U.S. Supreme Court has said that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[107] That view tends to oversimplify the fair use analysis, and the Court similarly oversimplified the policy behind copyright by claiming plainly that "[t]he purpose of copyright is to create incentives for creative effort."[108] As discussed above, copyright policy and fair use as an underlying policy-based doctrine must balance both the availability of art and the incentives to its creation. Thus, a better way to analyze the character of a purportedly fair use is not to isolate the commercial aspect but rather to compare private gain with public benefit.[109] Commercial use is only one factor that tends to undermine a fair use defense.[110]

In the context of tabs, there are two ways in which their widespread availability online amounts to private gain. First, while the transcribers make the tabs available at no charge, opponents point out that tabsites generate advertising revenue.[111] The website operators respond that the sites are not profitable and that such income merely sustains the sites.[112] Even if that argument were accepted it still might not prove the absence of private gain. The second way in which tabs constitute a commercial use is that they can save their users the expense of purchasing official sheet music.[113] The facts of tab-sharing parallel the situation in *A&M Records, Inc. v. Napster*, where Napster's users were avoiding the expense of licensed copies of recorded music.[114] The *Napster* court found that fact to weigh against a finding that music-sharing was a fair use and noted that commercial use need not be a direct gain.[115] Thus, tabbing can be said to involve private gain, but there are public benefits to tabbing as well.

The public benefit of online tablatures is largely an educational one. Their simplicity and availability encourage people to play musical instruments.

---

105. *Id.*
106. *E.g.*, Neil Young Tab, *supra* note 17.
107. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).
108. *Id.* at 450.
109. 4 NIMMER & NIMMER, *supra* note 25, § 13.05[A][1][c].
110. *Id.*
111. *See* Mirapaul, *supra* note 6; Tedeschi, *supra* note 1.
112. *See* Tedeschi, *supra* note 1.
113. *See id.* (noting that many sites have archives available for free).
114. 239 F.3d 1004, 1015 (9th Cir. 2001).
115. *Id.*

Additionally, tabbers make available a number of transcriptions that might not be feasible to publish commercially, creating a diverse resource. On the other hand, tabbers may be competing with licensed transcribers, who are also educators, and "a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship."[116] Educational materials are subject to markets just like anything else.[117] And despite the statutory language that a fair use can "include[] multiple copies for classroom use,"[118] the scope of unlicensed reproduction by internet users could be boundless. Copies of tabs can be printed off the internet indefinitely. Similarly, if every person who posts a tab or other instructional material on the internet could be considered an educator entitled to a relaxed standard for copying, then the consumer base for licensed tabs would disappear. Thus, the notion of educational purpose as a good use tending toward fair use should not be stretched too far. The impact of a use of copyrighted works on the market for those works will be addressed again in consideration of the final factor in the fair use test,[119] but for now it is important to consider the problem of claiming fair use when the purpose of the use is the same as the purpose of the copyrighted work and is unrestrained.

The purpose of the use should be examined in light of the purpose and character of the copyrighted work.[120] The question is "whether the new work merely supercedes the objects of the original creation . . . [or] whether and to what extent the new work is transformative."[121] This notion seems intimately tied to the issue of commercial use, for the more a use can be seen as a replacement of a marketable product, the more the use appears commercial. In this context, transformation inheres in "expression, meaning, or message."[122] The transformation requirement is not absolute,[123] but it does shed light on the nature of the problem, and it definitely doesn't help the tabbers. As demonstrated previously, tabbers transcribe others' expression and do not add their own.[124] This seems to render moot the possible argument that tabs add something new in that they are more user-friendly for the beginning guitarist than traditional music notation.[125]

A more interesting argument would be that tablatures don't even share the same purpose as a musical composition, because the purpose of compositions is not to educate. It is arguable that composers only intend for their works to be heard

---

116. Salinger v. Random House, Inc., 650 F. Supp. 413, 425 (S.D.N.Y. 1986).

117. *See generally* S. REP. NO. 94-473, at 64 (1975) (In the context of discussing the nature of a copyrighted work (the next factor in this discussion), the report notes that education materials are "consumable" and refers to the "school markets").

118. 17 U.S.C. § 107 (2006).

119. *See* discussion *infra* Part II.B.4.

120. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (internal quotations and citations omitted).

121. *Id.*

122. *Id.*

123. *Id.*

124. *See* discussion *supra* Part II.A.

125. *See generally* Dan Cross, *Learning Guitar: How to Read Guitar Tablature*, http://guitar.about.com/library/blhowtoreadtab.htm (last visited Jan. 18, 2008).

and performed. The argument is not that the composers do not view their works as artistic statements in a creative dialogue or do not want others to play their music, but rather that the composers did not intend to exploit their compositions in the form of music notation used educationally.[126] Do songwriters even care if their works are written down? Recall that it is not even necessary for a songwriter to write down a composition in order for it to receive copyright protection; instead, it may be fixed as a sound recording.[127] And if motive follows money, it is important to consider that "revenue generated from the sale of sheet music . . . was the major source of revenue for publishers around the turn of the century, but it was quickly overshadowed by the public performance and [recording] revenue."[128] This reveals that compositions may have several purposes, and the argument that compositions should not be protected in their use as educational materials is essentially an argument for limiting the more incidental profitability of those works. The question becomes whether copyright should only preserve those incentives to create that reflect the actual or substantial motivations of creators. In its current state, U.S. copyright law broadly protects the owners' rights in music compositions, including their use as scholarship in the form of licensed publications.[129] Tablatures, having the same purpose, tend to supplant that educational use and the market for licensed music compositions, and so the character of tabbers' use tends to show that tablatures are not a fair use of copyrighted works.

2. The nature of the copyrighted work

The second factor to be considered in analyzing whether tablatures are a fair use of copyrighted works is "the nature of the copyrighted work."[130] This inquiry recognizes that we value, and thus, protect some original works more than others: "Works that are creative in nature are 'closer to the core of intended copyright protection' than are more fact-based works."[131] There is also an important value in protecting works that are unpublished;[132] indeed, privacy is one fundamental purpose of copyright.[133] As applied to tablatures, this factor would again weigh against a finding that tablatures are fair use.

As a matter of first impression, it seems that music compositions are by nature more creative than factual, and courts will make that finding without

126. At least some popular guitarists don't take issue with tablatures. The "Guitar Tab Universe" homepage quoted Sonic Youth guitarist Thurston Moore as supporting tablatures, GZ, *supra* note 8, and former Sublime band member Mike Happoldt has expressed support for tabbers, Tedeschi, *supra* note 1.

127. 1 NIMMER & NIMMER, *supra* note 25, § 2.05[A].

128. Allen & Newmark, *supra* note 66, at 670. The fact that a composer might receive print royalties could be more attributable to the motivation of music publishers and the organization of the music industry. Many contracts combine both recording rights and publishing rights. *Id.* at 663–64.

129. *Id.* at 668.

130. 17 U.S.C. § 107 (2006).

131. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001) (quoting Campbell v. Acuff-Rose Music, 510 U.S. 569, 586 (1994)).

132. 4 NIMMER & NIMMER, *supra* note 25, § 13.05[A][2][b]

133. *See id.* § 19.E02[B][2].

hesitation.[134] The Ninth Circuit in *Napster* readily agreed with the swift determination of the district court that "'copyrighted musical compositions and sound recordings are creative in nature . . . which cuts against a finding of fair use under the second factor.'"[135] The Senate Report to the 1976 Copyright Act is also on point.[136] In discussing this very factor, it suggests "that the doctrine of fair use would be applied strictly to the classroom reproduction of entire works, such as musical compositions . . . which by their nature are intended for performance or public exhibition."[137] With these authorities in mind, a court would rightly mark the factor against a finding that tablatures are fair use and move on, but the point here is not just to demonstrate that the current practice of online tab-sharing is doomed, but also to reveal arguments that might save them in the future.

First, there is something more to the nature of music compositions than just the fact that they are creative and intended to entertain.[138] They are also instructional and should stand somewhere between the disserving dichotomy of creative works versus factual works. This mirrors the weakness of the commercial versus noncommercial distinction in the previous factor and the fact that compositions have multiple purposes. Here, too, the analysis focuses on how to both promote and incentivize artistic creation, and perhaps the issue of how far incentives should relate to purposes is more apparent in this context. If we value compositions for their entertainment value, then the incentives toward that function should be more strictly protected, while their instructive capacity should be more susceptible to use without the express permission of the copyright owners.

Second, the need to protect authorial privacy has an interesting twist in this debate, because many songs are both available and unavailable.[139] A song may be available as a sound recording, thus fulfilling its entertainment potential, but unavailable in written notation and lacking in its instructional potential. If a song is available in some form, then the concern for protecting unpublished works as a matter of privacy should not attach; conversely, the unavailability may justify fair use. Works that are no longer in print are susceptible to fair use,[140] so perhaps works that have been published in one form but may never become available in another form should be open to fair use. That proposition confronts the fourth factor of the fair use test, dealing with potential marketability,[141] and will be addressed in that context. For now it is important to note that courts think

---

134. *See, e.g.*, *Campbell*, 510 U.S. at 586.

135. *Napster*, 239 F.3d at 1016 (quoting A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 913 (N.D. Cal. 2002)).

136. S. REP. NO. 94-473, at 64 (1975).

137. *Id.*

138. The District Court in *Napster*, 114 F. Supp. 2d at 913, relied on the notion that music compositions are entertainment in finding that they have a creative character. Presumably the Senate Report refers to the nature of compositions as "for performance or public exhibition" on similar reasoning. S. REP. NO. 94-473, at 64.

139. Tedeschi, *supra* note 1, at C1 (quoting Tim Reiland, Chairman and CFO of Musicnotes online sheet music service, as saying that "[l]ess than 25 percent of the music out there ends up in sheet music because sometimes it just doesn't pay to do it").

140. 4 NIMMER & NIMMER, *supra* note 25, § 13.05[A][2][b].

141. 17 U.S.C. § 107 (2006).

compositions are highly deserving of protection, but there are arguments that tend to make room for a fairer use of music compositions—a fairer use than tablatures currently make.

3. The portion of the work used

Whether the use of a protected work is a fair use also depends upon "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[142] This is the third factor listed in the statute.[143] The idea is that a fair "user only copies as much as is necessary for his or her intended use."[144] Thus, this factor is closely tied to the first factor, because the analysis requires an understanding of the purpose and character of the use.[145] Here too, courts are careful to consider whether the purpose of the use threatens to supplant the purpose of the protected work, because it is possible for a use that borrows a small portion to nonetheless substantially infringe on the value and potential of a protected work.[146] This seems to be what courts are really assessing when they consider not only the quantitative borrowing of a purported fair use but also its qualitative borrowing.[147] If any of the factors is least harmful to the position that tablatures are a fair use, it may be this one; however, that suggestion may not hold up under a closer analysis.

In quantitative terms, it is arguable that each tablature uses hardly any of the information that comprises a musical composition and has relatively weak instructive capacity. In the film *Amadeus*, the Italian composer Salieri jealously peruses one of Mozart's works in progress, practically having an aural experience;[148] it is hard to imagine one doing the same when looking at a haphazard tab. Of course, tabbers and their users have probably heard the songs before, so they can use relatively little information to accomplish their instructive purpose. They point out that tabs are inaccurate and leave out important information, such as rhythm.[149] That alone has some initial importance by way of contrast with the extensive copying of entire works at issue in *Napster*,[150] where the court rejected fair use. Tab-sharing may thus be less susceptible to the stigma of immorality that attaches to music-sharing.

Perhaps the tablature question is more similar to the facts in *Kelly v. Arriba Soft Corp.*[151] After applying the fair use test, the court found that an internet search engine that returned results of user searches as thumbnail images did not

---

142. *Id.*
143. *Id.*
144. Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003).
145. *Id.*
146. *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564–65 (1985).
147. *See id.*; Telerate Systems, Inc. v. Caro, 689 F. Supp. 221, 229 (S.D.N.Y. 1988).
148. AMADEUS (1984).
149. *See, e.g.*, MuSATO: Music Student and Teacher Organization, http://www.guitarzone.com/musato/ (last visited February 11, 2007).
150. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001).
151. 336 F.3d 811 (9th Cir. 2003).

infringe the plaintiff-photographer's copyrighted images.[152] The court found that the third factor did not weigh against finding fair use, though this finding was based primarily on the fact that such low quality images could not serve as a replacement to the original, high-resolution images.[153] A court may more likely find that tablatures sufficiently capture the value of a work and have a supplanting effect. A comparison should help illuminate this.

An earlier footnote considered an online tablature version of OHIO, by Neil Young, and a licensed, published version found in a songbook.[154] The online version was two pages long compared to the eleven pages in the songbook, and the online version completely lacked time signatures.[155] There is yet another comparison that should be made, however. Another published version of the song appears in an anthology of Neil Young songs in easy-to-learn form, and it comprises only one printed page.[156] It is different from the online tablature in that it shows the timed, lyrical melody on the traditional music staff and has chord charts to give an idea of the backing rhythm.[157] The online tab version lists the chords, and notates the lead guitar riffs as well.[158] Both versions give at least some sense of timing of the rhythm in that the chords change along with the lyrics and are sequential (though, the lyrics are only reproduced in part in the online tab).[159]

The foregoing comparison reveals that a music transcription may be instructive at varying levels of complexity, and that multiple transcriptions can "capture" the essence of a song. A transcription could have as little content as several chords, or as much content as the melodies and harmonies of multiple instruments and vocals—timing and all. This can be analogized to the facts in *Harper & Row Publishers, Inc. v. Nation Enterprises*, where the defendant magazine publisher copied and preemptively published quotes from President Ford that were to appear as memoirs in the plaintiff's magazine.[160] The U.S. Supreme Court agreed that, even by taking a relatively small portion of the work, the infringing publisher took the "heart" of the protected work.[161] Similarly, an online tablature, though less complete and informative than an official publication, could capture a song and replace the need for those official versions. That is truly the underlying concern, and it receives the direct attention of the fourth and final factor.

4. The adverse effect on markets

The fourth factor of the statutory test requires courts to consider "the effect of the use upon the potential market for or value of the copyrighted

152. *Id.* at 822.
153. *Id.* at 821–22.
154. *See supra* note 17.
155. *See supra* note 17.
156. NEIL YOUNG, NEIL YOUNG: ANTHOLOGY EASY GUITAR (1999).
157. *Id.*
158. Neil Young Tab, *supra* note 17.
159. *Compare* YOUNG, *supra* note 156, *with* Neil Young Tab, *supra* note 17.
160. 471 U.S. 539, 539 (1985).
161. *Id.* at 564–65.

work."[162] The U.S. Supreme Court has said that "[t]his last factor is undoubtedly the single most important element of fair use."[163] Indeed, many courts consider that to be the case.[164] The standard is not whether a use has *any* negative impact, such as the potential impact of negative criticism; rather, this factor assesses whether the use has an "adverse impact only by reason of usurpation of the demand for plaintiff's work."[165] The burden to show this type of harm may actually rest upon the copyright holder, but only if a court considers the use noncommercial.[166] Furthermore, the harm need not be actual and present but may be the result of eventual widespread use.[167] No matter where the burden lies between tabbers and the music publishers, this factor almost certainly weighs against finding that tablatures are fair use.

Perhaps the biggest problem facing the supporters of online tablature is that there is already a current market for printed sheet music and a growing market for official, online tablature.[168] A representative of the Music Publishers' Association claims that since internet tablatures came onto the scene, the sales figures for the most popular printed songbooks have dropped from 25,000 to 5,000 copies sold annually.[169] Perhaps the reason music publishers have not aggressively pursued legal action against tabsites since they first made their threats ten years ago is because the publishers are only now increasingly moving into the online realm.[170] One music group, Universal Music Enterprises, recently made a tablature version of one of Peter Frampton's new releases available for download on Apple's iTunes music service for those who bought the album from iTunes.[171] This might summon visions of an "iTabs" service developing in the near future, but since websites offering digital notation already exist, the analogy may only be relevant to suggest that the size of commercial archives, the cost of individual

---

162. 17 U.S.C. § 107 (2006).

163. *Harper & Row Publishers, Inc.*, 471 U.S. at 566.

164. 4 NIMMER & NIMMER, *supra* note 25, § 13.05[A][4].

165. *Id.*

166. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

167. *Id.* In the case of unlicensed tablatures, the use is already widespread. Recall that one tabsite reportedly had 1.4 million users in July of 2006. Tedeschi, *supra* note 1.

168. Tedeschi, *supra* note 1.

169. *Id.*

170. Websites that offer downloadable music notation for sale include Musicnotes.com, http://www.musicnotes.com (last visited Feb. 17, 2007); Sheet Music Direct, http://www.sheetmusicdirect.com (last visited Feb. 17, 2007); and FreeHandMusic, http://www.freehandmusic.com (last visited Feb. 17, 2007). As an indication of the growth of these sites, Musicnotes reported a 45% increase in sales for 2006. *Musicnotes Posts First Profit in 2006*, CAPITAL TIMES (Madison, Wis.), Feb. 14, 2007, at A10. The delay in enforcement may have also been a practical matter. But since the enactment of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.), copyright holders can now more effectively know which online entities are susceptible to liability and enforce their rights against them. *See supra* Part I.B.

171. *UMe Offers Unique Download of Sheet Music & Guitar Tablature From Peter Frampton's "Fingerprints" Album on the iTunes Store; First Time Sheet Music & Tablature From an Album Will Be Released to Fans Online*, MARKET WIRE, Sept. 13, 2006.

songs, and the timely availability of notation may one day be comparable to the offerings of digital music vendors such as iTunes.

Considering the extent of the developing market for digital music notation, the question becomes whether unlicensed tabs adversely impact that market. The tabsites almost certainly have the burden of arguing that that is not the case, because a court will most likely see unlicensed tabs as a commercial use—a way to avoid paying for licensed ones.[172] On the other hand, the tabsites might argue that musicians will still buy official transcriptions.[173] That argument seems to underestimate the reality that unlicensed tabs can in fact be a substitute for licensed ones. As argued to this point, transcriptions with varying levels of information can still capture the expression of a song.[174] And while the U.S. Supreme Court has suggested that where a "use is transformative, market substitution is at least less certain,"[175] tablatures threaten to supplant the instructive purpose of compositions without being transformative in any relevant sense.[176]

The picture that emerges under the fourth factor is hardly favorable to the tabsites, especially considering that courts put so much emphasis on that part of their analyses. The widespread use of unauthorized tablatures appears to pose a significant threat to a potentially booming online market. In total, the fair use analysis has shown that tablatures tend to supplant licensed transcriptions rather than add something new. Thus, a court would deem tablatures infringing and not a fair use, even though they may have initially appeared to be a fair use in some superficial and perhaps sympathetic respects.

III. SHOULD WE SAVE TABLATURES?

In the Introduction, this Note suggested that the tablature debate would add more fuel to the fire of ideological debate over copyright, especially because online tabbers were a sympathetic group.[177] After detailing how a court would most likely resolve the debate under the fair use test, it seems that the issue is simple and that tabbers are undeserving of any legal protection. But just because the current law produces a certain result does not mean that there is not something problematic going on here. By tabbing, musicians have flexed their own musical muscle to teach others and expand the community of musicians. The law should preserve this benefit under fairer circumstances. While the fair use test would not

---

172. *See supra* text accompanying notes 111–115.

173. *See* GuitarTabs.com, *supra* note 58. In defense of online tabs, the site operator argues that tabs encourage licensed sales and remarks, "The notion that a musician serious enough to spend $30 on a sheet music book would instead settle for a by-ear tablature interpretation seems unlikely to me." *Id.* One implicit problem with this argument is that a tabsite visitor can often get a single tab that would otherwise only be available in one of those more expensive books.

174. *See supra* Part II.B.3.

175. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (finding the transformative nature of a parody to weigh against a finding of harm to the market for the protected work).

176. *See supra* Part II.B.1.

177. *See supra* text accompanying notes 28–34.

suffice to protect educational uses of art analogous to tabbing, a compulsory licensing scheme could.

A. The weakness of the fair use test

The fair use analysis ultimately revealed that, in balancing the four factors of the defense, judges are ultimately concerned about the impact that a use of a copyrighted work will have on the marketability and profitability of the original copyrighted work. The weakness in the focus on potential markets is that the market cannot always satisfy demand for unique tastes in art; moreover, the market cannot always satisfy demand for unique uses of art that are beneficial to the public. Stanford Law Professor Lawrence Lessig explains that this dilemma exists due to "the complexity of our preferences and how hard it is for others to speak to them . . . . [T]he costs of knowing what each person would want to hear are prohibitive."[178] Lessig, who speaks of the internet as a commons, has written that post-internet markets have a greater potential to satisfy consumer preferences than pre-internet markets, because the internet lowers the costs for consumers to decide their preferences and for providers to understand and meet them.[179] In the past, tabbers have collectively tried to provide educational access to music compositions. Admittedly, the growing effort by music publishers to offer official tabs online is addressing this issue of demand, but unique interests will always exist at the fringes. The issue is not moot; rather, it goes beyond just notation for guitar and is about access to art as education and inspiration in general.

The tablature debate brings to the fore the dual role of art in entertaining and educating. A rights holder may market art in the first instance and later market it for educational uses. This was recognized earlier under the first factor of the fair use analysis, regarding the purposes of protected works.[180] As regards music compositions, rights holders can bring them to life in sound recordings, and, if they transcribe them to a visual medium, they can use them to educate.[181] The nature of compositions reveals that their educational function does not necessarily reside in the same layer as their larger artistic function. While all art has an educational function in inspiring further creation,[182] it can be said that compositions are a type of art with a primary purpose that can be accompanied by secondary educational products. The composition in the abstract can entertain, inspire, and educate once it is recorded or performed, but compositions, when symbolically and visually perceived, appear entirely educational. When the educational capacity of creative works is not solely contemporaneous with experiencing the works themselves, public use of that capacity without express permission of the copyright owners should be more acceptable under the law.

Still, the law should not entirely relegate educational uses of art to the discretion of public users. There is no justification that educational materials

---

178. *See supra* text accompanying notes 28–34.
179. LESSIG, *supra* note 97, at 15, 132–33.
180. *See* discussion *supra* Part II.B.1.
181. *See* Allen & Newmark, *supra* note 66, at 663.
182. *See* LESSIG, *supra* note 97, at 104–05.

should simply not be subject to market forces,[183] even when they may constitute a relatively small percentage of the revenue an author will make from a particular work (as seems to be the case with compositions).[184] The interests of quality also demand a competitive environment, and if secondary educational materials are to be subjected to markets, then it makes sense under prevailing copyright values that their creators should be the ones to exploit them.[185] The question becomes how much control over the educational uses of their works the creators should have when that control threatens the availability of those uses—the quantity aspect. How should copyright law respond in the face of unsatisfied demand for educational uses? There are two major approaches that come to mind, both of which Professor Lessig has suggested. First, courts could be fairer about fair use.[186] Second, Congress could subject more uses to compulsory licenses.[187] As discussed, the judicial doctrine of fair use is so protective of the profitability of artistic works that a judge would almost certainly reject the notion that secondary educational uses of art such as tablatures, even when further circumscribed, can be fair use. Accordingly, this Note calls upon Congress to expand compulsory licensing in copyright and broaden permissible public use of artistic works in limited circumstances.

B. The proposal: temporary compulsory licenses

Users of artistic works should have license, irrespective of the consent of copyright owners, to non-commercially produce and distribute secondary educational materials based on copyrighted works in the absence of similar licensed materials or products being commercially available.[188] Thus, the proposed compulsory license is for producing and distributing secondary educational

---

183. *See generally* Salinger v. Random House, 650 F. Supp 413, 425 (S.D.N.Y. 1986). Before finding that the educational use of a protected work weighed in favor of a defendant alleging fair use, Judge Leval cautioned that an educational-commercial dichotomy can oversimplify the concerns of fair use. *Id.* "[P]ublishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship." *Id.* Thus, educators may exploit copyright but also deserve its protections.

184. *See* Tedeschi, *supra* note 1 (quoting former Sublime band member Mike Happoldt, who suggested the income is forgettable); *see also* Allen & Newmark, *supra* note 66, at 670. While the authors describe print income as a "major source of income," they also remark that it has been "overshadowed" by recording and performance revenues. Allen & Newmark, *supra* note 90, at 670.

185. *See* Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (reasoning that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright").

186. *See* LESSIG, *supra* note 97, at 265. For example, the Supreme Court has held that there is presumptively no fair use simply where "a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 567 (1985).

187. *Id.* at 254–55.

188. An absence of conflict would also occur when a secondary educational material is out of production.

materials. Currently U.S. law already allows users to obtain compulsory licenses for musical works (compositions), but the license only allows users to create new phonorecords—sound recordings fixed in material form—not to publish or distribute the underlying work.[189] To emphasize, the statute does allow licensees to duplicate previously existing sound recordings or produce sheet music.[190] Subject to certain restrictions, the license allows one to fix a new sound recording of another's music composition if the owner of that work has previously authorized a sound recording of the composition to be released to the public.[191] Instead of asking permission, the one compelling the license only has to provide notice and pay a statutory royalty to the copyright holder.[192] Basically, it allows artists to cover the songs of others on their own albums; but radio play, performances, and other distributional issues would require the user to acquire further licenses from the copyright owner.[193]

The proposed expansion of compulsory licensing would apply to other works besides guitar tablatures. Other secondary educational materials might include screenplays or simple drawings of visual arts to give a basic sense of composition or other elements of design. The example of a screenplay is demonstrative. Once its expression culminates as a film, the written script takes on a more secondary function: It can be studied. Again, the idea is not that screenplays should not be marketable—many are in fact available from online booksellers. The goal is to prevent copyright holders and popular markets from having complete control over the availability of these materials and the creative dialogue in general.[194] Indeed, when Congress enacted the original compulsory licensing scheme for phonorecords, it was concerned that copyright licensees would develop a "great music monopoly" over sound recordings.[195]

The details of a compulsory licensing provision for secondary educational materials would differ in design and purpose than how U.S. law provides for

---

189. 17 U.S.C. §§ 101, 115 (2006). Interestingly, Congress' decision to use compulsory licenses as an exception to a composer's exclusive rights arose in the context of sheet music. LESSIG, *supra* note 97, at 108–09. In a famous case, the U.S. Supreme Court ruled that piano rolls, which could be played by "automatic" pianos, were not copies of sheet music. *Id.* (citing White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 21 (1908)). Congress responded by saying that people could mechanically reproduce musical works so long as they paid a statutory royalty. *Id.* (citing Act of March 4, 1909, ch. 320(e), 35 Stat. 1075, 1076 (1909) (current version at 17 U.S.C. § 115 (2006))). But this did not grant a compulsory license for reproducing sheet music. *See id.*

190. This is verified by the analysis in *M. Witmark & Sons v. Standard Music Roll Co.*, 213 F. 532, 534 (D.N.J. 1914), wherein the court reasoned that a compulsory license allows for the mechanical production of sound, not printed lyrics. Similarly a compulsory licensee cannot notate the composition in print or other form.

191. 17 U.S.C. § 115(a)(1).

192. *Id.* § 115(b)–(c).

193. *See id.*

194. This is precisely one of Professor Lessig's overarching concerns. He worries that the availability of artistic resources will hinge on copyright holders granting permissive access—such grants being largely based on market forces. LESSIG, *supra* note 97, at 11–12.

195. Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 4 (D.C. Cir. 1981) (quoting H.R. Rep. No. 2222, at 7 (1909)).

compulsory licensing of new sound recordings. Unlike the phonorecord scheme, copyright owners would have the power to limit the time period over which compulsory licensees of secondary educational materials could take advantage of their licenses.[196] As stated at the beginning of this section, the proposal offers copyright users license in the absence of similar secondary educational materials being made commercially available by the owners. Compulsory licenses under this scheme would terminate when copyright owners make officially licensed versions of the materials available, or possibly before that time. In this manner, copyright owners have incentive to exploit the educational capacity of their works. The proposal also addresses practical challenges that result from this arrangement.

In order to facilitate communication between owners and users and to prevent conflict between the availability of user-made and owner-made materials, compulsory licensees would have to provide notice to the copyright owners before they make a secondary material available. Compulsory licenses under the current law are ineffective if the licensee does not provide notice to the copyright owner.[197] Under that scheme, the notice requirement serves to give copyright owners the opportunity to register their works, at which point the owners are entitled to receive royalties. Here, the notice serves to identify educational users so that owners could, in turn, provide notice to the users that an official version of the material is already available or that they intend to publish and distribute official versions within a one-year timeframe—if those representations were made in good faith. Such notice would itself be a triggering event: Upon receipt of the notice, the educational user would have the responsibility to never distribute or end his or her distribution of materials made subject to a compulsory license. Educational users would be subject to civil penalty for failing to follow the requirements of either notice provision, and owners could face a civil penalty for engaging in a pattern of providing notices that misrepresent the actual or pending availability of official secondary educational materials.

The proposed scheme would differ in another major respect. Compulsory licensees of secondary educational materials would not owe copyright holders statutory royalties.[198] The basic premise here is that the law should value some beneficial uses of art more than rewarding its creators with all incidental and low-value profits to be won with those works. Additionally, the proposal prohibits compulsory licensees from using their licenses in profit-making ventures. As first stated, the proposal allowed for noncommercial use, which now must be clarified as use without any purpose to earn revenue. In this manner, unsophisticated users should continue to be the ones making, distributing, and learning from secondary educational materials. Without making any money themselves, these users would have no earnings to share.

The prohibition on commercial use should also address the concern that unofficial secondary materials will still invade the profitability of later-released, official materials if the unofficial materials satisfy part of the consumer base. With

---

196. *See* 17 U.S.C. § 115.

197. *Id.* § 115(b).

198. The current law requires compulsory licensees to pay royalties. 17 U.S.C. § 115(c).

a prohibition on commercial use, the unofficial materials would presumably only attain a certain level of quality that may not at all threaten the official market. Even if a user obtained and kept a copy of an unofficial material on his or her computer, the user may very well still desire the quality and other advantages that would come with a licensed copy.[199] Additionally, the unofficial material could spur demand at three levels, including the demand for official versions of other specific works, the demand for the "primary" or "entertainment" formats of the creative materials (e.g. records, albums, film, and visual arts), and the demand for the secondary materials in general.[200] The presence of unofficial materials online and the notice procedures included in the proposal could also help publishers predict preferences and be the first producers anyway. As Professor Lessig has suggested, the internet allows for very efficient formation and assessment of preferences.[201] It bears repeating that, even if official markets begin to successfully capture demand and preempt unofficial materials, unofficial materials will always be of value at the fringes, meeting unique interests. It is the ability of the internet to cater to these unique interests that is worth preserving,[202] and the expanded compulsory licensing scheme that this Note proposes will support that effort. More fundamentally, the proposed change recognizes that diverse, educational access to art is ultimately at stake and challenges profit as the bottom line in copyright law.

C. Dealing with market obsession

At base, the proposal to expand compulsory licensing for music compositions and analogous educational uses rejects the picture of copyright law that has developed under the judicial doctrine of fair use. The direction of judge-made copyright law has become clear,[203] but its policy justification has not. Courts are ultimately concerned about the fourth factor in the fair use balancing test, regarding the impact of purportedly fair uses on potential markets for copyrighted works.[204] That trend aims to preserve without exception all incidental profitability of protected works to their authors. In writing for the majority in *Harper & Row Publishers, Inc. v. Nation Enterprises*, applying the fourth fair use factor, Justice O'Connor reasoned that "once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression."[205] If this is the standard for defending educational use of art, then the Muses are crying.

---

199. The homepage for one official online site advertises that its songs are transcribed by professionals and that video instruction for some songs is available. Sheetmusicdirect.com Homepage, http://www.sheetmusicdirect.com (last visited March 14, 2007).

200. Professor Lessig has made similar arguments with respect to digital music-sharing. *See* LESSIG, *supra* note 97, at 131.

201. *Id.* at 131–33.

202. *Id.* at 10–13.

203. *Id.* at 266.

204. *See* discussion *supra* Part II.B.4.

205. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 567 (1985).

Why should consumers of art have to justify every loss of revenue? The U.S. Constitution established copyrights as a means "[t]o promote the Progress of Science and useful Arts."[206] Copyright law is supposed to *balance* the incentives to create with the interest of further creation,[207] and educational access to art plays an indispensable role in that process. To an extent, judges have upset the balancing act, and if the tablature debate is one day tested in court, a judge will in all probability overstate the role of potential markets and profit incentives in fair use.

As to the role of incentives, Professor Lessig has argued that "[o]ur aim should be a system of sufficient control to give artists enough incentive to produce, while leaving free as much as we can for others to build upon and create."[208] The idea of "just enough incentive" could lead one to argue that songwriters should not even expect royalties from print publishing—surely the real gold is in recording and performance royalties, and publishing royalties may literally be an afterthought.[209] What this Note proposes does not go so far, but it does argue that U.S. copyright law should medicate its obsession with profitability in potential markets. The tablature debate is the perfect arena for Congress to begin restoring balance in copyright law. What could better promote the progress of art than musicians congregating online to share unique interests and help each other learn to play music?

IV. PREVENTATIVE MEASURES AND CONCLUDING REMARKS

Considering the current trend in copyright law, it may be hard to imagine that either Congress or the courts will act to strengthen fair use in a manner that will protect the future of online tabbing for music fans. But failure to act may fuel the bad sentiment that some say has been growing between fans and musicians since the *Napster* days.[210] Short of endorsing unofficial tablatures, there are a couple alternative steps that copyright owners could take to improve the availability of music transcriptions. First, publishers could become more involved in facilitating the creation of amateur tablatures. Even better would be for the actual songwriters to retain more control over their works and authorize amateur tabbing if they so choose.

According to the tabbers, the music publishers have not been willing to engage in open discussion about the future of tabs online.[211] This is unfortunate, because there is much that the publishers could do to promote the availability of music transcriptions. In a sense, this Note proposes that Congress force music publishers to cooperate with amateur transcribers in ways they already should be. Publishers could monitor forums where users could transcribe and share songs to which the publishers hold the respective rights. In this manner, the publishers could allow music fans to create amateur and officially licensed transcriptions of

---

206. U.S. CONST. art. I, §8, cl. 8.

207. *See supra* text accompanying notes 97–103.

208. LESSIG, *supra* note 97, at 249.

209. *See supra* notes 128–30 and accompanying text.

210. *See* Krissi J. Geary-Boehm, Note, *Cyber Chaos: The Clash Between Band Fansites and Intellectual Property Holders*, 30 S. ILL. U. L.J. 87, 89–96 (2005); Tedeschi, *supra* note 1.

211. *E.g.*, GZ, *supra* note 8.

songs that are not commercially available, and the companies could monitor the posts to ensure they are for unpublished transcriptions and songs for which each monitoring publisher holds the rights. This would only help the publishers have better insight into their market. While ideally tabbers should not have to submit to this sort of control, it would at least improve educational access to art.

Another measure that could promote the availability of music transcriptions is for the actual music composers to retain the print publishing rights to their works and authorize their fans to engage in more extensive use. The idea of having creators decide the extent to which they want to protect their content or make it freely available to other creators is something specifically addressed by an organization called Creative Commons, founded by Professor Lessig and others.[212] The Creative Commons website explains that it "provides free tools that let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry. You can use [Creative Commons] to change your copyright terms from 'All Rights Reserved' to 'Some Rights Reserved.'"[213] The organization is a more ambitious concept than what songwriters should do in the short run: Songwriters should refuse to sign contracts that give to large companies entitlements they would rather see in the hands of the public. Of course, for a songwriter to retain even a portion of their copyright would require bargaining power.[214] This may be difficult in a world where five large companies control eighty percent of all music distributed worldwide.[215] Nevertheless, if the music community is passionate about the future of music in general, then this is something for which musicians should strive.

In using tablatures to explore the policy basis of fair use, this Note demonstrates that it generally makes sense that copyright protects the marketability of art, but it also appears that copyright trends have allowed for penny-pinching monopolies to develop. Market forces cannot entirely accommodate the unique and ever changing demand that is fueled by the internet, so copyright should strive to improve the quality and availability of instructional materials. The current practice of amateur tabbing can be viewed as a threat to those goals, but fairer circumstances could ensure that diverse artistic interests will always thrive on the internet.

In applying the classic fair use test to tablatures, the general theme is that unauthorized tablatures tend to supplant the purpose of authorized ones. This concern shows up in analyzing each of the four factors, and perhaps only the third factor, regarding the extent of the use, weighs in favor of amateur tabbing as fair use. The analysis shows that tabbers are unlikely to obtain the declaratory relief necessary to continue tabbing as they do now. Current trends in copyright law are highly protective of creative works and courts are prone to closely scrutinize and emphasize the impact of purportedly fair uses on the current and future markets for protected works.

---

212. *See* Lessig, *supra* note 61, at 11–12.

213. Creative Commons, http://www.creativecommons.org (last visited March 14, 2007).

214. Allen & Newmark, *supra* note 66, at 671.

215. Lessig, *supra* note 61, at 9.

Despite the supplanting effect of amateur tabs, it is worthwhile to carve out an area from exclusive rights that protects tabs under fairer circumstances. Judges applying the fair use test appear unwilling to strike this balance, but Congress, through an expansion of compulsory licensing, can define those circumstances. This is a small measure toward rebalancing creative incentive with creative progress, but it is of great importance. The current law has skewed that balance, and what is at stake is perhaps the pinnacle of creative flourishing. The internet has provided a great forum for unique interests to congregate, but copyright law threatens to relegate the future of art to the hands of a few. We must not allow that to happen.