

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 18 *Volume XVIII*
Number 1

Article 12

2007

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Recommended Citation

Tara Lynn Waters, *Gimme Shelter: Why the Courts Can't Save Online Guitar Tablature but the Music Publishing Industry Can (and Should)*, 18 Fordham Intell. Prop. Media & Ent. L.J. 253 (2007).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol18/iss1/12>

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Gimme Shelter: Why the Courts Can't Save Online Guitar Tablature, but the Music Publishing Industry Can (and Should)

Tara Lynn Waters*

INTRODUCTION

"Last time I checked the catalog, we don't own the G-minor chord."¹

—Clark Miller, EMI Music Publishing

EMI doesn't own the C, F, E-flat, or F-sharp chords either. However, they do claim to own the following:

```
E----3-----1----1----2----2
B----3----1----1----2----2----
G----3-----2----1----3----
D----5----2----3----3----4----
A----5----3----3----4----5----
E----3----0----1----0----2----
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¹ Matthew Mirapaul, *Tablature Erasa: Guitar Archive Closed by Lawyers*, N.Y. TIMES, June 6, 1996, available at <http://partners.nytimes.com/library/cyber/mirapaul/0606mirapaul.html>.

² Author-generated partial tab of a composition controlled by EMI Music Publishing.

The above diagram is not simply a bunch of dashes and numbers, but guitar tablature (hereinafter “tab”) for a popular rock song. A musician versed in reading tab can use the above diagram to play that song on his guitar. However, to accurately play the song he will also likely refer to a sound recording of it or utilize other, more detailed notation pertaining to rhythm, fingering, and strumming.³ Standing alone, guitar tab simply provides diagrammed instructions for which strings to press.⁴ Most tab scribes add to basic tab notation to provide fuller instruction; lyrics, comments, chord names, and other musical descriptors frequently accompany tab. For this reason, its use is widespread within the musician community, particularly online. And, that use has drawn the ire of the music publishing industry.⁵

When a songwriter composes a song, the composition is immediately afforded copyright protection. It is commonplace for songwriters to assign a percentage share of their compositional copyright to a third-party music publisher.⁶ “Music publishers own their own songs or control (administer) songs owned by others.”⁷ U.S. copyright law confers upon the owner or controller of the compositional copyright the exclusive right to create and distribute copies of the musical composition.⁸ This means that

³ Howard Wright, *The Guide to Tab Notation: How to Read and Write Tab*, Apr. 18, 1995, at 1.2, <http://www.harmony-central.com/Guitar/tab-notation.txt>.

⁴ Guitar tab consists of six lines corresponding to the six strings on a guitar. The numbers written on the lines correspond to the fret number. For example, a 3 written on the bottom line indicates that a player should press the top E string on the guitar with his left hand on the third fret of the fretboard. *See also infra* Part I.C.

⁵ *See* Mirapaul, *supra* note 1; accord Bob Tedeschi, *Now the Music Industry Wants Guitarists to Stop Sharing*, N.Y. TIMES, Aug. 21, 2006, available at <http://www.nytimes.com/2006/08/21/technology/21ecom.html?ex=1313812800&en=ea101e928815dd86&ei=5090>. *See also* A Statement from the MPA Regarding Websites Distributing Unauthorized Sheet Music and Tablature, Mar. 10, 2006, <http://www.mpa.org/news/show/5> [hereinafter *Statement from the MPA*].

⁶ Not all publishing rights are necessarily assigned to a music publisher. The terms of assignment vary according to each individual songwriter’s contract. In addition, publishing rights may be divided across multiple songwriters and therefore multiple publishers. For a detailed explanation of the business of music publishing, see Michael J. Perlstein, *Music Publishing*, in ENTERTAINMENT LAW 79–138 (Howard Siegel ed., N.Y.S. Bar Ass’n 2004) (1990).

⁷ *Id.* at 79.

⁸ 17 U.S.C. § 106 (2002) (“... the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work

only the songwriter or his music publisher may license the printing and distribution of sheet music, i.e., the written musical notation for a song.⁹ Until about fifteen years ago, a musician wishing to learn how to play a song had only three options: 1) attempt to play the song by ear, 2) purchase the sheet music for that song to learn on his own, or 3) hire an instructor to teach him the song. Option one requires either innate musical prowess that only a lucky few are blessed with, or advanced training and instruction. Options two and three require monetary investment. A tablature edition guitar songbook for a popular rock band at New York City's largest sheet music store, Colony, cost \$21.95 in September of 2007.¹⁰ Single song sheet music may be purchased online at a variety of websites for approximately \$4.95 per song.¹¹ Private guitar lessons typically range from \$25–75 per hour depending on the skill level of both the instructor and student.¹² However, the explosion of the internet has changed the traditional musical instruction model.

Over the past fifteen years, musicians have created a massive online educational network. Communities of musicians, worldwide, log on everyday to post their tab, solicit input and feedback, and critique and download others' tab. A web search for "tablature" yields six million results, and counting.¹³ The major community sites, the On-Line Guitar Archive (hereinafter "OLGA"), Guitar Tabs dot com (hereinafter "Guitar Tabs"), and Ultimate Guitar Tabs Archive (hereinafter "Ultimate Guitar"), collectively have well over one million users.¹⁴ Proponents of tab

in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public . . .").

⁹ See Perlstein, *supra* note 6, at 102.

¹⁰ See Colony Record and Radio Center, <http://www.colonymusic.com/> (last visited Sept. 10, 2007).

¹¹ See, e.g., Guitar TAB Downloads and Music Books at Musicnotes.com, <http://www.musicnotes.com/guitartab/> (last visited Sept. 10, 2007).

¹² See, e.g., Musician Search for Guitar Lessons, Craigslist, <http://newyork.craigslist.org/search/muc?query=guitar%20lessons> (last visited Feb. 25, 2007).

¹³ Google web search, <http://www.google.com> (last visited Oct. 1, 2007).

¹⁴ OLGA and Guitar Tabs' membership numbers are not readily discernable because they have taken their sites down in response to threats of legal action. See On-Line Guitar

websites highlight the educational purpose of sharing tab online.¹⁵ Online tab sites enable long-distance learning among musicians. Most sites have community features, such as message boards, that allow users to request tab from other users, critique versions of tab, and get general help with guitar playing.¹⁶ A budding guitar player no longer needs a local instructor; he simply needs an internet connection. Great for him, not so great for music publishers; he also no longer needs traditional printed sheet music.

With free tab readily available online, it is not surprising that the Music Publishers' Association of the United States (hereinafter "MPA") is applying pressure on tab websites. The MPA released a statement on March 10, 2006, elucidating its decision to actively pursue tablature websites for copyright infringement.¹⁷ If music publishers own the exclusive right to reproduce or prepare derivative works of musical compositions, then doesn't online tab infringe that right? The MPA certainly believes so.¹⁸ Tab websites, the majority of site users, and even some composing musicians, disagree.¹⁹ But, just in case they're wrong, most tab

Archive, <http://www.olga.net> [hereinafter OLGA]; Guitar Tabs dot com, <http://www.guitartabs.com> [hereinafter Guitar Tabs]; Ultimate Guitar's members-only forum has over 690,000 members. UG Community, <http://www.ultimate-guitar.com/forum> (scroll down to section labeled "UG Community @ Ultimate-Guitar.Com Statistics") (last visited Oct. 1, 2007). Assuming that OLGA and Guitar Tabs, when fully operational, boasted at least an equal number of members, the total figure would be roughly 2 million members. This figure does not take into account the hundreds of other sites still delivering online tabs to users. However, duplication of users among the sites is likely.

¹⁵ See, e.g., Music Student and Teacher Organization, <http://www.guitarzone.com/musato>. MuSATO's motto is: "Fighting for the freedom to fairly use tablature in online education." *Id.*

¹⁶ See UG Community, <http://www.ultimate-guitar.com/forum> (last visited Sept. 10, 2007); alt.guitar.tab, <http://groups.google.com/group/alt.guitar.tab/topics> (last visited Sept. 10, 2007).

¹⁷ See *Statement from the MPA*, *supra* note 5.

¹⁸ See *id.*

¹⁹ See NMPA Letter, <http://www.guitartabs.com/nmpa.php> ("I honestly believe that what I'm doing is neither illegal or harmful to the music publishing industry.") (last visited Jan. 15, 2007); Guitar Noise Forums, <http://www.guitarnoise.com/forums/viewtopic.php?t=26207> (tab users reacting to the news that OLGA had shut down and discussing whether or not tab infringes the compositional copyright); Tedeschi, *supra* note 5 (reporting '90s band Sublime guitarist Mike Huppoldt as saying "I think this is greed on the publishers' parts").

sites include disclaimers or terms of use provisions that explicitly state that online tabs should be used for “private study, scholarship, or research.”²⁰ Such language clearly invokes the fair use defense provided by U.S. copyright law.²¹ However, these disclaimers have not moved the MPA, who filed letters demanding that infringing content be removed from tab sites throughout the summer of 2006.²² Both OLGA and Guitar Tabs succumbed to the threat of legal action.²³

In spring of 2007, the Harry Fox Agency struck an ad revenue-sharing deal with tab website MXTabs.net, which was acquired by Musicnotes, a licensed sheet music publisher.²⁴ The tabs available on the new MXTabs site will continue to be user-generated and user-moderated.²⁵ While this deal marks a true milestone in the fight to save online tabs, the venture fails to address the key policy concerns surrounding the issue. Hal Leonard Corporation, the world’s largest music print publisher, highlighted some of these concerns in an email to other music publishers, warning them not to license MXTabs: first, the music community wants and needs *accurate* tab, and second, simply adopting a revenue-sharing model does nothing to abate copyright-infringing attitudes and behaviors.²⁶

²⁰ Email from Cathal Woods to author, OLGA site administrator (Oct. 29, 2006) (on file with author). See, e.g., Terms of Service at Guitar Tabs dot com, <http://www.guitartabs.com/tos.php> (last visited Sept. 10, 2007).

²¹ See 17 U.S.C. § 107 (2002) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.”).

²² Both OLGA and Guitar Tabs published their notices on their respective websites. See OLGA, *supra* note 14; Guitar Tabs, *supra* note 14, at <http://www.guitartabs.com/nmpa.php>.

²³ OLGA, *supra* note 14. OLGA also shut down temporarily in 1996 when EMI Music Publishing threatened its original web hosting provider, The University of Nevada at Las Vegas, with legal action. See Mirapaul, *supra* note 1.

²⁴ Musicnotes Announces First Free, Licensed Legal Guitar Tab Web Site, http://blog.musicnotes.com/main/2007/03/musicnotes_anno.html (Mar. 27, 2007).

²⁵ About MXTabs, <http://www.mxtabs.net/about> (“Similar to other user-generated content sites, MXTabs.net users are encouraged to create, edit, rate and review their own tablature interpretations of their favorite songs.”).

²⁶ Response to Hal Leonard’s E-Mail to the Music Publishing Community, <http://www.mxtabs.net/blog/2007/05/08/response-to-hal-leonard-e-mail-to-the-music-publishing-community/#more-19> (May 8, 2007, 2:52 EST).

This note prospectively analyzes the MPA's case against music tablature websites. Part I provides a cursory look at the double-headed structure of the music industry with particular emphasis on publishing rights and print licensing. It also details what music tablature is and how it differs from standard printed notation. Part II of this note reviews U.S. copyright law provisions, analogous case law, and scholarship that might be relevant in a potential litigation. In particular, it details the fair use provision and how courts have determined infringement under the substantial similarity test. Part III considers tablature's standing under the Copyright Act and evaluates a statutory fair use defense. Part IV concludes that courts will be constrained by fair use precedent and the intricacies of the music industry combined with the ever-improving technologies that allow users to share tab online make new legislation unlikely. Finally, this note suggests that the problem will be best solved by the music publishing industry adopting a policy-driven business model to provide affordable and accurate tab online.

I. BACKGROUND

A. *The Music Industry*

The music industry is a complicated beast with a double-headed structure. Most are familiar with the music distribution side of the business. Music labels produce and distribute sound recordings—in the form of LPs, CDs, and mp3s—of musical compositions. Copyright exists in the sound recording.²⁷ However, a sound recording is actually a protected derivative work of the underlying musical composition,²⁸ which may enjoy its own copyright protection.²⁹ Anyone wishing to create a sound

²⁷ See 17 U.S.C. § 102 (2002) (conferring protection to not only musical works but also sound recordings). Federal protection of sound recordings was first introduced in the 1976 Copyright Act in response to growing piracy concerns. Records distributed before the Act are still protected under state laws, which will not be preempted until 2067. *Id.* § 301(c).

²⁸ See Perlstein, *supra* note 6, at 81.

²⁹ Copyright in a musical composition exists upon creation of the work. Once the work enters the public domain, the underlying composition is no longer protected; however

recording of a copyrighted musical composition must obtain the appropriate license either from the composer, his agent, or by paying a compulsory license fee, or lower negotiated fee.³⁰ This means that two copyrights exist in every record: the compositional copyright and the sound recording copyright.³¹

The music publishing industry operates separate and distinct from the music distribution industry, focusing solely on compositional copyright. Confusion between the two probably stems from the fact that many music labels have a sister publishing company. For example, EMI Group is comprised of two divisions, EMI Records and EMI Music Publishing.³² Today, many artists and groups will form their own independent publishing companies to handle licensing and other music publishing affairs.³³ To complicate matters further, where a song has multiple authors, each author might have his own publishing company, or the authors will assign their rights to separate third-party publishers. This has made tracking of copyright ownership an odious task.

B. The Music Publishing Industry

Music publishing has a long history, extending far before the birth of the phonorecord. Printed music first appeared during the Renaissance.³⁴ Before the 12th century, complex musical compositions did not exist; “music [was] monophonic.”³⁵

derivative sound recordings would remain protected in accordance with federal copyright law. *See id.* at 79–80.

³⁰ *See* 17 U.S.C. § 115 (2002). Fees are also required by statute for performance of a work, etc. Compulsory fees are statutorily defined. *Id.*

³¹ A record, or phonorecord, does not benefit from copyright protection. *See* Perlstein, *supra* note 6, at 80. A phonorecord that embodies a protected sound recording will be labeled with the symbol © (P in a circle) with the date of first publication and the name of the owner of the sound recording copyright.

³² *See* Company Overview, EMI Group, <http://www.emigroup.com/About/Overview/Default.htm> (last visited Sept. 10, 2007).

³³ This is a trend famously started by the Beatles’ formation of Apple Corps Ltd., which includes a publishing division.

³⁴ *See* Michael W. Carroll, *Whose Music Is It Anyway?: How We Came To View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1409 (2004).

³⁵ *Id.* at 1440. “In music, monophony is the simplest of textures, consisting of melody without accompanying harmony.” Monophony, Wikipedia, <http://en.wikipedia.org/wiki/Monophony> (last visited Sept. 2, 2007).

Therefore, demand for a universal notation system did not exist either.³⁶ As notation developed, composers used the medium to innovate polyphonic compositions,³⁷ which in turn raised demand for accurate printed music.³⁸ Once the printing press was introduced, music publishers established a stronghold on the right to produce written music,³⁹ primarily made possible by England's privilege system.⁴⁰ The privilege system gave composers the right to their original manuscripts and publishers the right to reproduce them in printed form.⁴¹ Notably, music printing rights also specified techniques and fonts due to the cost and complexity of typesetting notation.⁴² Composers had an interest in maintaining the exclusivity of publishers' rights because it ensured that their compositions were reproduced true to their artistic vision.⁴³ However, publishers reproduced printed works selectively based on supply and demand economics.⁴⁴ The government favored this monopolistic system because it gave them power over which songs, and which subjects addressed by song, would be conserved for perpetuity.⁴⁵ Thus, the development of music publishers' copyright was born not from the Lockean principle of creator's right but from political and economic survivalism.

³⁶ See Carroll, *supra* note 34, at 1439.

³⁷ See *id.* at 1442. "In music, polyphony is a texture consisting of two or more independent melodic voices, as opposed to music with just one voice (monophony) or music with one dominant melodic voice accompanied by chords (homophony)." Polyphony, Wikipedia, <http://en.wikipedia.org/wiki/Polyphony> (last visited Sept. 2, 2007).

³⁸ See Carroll *supra* note 34, at 1443.

³⁹ See *id.* at 1456–57.

⁴⁰ See *id.* at 1462–64.

⁴¹ See *id.* at 1460. The privilege system also allowed the Crown to control trade and censor the press. See *id.* at 1462.

⁴² See *id.* at 1460. One argument raised by the MPA involves the cost of producing tab. See Tedeschi, *supra* note 5 ("Mr. Keiser, of the Music Publishers' Association, estimated that, including overhead costs, tablature could cost about \$800 per song to produce, license and format for downloading."). If we were in Renaissance times, the different production processes employed by music publishers and online tab scribes might be considered unique enough to each warrant separate protection and privilege.

⁴³ See Carroll at 1476–77.

⁴⁴ See *id.* at 1474.

⁴⁵ See *id.* at 1463.

These policies continue to drive the music publishing industry in the present-day. While interest in classical and Broadway show sheet music remains relatively steady, demand for popular and rock sheet music waxes and wanes with cultural shifts. Therefore, publishers are highly selective in deciding which songs and albums will be made available in print. This practice effectively allows music publishers to maintain a strict monopoly over the dissemination of musical notation for copyrighted songs. To compensate for the gaps in the print music library, guitar players have created a much more comprehensive online catalog of tablature.

C. Music Tablature 101

Most people, whether able to read music or not, readily recognize traditional staff notation. A much smaller number of people probably recognize tab notation. Guitar tab notation consists of a diagram of the six strings on a guitar; each string is labeled with a number indicating which string and fret combination the player needs to press.⁴⁶ The strings are labeled in order from the highest note to the lowest note or, for most right-handed players, upside down.⁴⁷ To illustrate, look at the first chord tabbed out on the first page of this note:

```

E----3-----1----1----2---- bottom string
B----3----1----1----2----2----
G----3-----2----1----3----
D----5----2----3----3----4----
A----5----3----3----4----5----
E----3----0----1----0----2---- top string

```

This tab indicates that to play the first chord, the player must press the top string and the bottom three strings in the third fret and the second and third strings in the fifth fret. Frets are mathematically calculated divisions on the neck of the guitar.⁴⁸ The first fret is farthest away from the guitar body.

⁴⁶ See Tablature, Wikipedia, <http://en.wikipedia.org/wiki/Tablature>, at Guitar tab (last visited Sept. 10, 2007).

⁴⁷ See *id.* The top string in a tab diagram represents the bottom string when a right-handed player is holding the guitar.

⁴⁸ Fret, Wikipedia, <http://en.wikipedia.org/wiki/Fret> (last visited Sept. 10, 2007).

Musicians have developed some conventions for creating tab but there are no hard rules.⁴⁹ Songs are rarely tabbed out fully, meaning that few musicians provide fully diagrammed tab of a song from the first note to the last. For online tab users, tab is meant to be shorthand notation for a song. Therefore, most musicians will simply tab out key components of a song, such as the chords for the verse and chorus. This information is usually enough for another musician to grasp the basics of how to play that song. A scribe may also include his own personal notational elements. Writing tab is often subject to personal style and preference. Unfortunately, this loose framework yields errors.

In light of this, the community aspect of tab websites is essential. When a user posts his tab, other users can immediately supply criticism and commentary. This feedback mechanism improves both the quality of tab available and the proficiency of the tab scribe. Because individuals with different musical backgrounds and playing levels create tab, there are often multiple versions of each song available. Where one person might hear an A note, another might hear an A flat. Moreover, there are multiple ways to play the same chord depending on tuning. There is almost no way for a beginning player to judge the quality of a posted tab without user comments and ratings. It is axiomatic that the tab user downloads at his own risk. Musicians who require accurate, note-for-note, chord-for-chord musical direction must purchase a tab version of the printed sheet music. However, not every song gets published as tab. Therefore, tab websites are the only comprehensive resource available for musicians to share knowledge and learn how to play contemporary songs.

D. OLGA and Its Progeny

The On-Line Guitar Archive is one of the oldest repositories for guitar tab online. Founded at the University of Las Vegas Nevada in 1992, OLGA began as a File Transfer Protocol (FTP) site.⁵⁰ Cathal Woods, OLGA's administrator since 1994, considers

⁴⁹ Wright, *supra* note 3, at 2.0–2.5.

⁵⁰ See Mirapaul, *supra* note 1; see also File Transfer Protocol, Wikipedia, http://en.wikipedia.org/wiki/File_Transfer_Protocol (last visited Sept. 10, 2007). Files

the site a virtual educational network.⁵¹ The popularity and demand for online guitar tab is evident from the scores of OLGA look-a-likes that have popped up since the early nineties. Guitar Tabs,⁵² Guitar Tab Universe,⁵³ Ultimate-Guitar,⁵⁴ and MXTabs⁵⁵ are just a few of the online resources for aspiring musicians. Google is also home to several usenet groups⁵⁶ that share tab online.⁵⁷ All of these sites encourage the purchase of official sheet music and emphasize that use of online tab is for educational and scholarly purposes only.⁵⁸

OLGA first came under fire in October 1995 when the British division of EMI Music Publishing discovered a mirror FTP site in England.⁵⁹ EMI successfully convinced the University of Nevada at Las Vegas that the site, hosted by the university, infringed its copyright.⁶⁰ After a short period of time offline, OLGA resurfaced, only to be shut down again in 1998 by the Harry Fox Agency.⁶¹ Harry Fox is the largest music publishing agency in the U.S.⁶² The most recent wave of pressure comes from the National

are stored on a remote server and individual users may upload and download files to and from the server. *See id.*

⁵¹ *See* Mirapaul, *supra* note 1.

⁵² <http://www.guitartabs.com>.

⁵³ <http://www.guitartabs.cc>.

⁵⁴ <http://www.ultimate-guitar.com>.

⁵⁵ <http://www.mxtabs.net>. Mxtabs was purchased by Musicnotes, an authorized online tab store, and will be re-launching in summer 2007. *See supra* notes 24–25 and accompanying text; *infra*, note 240 and accompanying text.

⁵⁶ Usenet is an Internet-based discussion system that allows users to post messages to all group subscribers via email. *See* Usenet, Wikipedia, <http://en.wikipedia.org/wiki/Usenet> (last visited Sept. 10, 2007); *accord* Google Groups Help Center – What is a Usenet Group?, <http://groups.google.com/support/bin/answer.py?hl=en&answer=46854> (last visited Sept. 10, 2007).

⁵⁷ *E.g.*, <http://groups.google.com/group/alt.guitar.tab/topics>; <http://groups.google.com/group/rec.music.makers.guitar.tablature/topics>.

⁵⁸ *See, e.g.*, An Open Letter, Mxtabs, <http://www.mxtabs.net/letter.htm> (last visited Mar. 4, 2007).

⁵⁹ *See* Robert Downes, *The Pitched Battle*, METROACTIVE, May 20, 1999, <http://www.metroactive.com/papers/sonoma/05.20.99/music-9920.html>. For improved speed and performance most FTP sites are mirrored (distributed) via a network of servers across the globe. *See* File Transfer Protocol, Wikipedia, http://en.wikipedia.org/wiki/File_Transfer_Protocol (last visited Sept. 6, 2007).

⁶⁰ *See* Downes, *supra* note 59.

⁶¹ *See id.*

⁶² *See* Harry Fox Agency, <http://www.harryfox.com> (last visited Sept. 13, 2007).

Music Publishers' Association (hereinafter "NMPA") and the MPA. In early summer 2006, counsel for the NMPA and MPA sent cease-and-desist letters and take-down notices to tab websites and their Internet Service Providers (hereinafter "ISPs").⁶³ The letters identified a handful of songs whose copyrights were allegedly infringed by the existence of guitar tab on the sites.⁶⁴

These notices should not have come as a surprise to tab website operators. On March 10, 2006, the MPA published a statement regarding digital distribution of unauthorized sheet music and tablature on its website.⁶⁵ In the statement, the MPA asserts unequivocally that online tab is subject to copyright and that websites that host unauthorized tab infringe that copyright.⁶⁶ The NMPA went a step farther in its paper, *The Engine of Free Expression: Copyright on the Internet*,⁶⁷ invoking the No Electronic Theft Act.⁶⁸ The music publishing industry's stance is clear. In fact, it seems that the NMPA and MPA do not believe that fair use could be raised as a defense by these websites.⁶⁹ Fortunately for Mr. Woods and all of the other tab site operators, no court has yet ruled on this issue.

⁶³ See, e.g., <http://www.olga.net> (last visited Sept. 7, 2007).

⁶⁴ See *id.*

⁶⁵ See *Statement from the MPA*, *supra* note 5.

⁶⁶ See *id.*

⁶⁷ NMPA, *The Engine of Free Expression: Copyright on the Internet*, available at <http://www.nmpa.org/music101/copyrights.asp> (last visited Sept. 10, 2007).

⁶⁸ 17 U.S.C. § 506 (1997) (outlining criminal copyright infringement).

⁶⁹ See *The Engine of Free Expression*, *supra* note 67 ("[t]his is not an activity that courts are likely to determine constitutes 'fair use'"); Frequently Asked Questions, MPA, http://www.mpa.org/copyright_resource_center/faq (stating that even use of part of a work for scholarship is prohibited—a use clearly provided for by the fair use provision) (last visited Sept. 10, 2007); 17 U.S.C. § 107 (2002) ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.").

II. COMPOSITIONAL COPYRIGHT INFRINGEMENT

A. *The Fair Use Test*

Congress explicitly contemplated musical works when drafting and revising the Copyright Acts of 1909 and 1976.⁷⁰ “Copyright protection subsists . . . in . . . musical works, including any accompanying words[.]”⁷¹ “The owner of copyright . . . has the exclusive rights . . . (1) to reproduce the copyrighted work in copies . . . ; (2) to prepare derivative works based upon the copyrighted work; [and] (3) to distribute copies . . . of the . . . work[.]”⁷² The 1976 legislative history elaborates on these rights.⁷³ “[T]he right to reproduce . . . means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be ‘perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’”⁷⁴ A derivative work may be “a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”⁷⁵

Examining tab under the language of the Copyright Act of 1976, it is easy to understand the MPA’s position. Tab could be considered any of the following: a transcription, translation, arrangement, abridgement, or condensation. One particularly problematic issue is the reprinting of lyrics,⁷⁶ which most tab scribes do to help others understand the timing of the song better;⁷⁷ lyrics are explicitly accounted for in the Act.⁷⁸ However, Congress

⁷⁰ See 17 U.S.C. § 102.

⁷¹ *Id.*

⁷² *Id.* § 106.

⁷³ Notes of Comm. on the Judiciary, H.R. Rep. No. 94-1476 (1976).

⁷⁴ *Id.*

⁷⁵ *Id.* (internal quotation marks omitted).

⁷⁶ See Mirapaul, *supra* note 1 (“Lyrics are like a slam-dunk[.] . . . They are protectable, and you need permission.”).

⁷⁷ See Wright, *supra* note 3, at 3.2(7) (encouraging tab scribes to include lyrics for ease of use).

⁷⁸ 17 U.S.C. § 102 (extending copyright protection to “musical works, including any accompanying words”). See also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON

also carved out an exception to the Act's exclusive rights.⁷⁹ The fair use exception allows use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research[.]"⁸⁰ The statutory defense, if successful, extinguishes liability for infringing use of a protected work. Determining whether an infringer may be exempt from liability requires an evaluation of four factors:

- (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.⁸¹

Because the fair use inquiry is factual, each case must be considered on its own merits. Therefore, determining whether creating and posting tab online is a fair use of the underlying musical composition requires the case to be brought before the courts. Until recently, the fourth factor, market impact, was given greater, almost dispositive weight.⁸² The Supreme Court, however, has backed away from this uneven approach.⁸³ Each case must be considered individually.⁸⁴ While prior decisions may be helpful to understand the strength of a case, they do not control. The factors must be balanced and considered in their totality.

COPYRIGHT § 2.05[D] (1997) (stating that musical compositions consist of rhythm, harmony and melody).

⁷⁹ See 17 U.S.C. § 107.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *Harper & Row, Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (stating that the "last factor is undoubtedly the single most important element of fair use").

⁸³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (stating that none of the factors may "be treated in isolation . . . [a]ll are to be explored, and the results weighed together").

⁸⁴ See *id.* at 577 ("[T]he doctrine . . . calls for case-by-case analysis.").

1. Purpose and Character of Use

The first factor looks at the purpose and character of the use. The appropriate inquiry considers whether the new work supplants the original or adds something new—“to what extent the new work is transformative.”⁸⁵ This question goes back to the purpose of copyright, which is to encourage new creation.⁸⁶ Also important to consider is whether the use is commercial.⁸⁷ The statute enumerates examples of non-commercial use that would be considered fair.⁸⁸ Such uses include “criticism, comment, news reporting, teaching . . . , scholarship, or research.”⁸⁹ However, “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”⁹⁰

2. Nature of the Copyrighted Work

The second factor considers the nature of the copyrighted work, or “the ‘value of the materials used.’”⁹¹ This inquiry seems driven more by policy than doctrine because it requires a subjective evaluation of the work. Copying is evidence that the original work is valuable. Otherwise, why would it be copied? It is unlikely that a court would find that a musical work lacks value. Possible exceptions to this assumption might include obscene or indecent music.⁹² Given the extensive protection afforded to musical works, this second factor does not add much to a fair use discussion.

⁸⁵ *Id.* at 579 (internal quotation marks omitted).

⁸⁶ *See id.*

⁸⁷ *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (stating that “every commercial use . . . is presumptively . . . unfair”); *cf. Campbell*, 510 U.S. at 584.

⁸⁸ *See* 17 U.S.C. § 107 (2002).

⁸⁹ *Id.*

⁹⁰ *Campbell*, 510 U.S. at 584.

⁹¹ *Id.* at 586 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1841) (No. 4901)).

⁹² For example, 2 Live Crew were able to overcome charges of indecency by claiming fair use as parody. *See id.* at 572.

3. Amount and Substantiality

The third factor compares the amount and substantiality of the portion used to the whole.⁹³ How much, and what part of the work is used, determines the reasonableness of the use “in relation to the purpose” of the use.⁹⁴ Even wholesale copying of a work might be justified depending on the result of the first factor inquiry.⁹⁵ No more than necessary to achieve the purpose may be taken.⁹⁶ However, fair use cannot be predicated on a showing that the materials taken are “insubstantial with respect to the *infringing* work.”⁹⁷ Therefore, the question is not simply what “quantity of the materials [is] used, but . . . [the] quality and importance” of what was used.⁹⁸ Taking “the heart” of a work typically swings against a finding of fair use.⁹⁹

4. Effect on Potential Market

The final factor, market impact, provides a more tactile measuring stick against which the court can evaluate fairness of use. Although it is no longer considered dispositive, its importance remains.¹⁰⁰ A defendant “would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”¹⁰¹ Today, the presumption of unfairness discussed in *Sony Corp. of America v. Universal Studios, Inc.*¹⁰² would be limited to cases of duplication for the purpose of

⁹³ See 17 U.S.C. § 107(3).

⁹⁴ *Id.*

⁹⁵ *Campbell*, 510 U.S. at 586–87.

⁹⁶ See *id.* at 587 (internal citation omitted).

⁹⁷ *Harper & Row, Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985).

⁹⁸ *Campbell*, 510 U.S. at 587.

⁹⁹ See *Harper & Row*, 471 U.S. at 564–65 (quoting the district court in *Harper & Row, Publ'rs, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)). However, some uses require taking the heart. For example, in the case of parody of musical works using the most memorable aspects of a song is likely critical to the parody. See *Campbell*, 510 U.S. at 588.

¹⁰⁰ See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. (forthcoming), available at <http://ssrn.com/abstract=998421> (finding in a statistical study of courts' application of the balancing test that where market harm was found, all courts held against fair use).

¹⁰¹ *Campbell*, 510 U.S. at 590.

¹⁰² 464 U.S. 417 (1984). See also *supra* Part I.C.

superseding the original work in the market.¹⁰³ Otherwise, market impact must be viewed in light of its relationship to the other factors.¹⁰⁴ A court “must take account not only of . . . harm to the original but also of . . . harm to the market for derivative works.”¹⁰⁵ “Evidence of substantial harm to [the derivative market] would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of the originals.”¹⁰⁶

B. Determining Infringement

To sustain a direct infringement claim, the plaintiff must establish ownership of copyright and copying by the defendant either through establishing the defendant had access to the work or that the defendant’s work is substantially similar to the original.¹⁰⁷ Registration with the Copyright Office is prima facie evidence of ownership of copyright.¹⁰⁸ If a work is not registered then two questions are raised: copyrightability of a protected work and permissibility of its use.

Copyrightability requires that the work be original and fixed in some tangible form.¹⁰⁹ The originality requirement does not mean that a work must be truly original or novel.¹¹⁰ Nor does it provide protection based on amount of labor invested in producing a work.¹¹¹ For musical works, originality is not as easy to discern as one might initially expect. There are a limited number of notes and combinations of those notes. Inevitably, one musical work will duplicate at least part of another work. This may happen out of pure coincidence, or may be purposeful, as is the case in

¹⁰³ See *id.* at 591.

¹⁰⁴ See *id.* at 591 n.21 (“[T]he importance of [market harm] will vary . . . with the relevant strength of the showing on the other factors.”).

¹⁰⁵ *Harper & Row, Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985).

¹⁰⁶ *Campbell*, 510 U.S. at 593.

¹⁰⁷ *E.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999).

¹⁰⁸ *E.g.*, *Express, LLC v. Fetish Group, Inc.*, 424 F. Supp. 2d 1211, 1217 (C.D. Cal. 2006).

¹⁰⁹ See 17 U.S.C. § 102 (2002).

¹¹⁰ See *Feist Publ’ns*, 499 U.S. at 345.

¹¹¹ See *id.* at 352–55.

sampling.¹¹² That one work might duplicate part of another work does not necessarily render it unoriginal.¹¹³ Other musical factors such as melody, rhythm, and arrangement must be considered.¹¹⁴

A musical work satisfies the fixation requirement either by being written down in some discernable notation, or by being recorded.¹¹⁵ Assumedly, one could not create tab of a song without first hearing it somewhere, meaning that the work has likely been fixed in a sound recording. A possible exception to this is if a person somehow created tab from a live performance of a non-fixed musical work.¹¹⁶ Such a situation seems improbable. Moreover, if a live performance is recorded, the work would likely be deemed fixed for the purposes of copyright under *nunc pro tunc*.¹¹⁷ Therefore, unless copyright protection has expired or the work is not fixed, musical works that are the subject of online tab are protected under copyright law.

Federal copyright protection also extends to derivative works.¹¹⁸ However, “[t]he right to make a derivative work does not authorize the maker to incorporate into it material that infringes someone else’s copyright.”¹¹⁹ Therefore, protection of a derivative work will not extend to any preexisting material taken from the original.¹²⁰ Moreover, “[i]f such preexisting material pervades the entire work, protection is denied to the entire work.”¹²¹ Determining whether a derivative work is copyrightable requires “independent artistic skill and endeavor.”¹²² The derivative work must not only satisfy the copyrightability requirements, but also

¹¹² See *infra* Part I.B.3.

¹¹³ See NIMMER & NIMMER, *supra* note 78, at § 2.01[A].

¹¹⁴ See *id.* at § 2.05[C]–[D].

¹¹⁵ See *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908) (“A musical composition . . . is not susceptible of being copied until it has been put in a form which others can see and read.”).

¹¹⁶ For example, if a musician plays a song made-up on the spot during a live performance and a person in the audience creates a tab of that song.

¹¹⁷ “Now for then.” This is a legal fiction; courts could impute fixation to protect the artists’ work under Locke’s labor policy.

¹¹⁸ See 17 U.S.C. § 103(a) (2002).

¹¹⁹ 18 C.J.S. *Copyrights and Intellectual Property* § 20 (2006).

¹²⁰ See 17 U.S.C. § 103(b).

¹²¹ 18 C.J.S. *Copyrights and Intellectual Property* § 20.

¹²² *Id.*

add substantively to the original.¹²³ It is critical to understand, though, that the right to prepare derivative works is an exclusive right belonging to the source copyright owner.¹²⁴ Anyone wishing to prepare a derivative work based on another person's copyrighted work must either obtain permission¹²⁵ or meet the fair use test.¹²⁶

1. The Supreme Court Considers Sheet Music . . . A Century Ago

A survey of cases addressing copyright infringement of sheet music and musical notation yields meager results. One of the only cases specifically addressing musical notation reached the Supreme Court in 1908¹²⁷ and directly informed the Copyright Act of 1909.¹²⁸ *White-Smith Music Publ'g Co. v. Apollo Co.* concerned the use of perforated rolls in player pianos.¹²⁹ The rolls were perforated in such a way that when they were turned within the player piano mechanism, it would sound as if someone were playing the song.¹³⁰ White-Smith unsuccessfully argued that the rolls were tantamount to copies of the sheet music and therefore infringed its copyright.¹³¹ The Court relied on previous rulings that found the perforated rolls not to be "copies of sheet music within the meaning of the copyright law."¹³² The fact that the rolls required mechanical intervention to be perceived largely informed the Court's decision.¹³³ The Court adopted the definition of "a copy of a musical composition to be a written or printed record of it in intelligible notation."¹³⁴ Moreover, the Court suggested that

¹²³ See *Pickett v. Prince*, 207 F.3d 402, 405 (7th Cir. 2000).

¹²⁴ See *id.* at 405–06.

¹²⁵ See *id.* at 406.

¹²⁶ See 17 U.S.C. § 107 (2002); see also *supra* Part I.A.

¹²⁷ See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

¹²⁸ After the decision was announced, Congress specifically addressed mechanical reproductions of musical works in its copyright law revisions. See 17 U.S.C. § 1 (1909), available at http://ipmall.info/hosted_resources/lipa/copyrights/The%20Copyright%20Act%20of%201909%20as%20amended%20and%20codified_.pdf.

¹²⁹ See *White-Smith*, 209 U.S. at 8.

¹³⁰ See *id.* at 10.

¹³¹ See *id.* at 11.

¹³² *Id.* at 12 (quoting *Kennedy v. McTammany*, 33 F. 584, 584 (C.C.D. Mass. 1888)).

¹³³ See *id.* at 12–13.

¹³⁴ *Id.* at 17 (internal quotation marks omitted).

for a perforated roll to be considered the equivalent of a copy it must be “intended to be read as an ordinary piece of sheet music, which, to those skilled in the art, convey[s] [sic], by reading, in playing or singing, definite impressions of the melody.”¹³⁵

2. Fake Books

The issues raised in *White-Smith* were revisited in the mid-1900s when bootleg song books began circulating.¹³⁶ Fake books, as they were called, were collections of cards that provided a sampling of the musical notation for a popular song on the front and essential song information, including copyright, on the back.¹³⁷ These cards were immensely popular among improvisational musicians as well as lounge musicians.¹³⁸ The concept was that musicians could use the cards as “cheat sheets” to help them remember how to play songs.¹³⁹ A company called Tune-Dex, founded by radio station director George Goodwin, produced thousands of cards.¹⁴⁰ The popularity of Tune-Dex led to the creation of the bound fake book, sold as a bootleg because the music publishing industry refused to authorize its creation.¹⁴¹ Variations of fake books promulgated in the underground music scene.¹⁴² Their bootleg status affected the quality and accuracy of the music printed in them.¹⁴³ The industry fought against fake books vigorously; two cases were tried in federal criminal court but resulted in only minimum fines.¹⁴⁴ Eventually, though, music publishers began publishing their own accurate bound collections, decimating the bootleg market.¹⁴⁵ As has been the case throughout

¹³⁵ *Id.* at 18.

¹³⁶ See Barry Kernfeld, *Pop Song Piracy, Fake Books, and a Pre-history of Sampling*, presented at “Copyright and the Networked Computer: A Stakeholder’s Congress” at 4 (Nov. 6, 2003), available at <http://www.personal.psu.edu/bdk4/PREHISTORY.pdf>.

¹³⁷ *See id.* at 2–4.

¹³⁸ *See id.* at 3–4.

¹³⁹ *See id.* at 4.

¹⁴⁰ *See id.* at 2, 4.

¹⁴¹ *See id.* at 4.

¹⁴² *See id.*

¹⁴³ *See id.* at 6.

¹⁴⁴ *See id.* at 4.

¹⁴⁵ *See id.*

history, “assimilation was a much more successful policy than prohibition.”¹⁴⁶

3. Samples

Unfortunately for the music industry, the technological advances of the late twentieth and early twenty-first centuries make assimilation a much more difficult proposition. Modern computer and recording technology allow almost anyone to use musical compositions in a multitude of unauthorized ways. A particularly popular use is known as sampling.¹⁴⁷ A song is sampled when a portion of it is used in the creation of a new musical work. “Musicians sample pre-existing works either digitally, by lifting part of a song from a pre-existing master recording . . . or by hiring musicians who re-play or re-sing portions of the pre-existing composition.”¹⁴⁸ Sampling is widely practiced in the rap and hip-hop genres of music. Famous samplers include the Beastie Boys,¹⁴⁹ Vanilla Ice,¹⁵⁰ and 2 Live Crew.¹⁵¹

At the onset of the phenomenon, rampant, unauthorized sampling was commonplace. Of great debate was how much of a musical composition was copyrightable and how much of a protected work could be used fairly. No hard rule exists as to how much of a work can be taken without breaching copyright law. In *Baxter v. MCA, Inc.*¹⁵² the Ninth Circuit held that a sequence of six

¹⁴⁶ *Id.* at 1.

¹⁴⁷ See Music Sampling, Wikipedia, http://en.wikipedia.org/wiki/Music_sampling (last visited Sept. 12, 2007).

¹⁴⁸ *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *1 n.1 (S.D.N.Y. Aug. 27, 2001).

¹⁴⁹ The Beastie Boys’ second album, *Paul’s Boutique*, used an unprecedented number of samples. See Beastie Boys, Wikipedia, http://en.wikipedia.org/wiki/Beastie_Boys#Paul.27s_Boutique.2FCheck_Your_Head:_1988.E2.80.931992 (last visited Sept. 12, 2007).

¹⁵⁰ Vanilla Ice famously sampled Queen & David Bowie’s hit song, *Under Pressure*. See Music Sampling, Wikipedia, http://en.wikipedia.org/wiki/Music_sampling#1990.27s (last visited Apr. 17, 2007).

¹⁵¹ 2 Live Crew’s sampling of Roy Orbison’s *Pretty Woman* was the focus of the seminal fair use case, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁵² 812 F.2d 421 (9th Cir. 1987).

notes of a musical composition was protected by copyright.¹⁵³ However, in *Intersong-USA v. CBS Inc.*,¹⁵⁴ the use of a descending scale progression was found to be a “common element[] . . . found in many other well-known songs.”¹⁵⁵ Ultimately, while “not every element of a [musical composition] is *per se* protected,”¹⁵⁶ there is no formula to determine how much is too much.

Moreover, some cases have arisen out of what amounted to subconscious sampling—that is, non-purposeful copying of protected elements such as melody and rhythm.¹⁵⁷ New York’s Southern District found that George Harrison subconsciously copied the melody of the popular song, *He’s So Fine*, when he composed the song *My Sweet Lord*.¹⁵⁸ On appeal, the Second Circuit reiterated that innocent intent is not a defense to copyright infringement,¹⁵⁹ and upheld both the District Court and its own prior rulings that copying may be inferred where the infringing work is substantially similar to the original and the alleged infringer had access to it.¹⁶⁰

4. Ringtones

Even more recently, the U.S. Copyright Office considered ringtones¹⁶¹ in a memorandum opinion.¹⁶² Ringtones are customizable incoming call sounds for phones.¹⁶³ They consist of snippets of songs, often the most recognizable part, much in the

¹⁵³ See *id.* at 425.

¹⁵⁴ 757 F. Supp. 274 (S.D.N.Y. 1991).

¹⁵⁵ *Id.* at 282.

¹⁵⁶ *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1253 (C.D. Cal. 2002).

¹⁵⁷ See, e.g., *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976).

¹⁵⁸ *Id.* at 180–81.

¹⁵⁹ See *ABKCO Music Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983).

¹⁶⁰ See *id.* at 997.

¹⁶¹ See generally Ringtone, Wikipedia, <http://en.wikipedia.org/wiki/Ringtone> (last visited Sept. 12, 2007).

¹⁶² See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303 (Copyright Office Nov. 1, 2006), [hereinafter *Ringtone Opinion*] (memorandum opinion), available at <http://www.copyright.gov/fedreg/2006/71fr64303.pdf>.

¹⁶³ Ringtone, *supra* note 161.

way samples consist of direct copies or re-creations of songs.¹⁶⁴ There are generally three categories of ringtones: monophonic ringtones are re-creations of a song, usually referencing just the melody; polyphonic ringtones are re-creations of a song's melody and harmony; and mastertones consist of actual digital copies of the master sound recording.¹⁶⁵ Today, the sale of ringtones is a multi-million dollar industry.¹⁶⁶

The music publishing industry disagreed with the music labels as to whether ringtones constituted mere copies or were derivative works of the original compositions.¹⁶⁷ The Copyright Office's determination would affect whether the § 115 compulsory royalty rates would apply to ringtone sales.¹⁶⁸ The Office found there to be a "broad spectrum" of ringtones, some of which clearly fall within the ambit of the statutory royalty rate, while others clearly include additional new authorship and are thus correctly categorized as derivative works.¹⁶⁹ Those ringtones that fall in the middle of the spectrum require evaluation on a case-by-case basis.¹⁷⁰

C. Secondary Liability on the Internet

One of the most important concepts elucidated by online infringement cases is secondary liability. The interconnectedness of the web also binds multiple parties in liability. If an infringing work is posted on a website, the original poster, website operator, website hosting provider, and ISP may all be liable to the copyright owner.¹⁷¹ The anonymous nature of the internet makes it more

¹⁶⁴ See *Ringtone Opinion*, 71 Fed. Reg. at 64,305.

¹⁶⁵ See *id.* at 6.

¹⁶⁶ BMI.com, *BMI Projects Downturn in 2007 Ringtone Sales* (Mar. 27, 2007), <http://www.bmi.com/news/entry/534672>.

¹⁶⁷ See *Ringtone Opinion*, 71 Fed. Reg. at 64,309–11.

¹⁶⁸ See generally 17 U.S.C. § 115 (2002). If § 115 applies, a person can obtain a "compulsory license" to create and distribute phonorecords of a work. *Id.* § 115(a)(1). Essentially, this means that a person need to neither obtain the permission of the copyright owner to use the work nor negotiate the royalty rate with the owner. Under a compulsory license, he pays a statutorily defined royalty amount. *Id.* § 115(c)(2)–(3).

¹⁶⁹ *Ringtone Opinion*, 71 Fed. Reg. at 64,313.

¹⁷⁰ See *id.*

¹⁷¹ Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, 112 Stat. 2860, 2877 (codified as amended at 17 U.S.C. § 512 (1998)); see also *Ellison v.*

difficult, and often impractical, for copyright owners to prosecute individuals. In response to this difficulty, Congress passed laws that allow prosecution of infringement enablers¹⁷²—the people and companies that provide the infrastructure and platform for the infringement to happen—under two theories: contributory and vicarious liability.

The Supreme Court established the appropriate tests for secondary liability in two landmark cases: *Sony Corp. of America v. Universal Studios, Inc.*¹⁷³ and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*¹⁷⁴ “One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it.”¹⁷⁵ Intent to infringe may be imputed.¹⁷⁶ However, “mere understanding that some of one’s products will be misused” does not presume intent.¹⁷⁷ Technological innovation remains an important policy driving secondary liability decisions.¹⁷⁸ The threshold question from *Sony* is whether a product is “capable of substantial noninfringing uses.”¹⁷⁹ Online, a product is a website feature—usually an application such as a message board, upload functionality, or other user posting mechanism. Most online applications meet the *Sony* test. Therefore, the question turns on intent.

Robertson, 357 F.3d 1072, 1076–77 (9th Cir. 2004) (identifying four “safe harbors” under which online content providers may avoid copyright infringement liability under the Online Copyright Infringement Liability Limitation Act).

¹⁷² See Online Copyright Infringement Liability Limitation Act § 512; see also *Ellison*, 357 F.3d at 1076 (“Difficult and controversial questions of copyright liability in the online world prompted Congress to enact . . . the Online Copyright Infringement Liability Limitation Act (OCILLA).”).

¹⁷³ *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

¹⁷⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) [hereinafter *Grokster*].

¹⁷⁵ *Id.* at 930 (citations omitted).

¹⁷⁶ See *id.* at 932.

¹⁷⁷ *Id.* at 933.

¹⁷⁸ See *id.* at 932–34.

¹⁷⁹ *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 442 (1984).

Encouraging infringement includes “advertising an infringing use or instructing how to engage in an infringing use.”¹⁸⁰ “[M]ere knowledge of infringing potential or of actual infringing uses would not be enough” to find liability.¹⁸¹ However, failure to take active steps to discourage and stop infringing activity might be viewed as intentional facilitation of unlawful conduct.¹⁸² Aside from commerce, the most common way a website profits is by selling advertisement space on its site. However, in the online space, the concept of profit extends beyond making money.¹⁸³ It is not necessarily clear that a court would limit its definition of profit to income generation. A website could refrain from selling advertisement but otherwise benefit from the infringement happening on its site. A site may profit from increased traffic, prestige, or search engine placement. As in fair use, a pure commercial/non-commercial analysis is not dispositive.

III. HOW ONLINE TAB FITS

A. *Is Online Tab Fair Use?*

The codification of the fair use doctrine highlights Congress’ intent to allow “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.”¹⁸⁴ In today’s digital world, the ease with which anyone can copy, excerpt, and transform protected works has grown exponentially. Thus, fair use has gained importance. Because there are no bright-line rules, and the inquiry involves questions of both law and fact, it is essential that fair use questions be brought before the court to be answered. Although

¹⁸⁰ *Grokster*, 545 U.S. at 936.

¹⁸¹ *Id.* at 937.

¹⁸² *See id.* at 939.

¹⁸³ Annie R. Lin, Note, *Who Owns the Cow When We Give Away the Milk for Free? Fair Use and the Protection of Web-Posted Materials*, 3 *BUFF. INTELL. PROP. L.J.* 46, 74 (2005–2006) (explaining that “commercial aspects” of a site could include “generating goodwill from advertisers, attracting site visitors, or otherwise benefiting from copied materials without having purchased them”).

¹⁸⁴ *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)).

this note does not conclude with absolute certainty that online tab infringes music publishers' copyright, assuming such allegations are true, fair use is the only defense that might save tab scribes and websites from liability.

The first factor looks to both how transformative the use is and whether the use is for commercial or non-commercial purposes.¹⁸⁵ Online tab scribes write and post tab to provide instructional context. The purpose is educational and frequently critical. Not only does online tab provide global musical instruction but it also allows the community to comment on the tabbed songs themselves. Particularly ingenious or difficult chord progressions will spark debate and discussion. Particularly poor tab will encourage guidance and mentoring amongst the community. Although the educational use is not strictly academic, i.e. for in-class instruction, one can easily imagine a scenario in which a private instructor might use tab fairly for teaching purposes.

In addition, tab is not copied verbatim from the source. The individual must put forth the effort to create tab himself, as well as determine which elements of the song are necessary for another person to find the tab useful. That only selections of a song are tabbed out might meet the requirement that copying not exceed what is "necessary to [achieve] the purpose."¹⁸⁶ Moreover, online tab is offered for free, readily distributed by its authors. Those looking for more extensive or detailed tab are directed to music publisher-licensed resources.

However, "[t]he more creative a work, the more protection it should be accorded from copying"¹⁸⁷ Composing musical works is among the most creative endeavors one can pursue. The special consideration given to musical works in the Copyright Act¹⁸⁸ certainly dictates that special protection be afforded. As previously discussed, this second factor usually tips in favor of the

¹⁸⁵ See 17 U.S.C. § 107(1) (2002).

¹⁸⁶ *L.A. Times v. Free Republic*, No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669, at *34 (C.D. Cal. Apr. 4, 2000).

¹⁸⁷ *Id.* at *54 (quoting 4-13 NIMMER & NIMMER, NIMMER ON COPYRIGHT § 13.05[A][2][a]) (2007).

¹⁸⁸ See, e.g., 17 U.S.C. §§ 101, 102, 106 (2002).

copyright holder and does not have as much influence on the outcome as the other three factors.¹⁸⁹

The amount and substantiality of what is tabbed in relation to the original musical work also probably tips against online tab scribes. Following the sampling cases, using just six notes might be infringing.¹⁹⁰ Most tab includes at least the verse and chorus—usually more than six notes. If a particular part of the song is extremely recognizable or unique, such as the guitar solo to Led Zeppelin’s “Stairway to Heaven,” that part will often be tabbed as well. These elements arguably comprise the heart of the song—the most recognizable part. As previously discussed, when the essential portions are taken, infringement is much more likely to be found.¹⁹¹

Finally, the inquiry rests upon the effect on the potential market or value of the work. Most people who use online tab probably do not purchase printed tab. Publishers argue that sheet music sales are down and attribute it to the availability of free online tab.¹⁹² However, sales of digital sheet music, authorized by music publishers, are growing exponentially. Digital sheet music copies are sold for approximately \$5.¹⁹³ Royalty payments were made in excess of one million dollars to publishers and songwriters by 2004.¹⁹⁴ There are several other authorized online sheet music dealers.¹⁹⁵ As of November 29, 2006, Musicnotes.com,¹⁹⁶ the largest online sheet music dealer, had sold its two-millionth sheet music download.¹⁹⁷ It sold one million downloads within the

¹⁸⁹ See *supra* Part I.A.2.

¹⁹⁰ See, e.g., *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1254 (C.D. Cal. 2002).

¹⁹¹ See *Harper & Row, Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 564–65 (1985).

¹⁹² See *Guitar Instruction Websites Shut Down by Music Industry*, <http://www.out-law.com/page-7235> (last visited Sept. 13, 2007).

¹⁹³ See *Musicnotes’ Royalty Payments to Publishers/Songwriters for Digital Content Pass \$1 Million Mark*, <http://www.musicnotes.com/press/royaltyoct2004.asp> (last visited Sept. 12, 2007).

¹⁹⁴ See *id.*

¹⁹⁵ See, e.g., *Sheet Music Direct*, <http://www.sheetmusicdirect.com>; *FreeHand*, <http://freehandmusic.com>; *Sheet Music Digital*, <http://www.dalymusic.com>.

¹⁹⁶ *Musicnotes.com*, <http://www.musicnotes.com> (last visited Sept. 12, 2007).

¹⁹⁷ See *Musicnotes.com Sells Two-Millionth Sheet Music Download*, <http://www.musicnotes.com/press/twomillion.asp> (last visited Sept. 12, 2007).

fifteen months prior to that November.¹⁹⁸ These figures would certainly inform a court's analysis of market impact, but unfortunately for online tab supporters, the fact remains that online tab has to a large extent displaced the printed tab market.

It would appear, then, that individual tab scribes have a tenuous fair use defense against the music publishing industry. So too, then, do OLGA, Guitar Tabs, and Ultimate Guitar. Those websites were created with the purpose of hosting online tab. Secondary liability looks to whether the sites intentionally induce and encourage infringing activity.¹⁹⁹ To escape liability, tab websites would have to demonstrate that they neither profited from the infringing use, and took active steps to stop and discourage the posting of infringing tab.²⁰⁰ Most of these websites have online advertisements, meaning they earn some amount of money. Sites claim that any money earned from advertising merely covers the costs of hosting the sites.²⁰¹ Whether a court would be persuaded by such an argument is uncertain. Sites also include language in their terms of use that invokes the fair use defense. They state that they will take down infringing content, and indeed by completely shutting down some sites have, but they have not taken active steps to ensure that infringing content is not posted in the first place. Therefore, if the underlying act, posting tab online, were deemed to be infringing, it seems likely that the websites hosting and encouraging the posting of tab, despite disclaimers, would be found liable as well.

B. Tab as Copies

The Copyright Act defines copies as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly

¹⁹⁸ *See id.*

¹⁹⁹ *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930, 936 (2005).

²⁰⁰ *See id.* at 930.

²⁰¹ *See, e.g.,* Tedeschi, *supra* note 5 (“Olga.net had earned an undisclosed amount of money by posting ads on Google’s behalf, but [Cathal Woods, the site administrator,] said that money had paid for bandwidth and a legal defense fund.”).

or with the aid of a machine or device.”²⁰² This definition casts a wide net. In *White-Smith*, the Supreme Court defined “a copy of a musical composition to be ‘a written or printed record of it in intelligible notation.’”²⁰³ While a court today would probably scrutinize the application of this definition, tab is a close fit. However, the key term “intelligible” leaves room for debate. Moreover, not all tab “conveys[sic] . . . definite impressions of the melody.”²⁰⁴ Depending on the composition being tabbed, melody may or may not be evident.

A look at the print tab for “Beautiful Day,” by U2, one of the compositions the NMPA and MPA listed in its cease-and-desist notices,²⁰⁵ underscores this problem. The following snippet of “Beautiful Day” shows the tab matching up with the melody:

The image displays three musical staves for the song "Beautiful Day" by U2. The top staff, labeled "Melody & Lyrics", shows a treble clef with a key signature of one sharp (F#) and a melody line with lyrics: "and the rea-son that you had". The middle staff, labeled "Guitar Part as Notes", shows the same melody line in a guitar-friendly arrangement. The bottom staff, labeled "Guitar Part as Tab", shows the corresponding guitar tablature with fret numbers 4 and 2. The number "206" is printed to the right of the tablature staff.

However, another portion, taken from the same song, shows a disparity between the two:

²⁰² 17 U.S.C. § 101 (2002).

²⁰³ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908).

²⁰⁴ *Id.* at 18.

²⁰⁵ See OLGA, <http://www.olga.net> (follow link to page 3 of the letter) (last visited Sept. 12, 2007).

²⁰⁶ U2 (MUSIC) AND BONO (LYRICS), BEAUTIFUL DAY, © COPYRIGHT 2000 BLUE MOUNTAIN MUSIC LIMITED/MOTHER MUSIC LIMITED/POLYGRAM INTERNATIONAL MUSIC PUBLISHING LIMITED, reprinted in U2 ALL THAT YOU CAN'T LEAVE BEHIND, at 12 (James Dean, music arranger, Universal Music Publishing, 2000) (identifying text added by author).

The image displays a musical score for the phrase "don't let it get a-way." It is organized into three horizontal sections. The top section, labeled "Melody & Lyrics", features a treble clef with a key signature of one sharp (F#) and a melody line with lyrics underneath: ". don't let it get a-way." The middle section, labeled "Guitar Part as Notes", shows the same melody and lyrics on a guitar staff with chord symbols and note heads. The bottom section, labeled "Guitar Part as Tab", shows the guitar part as a six-line tablature with fret numbers: 7, 9, 7, 7, 7, 7, 7, 10, 7, 9, 7, 7.

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Protected elements of a musical composition include not only melody, but also rhythm, and lyrics.²⁰⁸ Some tab conveys these protected elements; some do not. Therefore, it is clear that some tab may rightfully be considered a copy and thus infringing, whereas other tab may require a closer look.

Courts will also apply what is known as the substantial similarity test to determine whether a work has been copied. Under this test, the defendant must have had access to the original work and the two works must be substantially similar. “[S]ubstantial similarity may be found even if none of the words or brush strokes or musical notes are identical.”²⁰⁹ The Ninth Circuit pioneered the totality test, which takes the overall “concept and feel” of a work into consideration.²¹⁰ Generally, the standard is applied from the viewpoint of “the ordinary observer.”²¹¹ Online tab would easily be deemed a copy under this test. Tab scribes have access to compositions through the sound recordings used to create tab and the final product, while not necessarily an exact match, is meant to be as true to the original composition as possible.

²⁰⁷ *Id.* at 10.

²⁰⁸ *Supra* notes 78, 114.

²⁰⁹ National Information Infrastructure, <http://www.ladas.com/NII/CopyrightInfringement.html>.

²¹⁰ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

²¹¹ *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

C. *Tab as Derivative Works*

The allegations set forth by the NMPA and MPA²¹² rely on the theory that tabs are derivative works that only the music publishers, or those authorized by them, are entitled to create.²¹³ A derivative work may be “a translation, musical arrangement, . . . abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”²¹⁴ It must include “modifications which, as a whole, represent” the original work.²¹⁵ For the derivative work to be copyrightable, it must not only satisfy the originality and fixation requirements, but also substantively add to the original.²¹⁶

In light of the guidance set forth by the U.S. Copyright Office in its *Ringtone Opinion*,²¹⁷ the argument that online tab qualifies as a derivative work may fall short. Tab is meant to replicate as close as possible how to play the song. Online tab abridges and condenses the song into small, manageable sections that usually represent the key elements necessary to play the song. However, nothing substantive is added to the original composition beyond individual notation or comments on how to correctly play the song. While some “skill, judgment, and creativity”²¹⁸ is required to create tab, not much “original authorship”²¹⁹ is involved.

D. *A Brief Word About the First Amendment*

Copyright protects only the expression of the idea, not the idea itself. Therefore, prohibiting the use of a particular form of expression is not necessarily an improper restriction on speech.²²⁰ “First Amendment protections [are] already embodied in the Copyright Act’s distinction between copyrightable expression and

²¹² See, e.g., Letter from Ross J. Charap, counsel to NMPA and MPA, to owner of OLGA (June 9, 2006), available at <http://www.olga.net> (follow the links to takedown letter pages 1–6) (last visited Sept. 14, 2007).

²¹³ See 17 U.S.C. § 106(2) (2002).

²¹⁴ *Id.* § 106.

²¹⁵ 18 C.J.S. *Copyrights and Intellectual Property* § 20 (2006).

²¹⁶ See, e.g., *Pickett v. Prince*, 207 F.3d 402, 405 (7th Cir. 2000).

²¹⁷ *Ringtone Opinion*, *supra* note 162.

²¹⁸ *Id.* at 64,312.

²¹⁹ *Id.* at 64,313.

²²⁰ See *Harper & Row, Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.”²²¹ Still, anytime a website shuts down wholly, in the face of legal threats, the concern that speech is being chilled should be raised. OLGÄ and the other sites provided information and services beyond the alleged infringing content. Therefore, consideration of the collateral damage should weigh in on a potential free speech analysis.

It is important to note, too, that the Digital Millennium Copyright Act provides a safe harbor to ISPs who expeditiously take down infringing material.²²² Therefore, by taking down their sites, tab administrators avoid liability. But, to some extent, they also do a disservice to us all. The Brennan Center for Justice conducted a research project analyzing 320 cease-and-desist and take-down letters sent to the Chilling Effects Website.²²³ The study revealed “that more than 20% either stated weak copyright or trademark claims, or involved speech with a strong or at least reasonable free expression or fair use defense. Another 27% attached material with possible free expression or fair use defenses. Thus almost 50% of all the letters had the potential to chill protected speech.”²²⁴

IV. BUILDING A BRIDGE

Throughout the music industry’s litigious past, clashes between intellectual property holders and fans have largely been analogized as David versus Goliath battles.²²⁵ Ironically the internet has operated as a vehicle for bringing artists closer to their fans—through blogs, MySpace, and fansites—while also becoming a

²²¹ *Id.* at 560 (emphasis omitted).

²²² See 17 U.S.C. § 512(g) (2002).

²²³ See MARJORIE HEINS & TRICIA BECKLES, BRENNAN CENTER FOR JUSTICE, WILL FAIR USE SURVIVE? ii (2005). The Chilling Effects Clearinghouse is an online resource for information on intellectual property rights. Users can submit cease-and-desist and take-down notices to the site. Staff members analyze the letters and evaluate the strength of and speech-chilling potential of the claims and publish their research on the site. <http://www.chillingeffects.org>.

²²⁴ *Id.*

²²⁵ See Krissi J. Geary-Boehm, *Cyber Chaos: The Clash Between Fansites and Intellectual Property Holders*, 30 S. ILL. U. L.J. 87, 92–93 (Winter/Fall 2005).

medium in which true fandom, more often than not, involves some form of copyright infringement.²²⁶ It is a catch-22 of sorts. Framing the issue as a have and have-nots situation, while passionate and emotionally compelling, undermines the importance of the legal issues presented and the realities of the business. The simple fact is that technology will continue to outpace the industry. Attempts to “fight fire with fire,” such as Sony BMG’s controversial inclusion of intrusive rootkit software on its compact discs,²²⁷ were legal and public relations disasters. Each wave of lawsuits threatened by the Recording Industry Association of America (hereinafter “RIAA”) widens the divide between the industry and the fans. As record sales continue to decline and digital piracy remains steady, the industry stands on the cusp between revolution and defeat. What are the options?

A. Tolerated Use

Fans would probably be most favorable to a move towards “tolerated use.” The vast majority of songs, particularly of the independent music genre, cannot be purchased in authorized tab form. The only comprehensive resource available to aspiring musicians is the web. So, excluding those titles that are printed and sold, why not allow fans to post tab for songs for which tab is not otherwise available? This does not change the fact that songwriters and publishers rightfully own and control the copyright on these compositions; but no market is being displaced. Moreover, some bands and musicians link to online tab resources or allow fans to post tabs on their official and unofficial websites.²²⁸ Therefore, bands are already tolerating some use by impliedly licensing their fans to create and post tab.

²²⁶ See *id.* at 87–88.

²²⁷ The rootkit digital rights management software program limited the copying of Sony BMG’s CDs by individuals using their computers. However, the software also allowed malicious third parties to gain access to individuals’ computers, making them vulnerable to security threats. After lawsuits were filed in the U.S. and Canada, Sony BMG agreed to a settlement. See Sony BMG Litigation Info, EFF, <http://www.eff.org/IP/DRM/Sony-BMG> (last visited Sept. 14, 2007).

²²⁸ See, e.g., FrankBlack.net, <http://www.frankblack.net/tabs> (featuring tab on the official fansite, which is endorsed by Frank Black, frontman to influential rock group, Pixies) (last visited Sept. 14, 2007); Ash, <http://www.ash-official.com/index.php?>

B. *Advanced Notification*

Tab website operators would benefit from some advanced notification of which titles copyright owners would like to restrict the posting of. Projects such as Creative Commons²²⁹ empower copyright owners to explicitly dictate what use is permissible and what use is forbidden. The rest of the world is effectively put on notice as to how protected works may be used. This idea, of course, puts the onus on rights holders, and to some extent reverses the copyright default. Moreover, those wishing to use a work would be required to look up what licenses are available. Also, U.S. copyright law provides for fair use, which essentially empowers a person to use a work without concern as to whether the copyright owner wants the work to be used. However, rights holders still must be on alert to infringing uses so providing some form of notification would be a proactive step that could eliminate potentially expensive and reputation-harming litigation. It also would open up a dialogue between owners and users that could mitigate future conflicts.

C. *"Compulsory" Licensing*

Publishers might also benefit from adopting a licensing scheme similar to § 115's compulsory license,²³⁰ in which online tab websites pay a reasonable set fee to host tab for protected compositions. Website operators might offset the fee by charging users for access to protected works. While § 115's royalty rate formula²³¹ would not be applicable, publishers could work with tab site operators to create variable valuations based on whether a print version is available, the accuracy or detail of the online tab, or even the popularity of the song. Again, there would be some cost

page=fansites (linking from the official band website to a fansite providing tab for rock group, Ash) (last visited Sept. 14, 2007); Stone Sour, <http://www.stonesour.com/forum/viewtopic.php?f=6> (providing a forum for fans to post tab on the official band website) (last visited Sept. 14, 2007).

²²⁹ <http://www.creativecommons.org>.

²³⁰ See 17 U.S.C. § 115(c) (2007).

²³¹ See *id.* § 115(c)(2) ("the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger").

on the publishers to determine and notify websites as to which works are protected and what fee is appropriate. Certainly there will be some disparity between what a user believes online tab is worth and what the publishers believe it is worth. However, by working together and getting tab websites involved, users might be less resistant to the idea.

D. Bundled Tab

Tab users find printed tab to be disproportionately expensive. Music publishers claim that the overhead costs of printing tab require them to charge higher prices and to be more protective of their copyright.²³² Even with the move towards providing digital printed tab, special software is required to generate and view it,²³³ which infuses additional costs into making accurate tab available to users. Online tab users have expressed a strong desire to purchase authorized, complete, and correct tab that is priced reasonably.²³⁴ It is not that these people wish to “steal” tab—it is that the music publishing industry makes it expensive and unattractive to the millions of users looking for tab online. Gracenote²³⁵ provides CD track information and even digital copies of CD liner notes through music player software such as iTunes. The music publishing industry could follow suit and provide authorized tab as part of the legal music download package. The cost could either be included in the download price, or worked out through licensing agreements with music stores. This approach would not only provide users with complete and accurate tab, but also create incentives to purchasing music legally. On iTunes, for example, purchasing an entire album may give the

²³² See Tedeschi, *supra* note 5 (estimating the cost of producing accurate tab to be \$800 per song); *Statement from the MPA, supra* note 5 (stating that “[a]ccurate and complete notating of songs, whether in traditional sheet music format or in tablature, is a time-consuming and expensive activity”).

²³³ Musicnotes.com, along with the other authorized dealers, requires users to download and install special software to even preview tab available to purchase. See Musicnotes.com, <http://www.musicnotes.com/download/> (last visited Sept. 12, 2007).

²³⁴ See, e.g., Tedeschi, *supra* note 5 (quoting a guitar tab user in favor of the industry adopting a pay-per model service, which would provide the added benefit of complete and accurate tab to the online community).

²³⁵ Company Info, Gracenote, <http://www.gracenote.com/music/corporate/> (last visited Sept. 9, 2007).

user access to download special album-only tracks and artwork. Tab could become part of this exclusive offering. Or, because guitar players generally use tab in conjunction with a sound recording, streaming music services could programmatically sync the display of tab with the audio stream.

*E. iTab*²³⁶

Finally, the industry could provide its own music store that exclusively deals in tab. Such a product could supplant current online tab outlets by becoming a meta-database of tab. If market considerations make preparing tab for all titles cost prohibitive, why not tap the vast online musician community to contribute to this project? Similar to the open source community, the publishing industry could authorize individuals to work collaboratively and create an official, accurate, and comprehensive digital tab library. The project could operate under a per-song cost model or charge a subscription fee for access. Such a project would advance the industry's goodwill with the online community and deliver exactly what tab users are looking for.

CONCLUSION

Who is legally right, the music publishers or the tab users? Ultimately, one of the tab websites needs to take a stand and allow the courts to make the determination. However, fair use is a difficult and unpredictable defense.²³⁷ Courts will be constrained by precedent and will heavily consider the fact that online tab has supplanted the printed tab market. Writing new law that deals specifically with this issue would be great, except it's probably not going to happen. Moreover, the variances and intricacies of the music industry, coupled with the speed of technological change, will make any specific law difficult to apply.

²³⁶ See Jonathan Opp, *Music Publishers Seek to Silence Guitar Tablature Sites*, REDHAT MAGAZINE, Sept. 28, 2006, <http://www.redhat.com/magazine/023sep06/features/olga/> (quoting OLGA administrator Cathal Woods as saying: "If they had an 'iTab' ready to go modeled on iTunes or something like that where you could buy high-quality tablatures or scores for a buck a piece or \$0.50 each, that would be awesome.").

²³⁷ See Heins & Beckles, *supra* note 223, at 10.

The music industry continues to suffer from the backlash of its litigious history. Steps have been taken to remedy its reputation and align itself closer to the demands of its customers. In early 2007, EMI announced it would provide DRM-free downloads of its catalog via iTunes for \$1.29, a thirty-cent cost increase.²³⁸ In spring 2007, Gracenote and Yahoo! launched an authorized online lyrics database featuring the catalogs of several major publishing companies.²³⁹ And, most notably, the Harry Fox Agency struck an ad revenue-sharing deal with Musicnotes, its licensed online tab distributor, to re-launch MXTabs, which had previously shut down under the threat of legal action.²⁴⁰

However, OLGA and others remain closed. And, a void still exists in the online tab market. Online tab is certainly on the publishing industry's radar, but it has a long way to go to providing the comprehensive resource that the musician community is looking for. This note proposes just a few options to bridging that gap. It's time the music publishing industry learns to sing a song of symbiosis rather than trying to silence the people on whom it must rely to survive.

²³⁸ See EMI Music launches DRM-Free Superior Sound Quality Downloads Across Its Entire Digital Repertoire, <http://www.emigroup.com/Press/2007/press18.htm> (Apr. 2, 2007).

²³⁹ Sue Zeidler, *Yahoo, Gracenote Launch Lyrics Service*, REUTERS, Apr. 24, 2007, <http://www.reuters.com/article/musicNews/idUSN2419515620070424>.

²⁴⁰ Musicnotes Announces First Free, Licensed Legal Guitar Tab Web Site, <http://www.mxtabs.net/blog/2007/03/27/musicnotes-announces-first-free-licensed-legal-guitar-tab-web-site> (Mar. 27, 2007, 2:25 EST).

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