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Three Chords and the Truth: Analyzing Copyright Infringement Claims Against Guitar Tablature Websites

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Abstract:

Krist Caldwell is a J.D. Candidate at The University of Oklahoma College of Law as part of the Class of 2008. Below, Mr. Caldwell examines the potential copyright infringement of internet tablature. After brief overviews of music theory, guitar tablature, and copyright law, Mr. Caldwell analyzes both internet tablature reproduced from existing tablature booklets and internet tablature created by ear. Mr. Caldwell concludes not only that internet tablature most likely infringes on copyrights but also that limiting the free sharing of internet tablature hinders an age-old tradition of learning among musicians. The author sincerely thanks: his editor, Ami Decker, for going above and beyond; Roger McGuinn, for all the years of musical inspiration; and the author's family, for their unwavering support.

**THREE CHORDS AND THE TRUTH: ANALYZING
COPYRIGHT INFRINGEMENT CLAIMS AGAINST
GUITAR TABLATURE WEBSITES**

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I. Introduction

It's 3 a.m. Monday morning, his parents are away, and all fourteen year old Gene McGuinn wants to do is meet for a garage jam with his heavy metal band "Satan's Toenail." McGuinn's band is preparing for their first gig at a community talent show hosted by the local Southern Baptist church. However, the band has a small problem: They do not know any songs.

Having heard that Deep Purple's *Smoke on the Water*¹ is a song readably playable for most beginning musicians; McGuinn runs inside his home and logs onto his favorite guitar tablature website: Mega Shred Death Metal Guitar Tablature Online.² But something is amiss.

¹ Deep Purple, *Smoke on the Water*, on MACHINE HEAD (Warner Bros. 1972).

² Mega Shred Death Metal Guitar Tablature Online is a purely fictional website, to the fullest extent of the author's knowledge.

The guitar tablature website states that it has shut down its tablature feature due to claims of copyright infringement.

Furious, McGuinn calls his band mates inside where they spend hours surfing the web, only to discover that many of their relied-upon tablature sites have shut down citing copyright infringement. What is tablature? Have these websites shut down for valid reasons? And will Satan's Toenail be able to perform in time for their gig?

Guitar tablature is a means in which musicians dissect a song and write its notes in the form of various numbers and symbols representing how they play the song on a guitar. Traditionally, music-publishing companies have offered tablature books for purchase so that budding musicians may learn the works of their favorite artists. And with the advent of the internet, guitar tablature websites have gained popularity because such websites allow players to learn songs often without having to pay for such tablature.

While budding musicians may be fans of online tablature, copyright owners are not.³ Various websites have shut down their tablature features due to threats of copyright infringement claims brought by such owners.⁴ In December 2005, the Music Publishers' Association of the United States (MPA) "decided to take action against websites that post unauthorized sheet music and tablature versions of [its] members' copyrighted works."⁵ Claiming that such website owners either directly or indirectly profit from the infringing tablature, the MPA argues that unauthorized tablature websites are akin to, "a store giving away stolen merchandise to attract customers to buy other things in that store."⁶ Lauren Keiser, president of the MPA, is not only

³ BBC News, *Discord Over Guitar Sites*, <http://news.bbc.co.uk/1/hi/magazine/5305520.stm> (last visited Apr. 29, 2008).

⁴ *Id.*

⁵ Music Publishers' Ass'n, *A Statement from the MPA Regarding Websites Distributing Unauthorized Sheet Music and Tablature* (2006), <http://www.mpa.org/news/show/5> [hereinafter *Statement from the MPA*]

⁶ *Id.*

seeking equitable and monetary relief from such alleged infringers, he has also stated that if authorities can “throw in some jail time I think we’ll be a little more effective.”⁷

Additionally, the MPA states that its members have suffered a direct loss due to such infringing websites.⁸ The MPA asserts it is difficult for music publishers to invest what is necessary for producing and selling accurate, high-quality tablatures of songs when unauthorized competing versions are downloadable free on illegitimate websites, even if it is inaccurate.⁹ However, the actions of the MPA not only bar free internet tablature also available for purchase from a music store, it disallows internet users from downloading tablature for which there is no corresponding hard copy available for purchase.¹⁰

Lacking the funds necessary to engage in any form of litigation, and fearing the worst, most websites shut down their tablature features with little or no fight.¹¹ However, websites claim that the copyright doctrine known as “fair use” allows such websites to offer the tablature feature.¹² Rob Balch of Guitar Tab Universe,¹³ states that “official sheet music” of many players’ favorite artists is often unpublished or unavailable at local music stores.¹⁴ Additionally,

⁷ BBC News, Song Sites Face Legal Crackdown, <http://news.bbc.co.uk/2/hi/entertainment/4508158.stm> (last visited Apr. 29, 2008).

⁸ Statement from the MPA, *supra* note 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Bob Tedeschi, *Hoping to Move Guitar Notations into the Legal Sunshine*, NEW YORK TIMES, Apr. 2, 2007, at C6, available at http://www.nytimes.com/2007/04/02/technology/02ecom.html?_r=1&scp=1&q=guitartablature&st=ny&oref=slogin.

¹² Bob Tedeschi, *Now the Music Industry Wants Guitarists to Stop Sharing*, NEW YORK TIMES, Aug. 21, 2006, at C1, available at <http://www.nytimes.com/2006/08/21/technology/21ecom.html?pagewanted=1&sq=guitar%20tablature%20fair%20use&st=nyt&scp=r>.

¹³ Guitar Tab Universe is one of the websites accused of copyright infringement. See To All “Guitar Tab Universe” Visitors, GuitarZone.com 2.0, <http://www.guitarzone.com> (last visited Dec. 11, 2008).

¹⁴ GuitarZone.com FORUM, <http://www.guitarzone.com/forum/index.php?showtopic=163367> (last visited Apr. 29, 2007).

Balch claims the websites’ “teachers [are] educating students and [such works are] covered as a ‘fair use’ of the tablature.”¹⁵

Because the issue has never gone to trial, the uncertainty of whether the copyright infringement claims against guitar tablature are valid has musicians kicking over drum stands and music executives pulling out the remnants of their already thinning hair. The purpose of this article is to analyze the nature of potential copyright infringement claims that may be brought against online guitar tutorial websites that utilize guitar tablature, as well as possible defenses that may be asserted against those claims.

II. An Introduction to Basic Music Theory and Guitar Tablature

A. Music Theory

To understand the impact that guitar tablature has made upon the music community, it is first important to learn the key concepts of basic music theory. Such an understanding will also aide the readers’ appreciation of the tabbers’ (those who put a song in tablature format) arguments that tablature is simply an extension of an age-old method of teaching musicians to play the guitar, and therefore, should be excluded from such copyright infringement claims.

Traditionally, music is written upon a staff composed of five lines that run horizontally across a sheet of notation paper. (See Figure 1.) To the left of the staff is a “clef.”¹⁶ A clef designates the pitch of a piece of music and is often used to discern what instrument to play.¹⁷ Notes are placed along and in between the individual lines of the staff to inform the reader which

¹⁵ *Id.*

¹⁶ MARC SCHONBRUN, THE EVERYTHING READING MUSIC BOOK: A STEP-BY-STEP INTRODUCTION TO UNDERSTANDING MUSIC NOTATION AND THEORY 11 (Gary M. Krebs et al. eds., 2005).

¹⁷ *Id.*

musical note to play on an instrument.¹⁸ The notes that run below or above the staff are ledger notes. Additionally, flags and dots may accompany the notes to dictate what speed to play them, and certain symbols govern whether the notes are played “flat” or “sharp.”¹⁹



Figure 1: Line of Music Example

Musicians also use note intervals known as “scales” and “modes.”²⁰ “A scale is a sequence of tones comprised of varying intervals. Modes can be described as scales based upon the tones of the main scale.”²¹ Scales are essential to musicians, particularly guitar players. Scales help in constructing solos and aid the guitar player in determining the construction of other musicians’ solos so that the experienced guitar player is capable of learning a solo largely by ear; that is, by simply listening and applying one’s knowledge of the specific scale.

Additionally, musicians play groups of notes known as “chords.” A chord is a grouping of three or more notes played simultaneously.²² Chords are notes in a given scale, created by choosing a root note and then playing every other note of the scale.²³ Guitar players mainly utilize chords by strumming them, which means attacking all the notes of a chord with a single stroke of the picking arm rather than picking individual notes with fingers or a guitar pick.

B. Guitar Tablature: The Illiterate Musician’s Friend

¹⁸ *Id.*

¹⁹ *Id.* at 21.

²⁰ ADAM KADMON, *THE GUITAR GRIMOIRE: A COMPENDIUM OF FORMULAS FOR GUITAR SCALES AND MODES* 5 (1991).

²¹ *Id.*

²² Schonbrun, *supra* note 16, at 178.

²³ MARK GALBO, *MELODIC ARPEGGIOS FOR LEAD GUITAR 7* (Ed Lozano 2004).

Fortunately, such an understanding of music theory is not necessary for one to pick up the guitar and start playing. Various methods of learning the guitar help the student player become proficient with the instrument without heavy reliance on reading sheet music or understanding music theory. Guitar tablature is one of the most popular modalities for a student player to learn songs for the guitar in a simple and straightforward fashion.

“Tablature – or tab, as it’s commonly referred to – is an alternative form of notation that is commonly used for guitar or bass. Guitar tab is specific to the guitar; other instruments cannot read this notation.”²⁴ However, to understand tab, one must first have a basic understanding of the guitar.



Figure 2: A Guitar

²⁴ Schonbrun, *supra* note 16, at 7.

The protrusion that extends from the guitar’s body is the “neck” of the guitar. Along the neck, are metal staffs known as “frets.” The frets run parallel to one another and perpendicular to the strings from top to bottom of the neck. Usually, a guitar will have 22 to 24 frets depending upon the model of guitar and type of music it plays. The strings run the length of the neck. Generally, a guitar will have six strings. However, specialty styles such as folk guitars use twelve strings while some “metal” guitars utilize seven. Guitar players play notes on the guitar by placing their fingers in-between the frets (known as the fret position) and then attack the notes on the strings with a finger or pick.

Tablature is composed of six horizontal lines running across the page of a tab-sheet (a piece of paper on which tablature is written), representing the six strings of the guitar. Additionally, the lines are marked with numbers indicating which fret to press down.²⁵

G Major Arpeggio

e-----2-3-5-----

b-----3-5-----

g-----2-4-5-----

d-----2-4-5-----

a-----2-3-5-----

E---2-3--5-----

Figure 3: Guitar Tablature Example

Guitar tablature also has a special notation for chords. Tablature often includes specific markings for chords, commonly referred to as a “lead sheet,” en lieu of having the chord represented by six lines and number markings. A lead sheet uses a form of “musical short hand

²⁵ *Id.*

to indicate a song via a single written melody and chord symbols.”²⁶ Another form of chord marking in tablature is a “chord chart.” Chord charts are much like lead sheets but chord charts utilize some standard music notation to indicate how long a chord is played.²⁷

While guitar tablature is utilized in guitar tutorial books available at most music stores, it is also available free through guitar tablature websites.²⁸ Most websites that host tablature allow users to upload tablature onto the website.²⁹ Because tablature uses the structure of lines and numbers to represent music to play on the guitar neck, it is easily written on a computer’s word processing program, thus easily uploaded and read.

With most websites, guitar tabs are edited and created by amateur musicians, and other guitar players are allowed to rate the accuracy and usefulness of the tab (perhaps a testimonial to the inaccuracy of many tabs).³⁰

Users often create a tab by first listening to the recording, then reducing the musical work to tab through analyzing the key and chord structure of the arrangement. Since most popular songs use common chord progressions, it is not terribly difficult for the tabber to determine the chord structure of the song. For example, most blues and rock songs use the chord progression of I, IV, V. Once the chord progression is determined, tabbers can ascertain the key of the song and are often able to deconstruct the song’s solos and riffs by using the appropriate scale to determine which notes to play. They can then write a tab that is a complete representation of the song in tab format, through a process of trial and error.

²⁶ *Id.* at 8.

²⁷ *Id.* at 9.

²⁸ An example of free internet tablature may be found at <http://www.ultimate-guitar.com/>.

²⁹ An example of this upload feature may be found at <http://www.ultimate-guitar.com/>.

³⁰ An example of the rating feature may be found at <http://www.ultimate-guitar.com/>.

While internet tablature may be a somewhat recent innovation for guitar players, it is important to point out that musicians traditionally have relied on their ability to learn a song by “ear” through the aforementioned trial and error process.

III. HELP! An Introduction to Basic Copyright Law

To be copyrightable, an expression must be an original work of an author that possesses some minimal degree of creativity.³¹ “To prove copyright infringement, the plaintiff must show (1) ownership of the copyright; (2) access to the copyrighted work; and (3) substantial similarity between the copyrighted work and the defendant’s work.”³² Courts have relied upon two tests to determine infringement.

The first test, set forth in *Arstein v. Porter*, utilizes a bifurcated test to analyze the second and third elements of an infringement claim.³³ In *Arstein*, the plaintiff alleged various claims of copyright infringement, stating the defendant had stolen many of his musical compositions.³⁴ The plaintiff testified to “fantastic” stories regarding how the defendant accessed the copyrighted works.³⁵ In his own words, the plaintiff said that the defendant, “had stooges right along to follow me, watch me, and live in the same apartment with me.”³⁶ The plaintiff asserted that the defendant’s stooges broke into and ransacked the plaintiff’s apartment for purposes of stealing his compositions.³⁷

³¹ Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

³² Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp. 562 F.2d 1157, 1162 (9th Cir.1977).

³³ *Arstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

³⁴ *Id.* at 467.

³⁵ *Id.* at 469.

³⁶ *Id.* at 467.

³⁷ *Id.*

To respond to the issues of copyright infringement, the court used a bifurcated test to analyze the second and third elements.³⁸ With respect to proving a defendant had access to the copyrighted work, the court stated, “the evidence may consist (a) of defendant’s admission that he copied or (b) of circumstantial evidence - usually evidence of access - from which the trier of facts may reasonably infer copying.”³⁹ In relying upon circumstantial evidence, the court stated that dissecting the two works or expert testimony might be necessary.⁴⁰ Once copying is established, the court must determine if such copying is illicit.⁴¹ To determine illicit copying, “the test is the response of the ordinary lay hearer; accordingly, on that issue, ‘dissection’ and expert testimony are irrelevant.”⁴²

The second test was set forth in *Krofft v. McDonald* and utilizes two prongs to determine substantial similarity.⁴³ The facts in *Krofft* involve the McDonald’s fast-food chain advertising with commercials that infringed upon H. R. Pufnstuf.⁴⁴ While the court made use of the test set forth in *Arnstein*, it found the test somewhat lacking and modified it to include an extrinsic and intrinsic analysis of substantial similarity.⁴⁵ The extrinsic portion of the test looks for similarity between the ideas of the two works, while the intrinsic portion looks at the similarities between the two works’ expression of the idea.⁴⁶ While the courts may have adopted different approaches to ascertaining copyright infringement, the end test is still the same: Whether the average listener, upon hearing the two works, would determine the works to be substantially similar.

³⁸ *Id.* at 468.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977).

⁴⁴ *Id.* at 1161. *H.R. Pufnstuf* was a popular children’s program that aired in the late 1960s and early 1970s.

⁴⁵ *Id.* at 1163-65.

⁴⁶ *Id.* at 1164.

Additionally, to prove infringement, the accused party must infringe upon one of the copyright holder's rights listed in section 106 of The Copyright Act. Those rights are:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio visual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁴⁷

The right potentially infringed by internet tablature is the right of copyright holders "to prepare derivative works based upon the copyrighted work."⁴⁸

A. Derivative Works

For the MPA to succeed in a claim of copyright infringement against tablature websites, it must first demonstrate that guitar tablature transcribed by ear is an unauthorized derivative work.⁴⁹ Section 101 of the Copyright Act defines a derivative work as "a work based upon one or more preexisting works, such as a translation, . . . art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted."⁵⁰

Examples of derivative works are action figures modeled from characters in a cartoon and a motion picture based on a novel. Such works are easily recognizable as derivative works because someone can readily ascertain they are based on a preexisting work (either a cartoon or a

⁴⁷ 17 U.S.C. § 106 (2006).

⁴⁸ *Id.*

⁴⁹ The reasoning for this is discussed in the analysis section of this document.

⁵⁰ 17 U.S.C. § 101.

novel) transformed for the toy market or adapted for the silver screen. Because guitar tablature does not reproduce the recorded sound of the copyrighted work, but rather transcribes the recording into a system of music notation, the issue of determining whether internet guitar tablature is a derivative work is of tantamount importance.

B. The Fair Use Defense

If tablature is to survive a claim of copyright infringement, fair use may be its only viable defense. And it may be a mixed blessing that there is no shortage of interesting cases that tackle the issue of fair use. In *Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema*, a case involving what the court describes as a “sexually depraved film”⁵¹ about the rather dubious exploits and struggles of several young women aspiring to become professional cheerleaders,⁵² the court stated “[t]he fair use doctrine allows adjustments of conflicts between the first amendment and the copyright laws...and is designed primarily to balance ‘the exclusive rights of a copyright holder with the public’s interest in dissemination of information affecting areas of universal concern, such as art, science and industry.’”⁵³

No doubt guitar tablature falls within the realm of “art” as mentioned by the court in *Dallas Cowboy Cheerleaders*, however, more is required for a work to fall within the doctrine of fair use.⁵⁴ Fair use allows a potential copyright infringer to avoid having one’s work found as

⁵¹*Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979).

⁵² *Id.* at 202-03.

⁵³ *Id.* at 206 (quoting *Wainwright Sec. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94-5 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)).

⁵⁴ While the court in *Dallas Cowboys Cheerleaders* did not discuss what constitutes art, courts have used the generic meaning of the word to include paintings, motion pictures, choreography, music and various other forms of artistic expression.

infringement if the work meets certain statutory requirements.⁵⁵ Section 107 of the Copyright Act provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (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.⁵⁶

IV. Analysis

Copyright protection not only exists in the sound and performance recordings of an artist's work, but in many instances, in the tablature itself. Many copyrighted tablature books exist on the market today from which internet tabbers copy directly. In such instances, the issue is not that of copyright infringement of the song, but of copyright infringement of the copyrighted tablature sold on the market.

In determining whether such works are infringing derivative works protected by the fair use defense, it is necessary to examine separately internet tablature created by ear and unauthorized internet tablature available for purchase on the market.⁵⁷ Since such works differ

⁵⁵ 17 U.S.C. § 107.

⁵⁶ *Id.*

⁵⁷ Tablature created by "ear" refers to the process of listening to a recording and then transcribing the notes into tablature format. Such ear transcription is necessary when a tablature booklet is unavailable, or often in the case of guitar tablature, not in existence.

substantially in the amount of transformative value, purpose, character, and effect on their respective markets, it is quite likely that courts will treat the two substantially differently.

A. Proving Copyright Infringement

1. Tablature Reproduced from Available Tablature Booklets

If the issue was taken to trial, courts would have little difficulty in finding that internet tablature reproduced from commercially available tablature booklets infringes upon the copyrighted work it intends to reproduce, and thus infringes upon the right to make reproductions of the copyrighted work as mentioned in § 106 of the United States Copyright Act.⁵⁸ Because of its mode of creation and use, guitar tablature copied from a booklet fulfills each respective element of copyright infringement in a strikingly obvious manner.

The first two elements to establish infringement are ownership of the copyright and access to the copyrighted work are readily ascertainable.⁵⁹ Proof of valid copyright ownership is established through the composers' and music companies' registration of the song through the United States Copyright Office. Additionally, access is easily established. In order for a tabber to create a tablature of a song from a booklet, the tabber must have access to a commercially available tablature book. Such access may be established through a variety of means, such as purchase from a retail music store or commercial website.⁶⁰ Moreover, such tabs often state which album or tablature booklet the tablature intends to recreate. By stating such information, the tabber admits to access.

⁵⁸ 17 U.S.C. § 106.

⁵⁹ Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir.1977).

⁶⁰ Retail music stores that offer tablature booklets include Brook Mays Music Company and Guitar Center. Websites that sell tablature booklets include www.halleonard.com and www.sheetmusicplus.com.

The third prong, the issue of substantial similarity,⁶¹ poses no great hurdle in finding copyright infringement for tablature copied from a booklet. Many tabbers only copy the primary guitar tablature from booklets available on the market, leaving out background and rhythm guitar notation. A fundamental tenet of copyright law states, “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”⁶² Therefore, because tablature of this nature is copied directly from a booklet, such copying would easily allow a court to find substantial similarity exists, even if the infringing tablature is not a complete reproduction of the tablature booklet.

2. Tablature Created by Ear

For a finding of copyright infringement, copyright holders would also have to show that guitar tablature created by ear fulfills the requirements of the three pronged test discussed above.⁶³ As previously mentioned, ownership of a valid copyright of the work can be easily established through proof of valid registration of the work at the United States Copyright Office. Additionally, access to the copyrighted work can be assumed because the tabber could not create a tablature of the song by ear without first hearing the copyrighted recording. However, for determination of the final prong of substantial similarity, the tablature created by ear would have to be deemed as infringing upon the copyright owner’s right to create a derivative work as found under § 106 of the United States Copyright Act.⁶⁴

B Unauthorized Derivative Works

⁶¹ *Krofft Television Prods.*, 562 F.2d at 1162.

⁶² *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936).

⁶³ *See Krofft Television Prods.*, 562 F.2d at 1162.

⁶⁴ 17 U.S.C. § 106 (2006).

Because of the amount of transformation required to put a song in tablature form, songs that are tabbed by ear will have to be analyzed to determine if they qualify as unauthorized derivative works, as discussed below.

To be a derivative work, a work must be both, substantially similar to the original work and transformed to a degree necessary to find an original work of authorship.⁶⁵ Courts should have little problem in finding that tablature created by ear is a derivative of the recorded composition. The notes of the song, once played on the guitar, will produce a substantially similar sound to that on the recording (provided the tabber has not made too many mistakes) and such a transcription of the notes from the recording to tablature notation transforms the recording into a written composition. Thus, the act of transforming the recording into a writing seems to fit snugly within the statutory requirement that a derivative work is a transformation or recasting of the original work.

An argument against finding copyright infringement in both forms of guitar tablature comes from the type of the music that internet guitar tablature often seeks to reproduce. Such music genres as jazz and blues place a heavy emphasis on improvisation. Often a blues or jazz song will be set around a chord change, such as the common I IV, V chord change in blues music, with the players taking turns to solo over the other instruments in the same motif of the chord change. Because of the improvisation of such musical styles, each performance of a song would be different from its predecessor, and therefore, limited by the copyright doctrine that states an expression must be in a fixed medium to be afforded copyright protection.⁶⁶

Once the work is stripped of the non-copyrightable aspects, all that is left for the guitar player in many instances is the common chord pattern of I, IV, V. Because such chord changes

⁶⁵ *Krofft Television Prods.*, 562 F.2d at 1162.

⁶⁶ See *BTE v. Bonnecaze*, 43 F. Supp. 2d 619, 626 (1999) (discussing the particularities of the fixation requirement as it pertains to musical compositions).

are common to blues music, it may be possible to argue that such chord changes are subject to the copyright doctrine of *scenes a faire*. *Scenes a faire* holds that when an expression is standard or ordinary within the given topic, such an expression is not afforded copyright protection.⁶⁷

Additionally, the court in *Apple Computer v. Microsoft*, found that where a work's copyright protection is substantially narrowed by such doctrines as *scenes a faire* and merger,⁶⁸ "the appropriate standard for illicit copying is virtual identity."⁶⁹ Therefore, it is possible to argue that for copyright infringement to exist in a blues song emphasizing improvisation and common chord changes, only a virtually identical reproduction of the performance can infringe the copyright.⁷⁰

However, such a defense may only be available in a select minority of cases; a quick viewing of an internet tablature site demonstrates that there is an abundance of tablature created from studio recordings. In such cases, anyone with knowledge of the recording process would find it difficult at best to assert that a recorded studio work is primarily the result of improvisation, as opposed to a composition that was coordinated, planned, and rehearsed by the band recording the work. Moreover, recordings of live performances (where improvisation is most likely found) are not as common as studio recordings nor are they tabbed with the same frequency as studio-produced albums.

Therefore, because tablature copied directly from booklets and posted on the internet for public consumption will no doubt, be deemed copyright infringement, and because tablature

⁶⁷ See *Atari Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982), *overruled on other grounds* by *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429 (7th Cir. 1985); *Wavelength Film Co. v. Columbia Pictures Indus.*, 631 F. Supp. 305, 306 (N.D. Ill. 1986).

⁶⁸ In explaining the copyright doctrine of merger, the court in *CDN Inc. v. Kapes* held, "that when expression is essential to conveying the idea, expression will also be unprotected." *CDN Inc. v. Kapes*, 197 F.3d 1256, 1261 (9th Cir. 1999).

⁶⁹ *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994).

⁷⁰ The virtual identity standard determines whether there is infringement by determining if two works are virtually identical as explained in *Apple Computer*.

created by ear from sound recordings will most likely qualify as an unauthorized derivative work, it is necessary to ascertain whether such works will be able to avail themselves of the fair use defense.

C. The ‘Fab’ Four of the Fair Use Defense

The test for the fair use exception is divided into four prongs that correspond to the factors mentioned in Section 107 of the Copyright Act.⁷¹ The factors are: (i) the purpose and character of the use; (ii) the nature of the copyrighted work; (iii) the amount or portion of the copyrighted work used; and, (iv) the effect of the use on the market.⁷²

1. The Purpose and Character of the Use

The first prong, of the fair use exception, commonly regarded as the most important prong, is that of the purpose and character of the use.⁷³ In this prong, the court looks, “to the purpose and character of the alleged infringing use, including its commercial or non-profit educational motivation or design.”⁷⁴

Guitar websites will face an uphill battle in convincing courts that internet tablature fulfills the purpose and character of the use requirement necessary to find a valid claim of fair use. In *A&M Records v. Napster*, the court stated, “[t]his factor focuses on whether the new work merely replaces the object of the original creation or instead adds a further purpose or

⁷¹ 17 U.S.C. § 107 (2006).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981).

different character. In other words, this factor asks ‘whether and to what extent the new work is ‘transformative.’”⁷⁵

In regards to internet tablature that reproduces a printed tablature booklet, these statements may be the first of many nails driven into the coffin of such websites’ arguments for the fair use defense. Such internet tablature works merely reproduce the original works and add no further purpose or a different character to the preexisting material. The fact that background and rhythm guitar portions are left out of the internet tablature does not create a transformative work as much as it creates an incomplete one.

One would be inclined to believe that guitar tablature created by ear might have a stronger argument that it is, indeed, a transformative work. The primary reason for believing that a song tabbed by ear is a transformative work is that if the song’s notation is nonexistent and put into tablature form via listening, the work is indeed transformed. However, the court in *Napster* observed, “[c]ourts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.”⁷⁶ It does not take the musical genius of Paul McCartney to find that in light of such a statement, arguing a previously non-tabbed work is transformed to the extent necessary for a finding of fair use would leave internet tabbers facing more than a hard day’s night.

Additionally, by claiming that internet tablature’s *raison d’etre*⁷⁷ is to facilitate the musical education of budding guitarists, tabbers may have a valid argument pertaining to the nature of the use of the internet tablature. Musicians argue that learning a song by ear and passing it along to another player is an age-old method of guitar education. They argue that

⁷⁵ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001). Napster, is an online music sharing program in which users are allowed to access a library of songs for purposes of downloading such material. *Id.* at 1011-12.

⁷⁶ *Id.* at 1015.

⁷⁷ The French expression “raison d’etre” literally translates to “reason for being.”

creating guitar tablature by ear and then posting it on the internet, is no different from listening to a song, determining its chord changes and rifts, and teaching it to a fellow budding guitar player.⁷⁸ Such arguments would invoke the educational aspect of fair use.

However, and rather counter intuitively, learning individual songs is often not the focus of music instruction as much as it is a vehicle for learning to play an instrument. Rather, music instructors focus on music theory and technique.⁷⁹ Learning songs is viewed as merely a byproduct of learning about such subjects and techniques, but not the primary objective. Simply put, music instructors focus on building their students into complete musicians, not someone who can simply cover a song or reproduce a performance.

In finding against the fair use defense for *Napster*, the court stated that, Napster users getting free something they would ordinarily have to buy, is yet another rejection of the Napster's fair use defense.⁸⁰ Such a statement begs the question: How is internet guitar tablature copied directly from a commercially available tablature booklet capable of availing itself of the defense of fair use? The answer is that it cannot. By copying directly from a booklet and posting the tablature online, tabbers are doing nothing less than stealing the intellectual property of copyright owners. Courts will no doubt find that such conduct is the equivalent of making photocopies available of commercially available printed materials.

2. The Nature of the Copyrighted Work

⁷⁸ Rifts are portions of the song in which the lead guitarist plays single notes, usually based upon a scale or mode in the appropriate key.

⁷⁹ This is why this article's author quit guitar lessons and went to law school.

⁸⁰ *Napster*, 239 F.3d at 1015 (quoting *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000)).

The second factor of fair use, analyzing the nature of the copyrighted work, is not as extensive and requires less analysis than the preceding factor.⁸¹

MCA v. Wilson states that courts should also “look at the nature of the copyrighted work. In doing so, the court may consider, among other things, whether the work was creative, imaginative, and original and whether it represented a substantial investment of time and labor made in anticipation of financial return.”⁸²

Creating a tablature version of a song for commercial sale is no easy task. Unlike internet tablature that may be downloaded free, customers who pay for professional tablature booklets expect accurate representations of the notes being played on the recording. Creation of professional tablature involves hired professionals who must not only distinguish and separate the various guitar parts of a song, but also analyze the amp settings and effects used in the recording so that home users may be able to consult such references in reproducing the original recording’s sound in their homes. In addition to just numbered lines of tablature notation, the booklets also provide customers with traditional music notation, background and rhythm guitar parts (often in the form of a chord chart), as well as the appropriate beats per minute of a song. Professional tabbers are expected to provide customers with a tablature that is complete and accurate.

“Works that are creative in nature are ‘closer to the core of intended copyright protection’ than are more fact-based works.”⁸³ The court in *Napster* held, “copyrighted musical compositions and sound recordings are creative in nature...which cuts against a finding of fair

⁸¹ 17 U.S.C. § 107 (2006).

⁸² *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981) (citing *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977); *Wainwright Sec. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977)).

⁸³ *Napster*, 239 F.3d at 1016 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

use under the second factor.”⁸⁴ Because the court in *Napster* found that musical compositions and recordings are to be afforded greater protection of the copyright laws in cases pertaining to illegal downloads of recordings, it is likely that a court will hold that such musical compositions and recordings are also to be afforded greater protection in a case pertaining to the illegal downloads of musical compositions.

3. The Portion Used

The third factor of fair use analyzes the amount of the copyrighted work used in the infringing work.⁸⁵ “While wholesale copying does preclude fair use per se, ‘copying an entire work’ militates against a finding of fair use.”⁸⁶

Internet guitar tablature is inherently limited in its ability to reproduce the notation of a complete song, and this may be both forms of internet tablature’s strongest argument for a finding of fair use. While many tablatures attempt to reproduce the main guitar portion of a song in its entirety, essential elements of the composition are left out of the tablature. Instruments, such as drums, keyboard, and horns cannot be notated in tablature form, and therefore, a tablature of a song represents a rather incomplete work. Moreover, many tablatures only attempt to reproduce certain riffs and solos of a song and leave the majority of the guitar composition untabbed and open to improvisation.

Even if the guitar portion of the song is notated in its entirety and is regarded as the predominant instrument of the composition, courts may still find a valid fair use defense.⁸⁷ In

⁸⁴ *Id.* at 1016.

⁸⁵ 17 U.S.C. § 107.

⁸⁶ *Napster*, 239 F.3d at 1016 (citing *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000)).

⁸⁷ Compositions with the guitar as the predominant instrument include such songs as the Beatles’ “Day Tripper” and the White Stripes’ “Seven Nation Army.”

Sony Corp. of America v. Universal City Studios, Inc., the court found fair use even though the case involved a complete reproduction of recorded material.⁸⁸

In *Sony*, Universal City brought an action against Sony for indirect copyright infringement.⁸⁹ Universal claimed that Sony's VCRs allowed users to record complete television programs and watch them at a later time (a process known as "time-shifting"), and thus infringed upon Universal's copyrights by making illegal reproductions of such programs.⁹⁰ In spite of the VCRs allowing users to make complete copies of copyrighted works, the court held that such time shifting is a fair use.⁹¹ The court stated that such time-shifting uses were primarily for private home use and therefore, must be characterized as a noncommercial or nonprofit activity.⁹²

Such a finding allows tabbers to make an argument that that such music notation is intended for private use in that its primary objective is to allow the home musician the ability reproduce a song in the comfort of his or her own bedroom. However, such an argument is a double-edged sword also striking a blow against finding fair use. For every musician that downloads tablature for personal and private pleasure it is equally likely a musician downloads internet tablature to cover a song for public and commercial performances.

Additionally, the court in *Sony* stated, "[a] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."⁹³ The affects upon the potential market bring one to the fourth and final factor of fair use.

⁸⁸ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁸⁹ *Id.* at 420.

⁹⁰ *Id.* at 421.

⁹¹ *Id.* at 454.

⁹² *Id.* at 448.

⁹³ *Id.* at 451.

4. The Effect of Use on the Market

The final factor of fair use attempts to ascertain the effect of the infringing work's use upon the market of the original work.⁹⁴ The court in *MCA* commented,

The aim of the copyright laws is to stimulate artistic creativity for the benefit of the public, and this is done by providing the artist with the financial motivation for creativity that flows from a limited form of monopoly...however, where a claim of fair use is made, a balance must sometimes be struck between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied..⁹⁵

The fourth factor of fair use seeks to strike a balance between the two fundamental tenets of intellectual property law: Encouraging ingenuity by protecting one's intellectual property rights so the owner can reap the financial benefits of a limited monopoly versus providing a benefit to the public by allowing use of such a work by artists for future creations.⁹⁶

In regards to tablature that is copied directly from a book, there can be little doubt that the original work's market is affected. In *Trebonik v. Grossman Music Corp.*, the court analyzed the fair use defense brought by the author of a guitar instructional book that infringed on the plaintiff's Chord-o-Matic device.⁹⁷ In determining whether the plaintiff's market was affected, the court held, "[t]he market for his copyrighted book is thereby substantially affected, since another work portraying the same material in the same organizational scheme is available from the defendant."⁹⁸ Guitar tablature website owners would therefore face the onerous task of

⁹⁴ 17 U.S.C. § 107 (2006).

⁹⁵ *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

⁹⁶ *Id.*

⁹⁷ *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339 (N.D. Ohio 1969).

⁹⁸ *Id.* at 350.

convincing a court that a product website users may download free does not affect the retail sales market for a more complete version of the same product.

In regards to tablature that notated by ear, tabbers have argued that such works are a fair use in that tablature created by ear does not deprive copyright owners of profits because literature and commercially available products on such tablature do not exist. However, the court in *Napster* held that, “[d]irect economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.”⁹⁹ Additionally, the court in *Sony* stated, “actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result.”¹⁰⁰

But actual harm has been shown in the case of internet tablature; the MPA states that official tablature sales are down from the usual 25,000 copies per year to a mere 5000.¹⁰¹ Whether this decline is due to internet tablature that is directly copied from official tablature booklets or tablature that is notated by ear is open to debate. However, it is more than likely, a combination of the two contributed to the decline. While some tablature websites do offer an accuracy rating feature, such websites do not distinguish between tablature that is an exact reproduction of a booklet and tablature that is notated by ear.¹⁰² Because courts do not impose a

⁹⁹ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001).

¹⁰⁰ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

¹⁰¹ Bob Tedeschi, *Now the Music Industry Wants Guitarists to Stop Sharing*, NEW YORK TIMES, Aug. 21, 2006, at C1, available at <http://www.nytimes.com/2006/08/21/technology/21ecom.html?pagewanted=1&sq=guitar%20tablature%20fair%20use&st=nyt&scp=r>.

¹⁰² Examples of accuracy ratings may be found at: <http://www.ultimate-guitar.com/>.

high threshold to show that a market has been adversely affected,¹⁰³ and because the MPA can demonstrate actual harm, it is likely that courts will find internet guitar tablature, whatever its origin of notation, fails the final factor of fair use.

V. Conclusion: We Can Work It Out

While internet guitar tablature may be a budding musician's stairway to heaven, it is the music industry's black Sabbath.¹⁰⁴ Guitar tablature may be the latest progression in the long history of musicians teaching one another popular songs. And like the spirit of so many rock 'n roll songs of the past, internet tabbers are rebelling against the establishment, often with a devil may care attitude. However, actions of the MPA may soon end such rock 'n rebellion. Internet tablature web sites would be living on a prayer if they use the defense of fair use.

For guitar tablature to invoke fair use adequately, it should, perhaps, rely on its potential educational uses. Much like Keith Urban's entrance into rehab, internet guitar tablature's admittance of its shortcomings, may become its saving grace. If guitar tablature websites were to expand their forums so that users may comment and critique one another's tablature, as well as the theory involved in each composition, it may be possible to convince courts that such websites serve a valid educational use for ear training musicians to dissect musical works. Additionally, if such tablature websites were to implement some sort of policing mechanism and disallow tablature plagiarized from official booklets, such websites might strengthen their position for a finding of fair use.

¹⁰³ Courts have repeatedly held that neither direct economic damage to the copyright holder nor economic benefit of the infringer is necessary for a showing of market impact, rather courts only focus on the possibility of such consequences. See *Napster*, 239 F.3d at 1015; *Sony*, 464 U.S. at 451.

¹⁰⁴ Black Sabbath is also a British heavy metal band whose most famous alumnus is Ozzy Osbourne. *Black Sabbath*, at WIKIPEDIA, http://en.wikipedia.org/wiki/Black_Sabbath (last visited May 1, 2008).

Regardless of the action guitar tablature websites take, the battle may already be won. With the MPA's extensive resources, guitar tablature websites are removing their tablature features with no fight.¹⁰⁵ It seems as though the power of an industry that thrives upon the youth's musical prowess is using its power to deter what has made it great.

Such a result leaves many musicians with the nagging feeling that something is unjust, and like Mick Jagger, many guitarists will be screaming, "I can't get no satisfaction!"¹⁰⁶ One must be steadfastly aware of the importance of the arts, and the encouragement of future musicianship. If the issue were ever brought to trial, perhaps courts would heed musicians' arguments that passing along songs is an important facet to continuing the musical tradition, and that society would be the biggest loser if musicians' efforts to create a free flow of knowledge were thwarted. As John Lennon and Paul McCartney may have put it, in the end, the intellectual property you take is equal to the intellectual property you make.¹⁰⁷

¹⁰⁵ Bob Tedeschi, *Hoping to Move Guitar Notations into the Legal Sunshine*, NEW YORK TIMES, Apr. 2, 2007, at C6, available at

http://www.nytimes.com/2007/04/02/technology/02ecom.html?_r=1&scp=1&q=guitartablature&st=ny&oref=slogin.

¹⁰⁶ The Rolling Stones, *Satisfaction*, on OUT OF OUR HEADS (London Records 1965).

¹⁰⁷ The Beatles, *The End*, on ABBEY ROAD (Apple Records 1969). The actual words of the song are "And, in the end, the love you take/ Is equal to the love you make." *Id.*