

**POSSIBLE SOLUTIONS TO THE GUITAR
TABLATURE PROBLEM:
WHY AN INTERNATIONAL APPROACH MAY BE
BEST FOR ALL ♦**

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INTRODUCTION

Guitar tablature (hereinafter “tab”) predates the Internet; it is a shorthand notation system that operates as an alternative to traditional sheet music. It has long been used to teach those beginning to play the

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instrument, but is also used by experienced players. The history of online guitar tabs dates back to at least 1992; in that year, the Online Guitar Archive (“OLGA”), which the BBC has referred to as the “mother of all guitar tab sites,” began operation.¹ OLGA was originally run from the University of Nevada, Las Vegas as a file transfer site for tabs.² Many similar sites were launched after OLGA, including Guitar Tab Universe and MXTabs, which were also two of the largest tab sites.³ While these tab websites were being created in the United States in the 1990s, tab websites were also being developed internationally; Eugeny Naidenov created Ultimate-Guitar.com in 1998 while he was a college student in Russia.⁴ Similar to Ultimate-Guitar.com, the previously mentioned websites were mainly run by amateur guitar players who viewed these sites as a hobby. For example, Cathal Woods, who ran OLGA from 1994 to 2006, is a professor of philosophy at Virginia Wesleyan College and Robert Balch, creator of Guitar Tab Universe, works full time as a technology consultant.⁵

In 2006, nearly twenty guitar tablature websites were sent “takedown” notices, which are essentially cease-and-desist letters, by the Music Publishers’ Association and the National Music Publishers’ Association, demanding the sites remove these tabs from the Internet due to copyright infringement.⁶ The tab sites claimed the legitimacy of their enterprise as educational, by making statements such as,

When you are jamming with a friend and you show him/her the chords for a song you heard on the radio, is that copyright infringement? . . . What about if you helped him/her remember the chord progression or riff by writing it down on, say, a napkin . . . infringement? If he/she calls you later that night on the phone or e-mails you and you respond via one of those methods, are you infringing?⁷

While posing these questions, tab sites have not initiated litigation over the alleged infringements.⁸ As OLGA director, Cathal Woods,

¹ Jonathan Duffy, *Discord Over Guitar Sites*, BBC NEWS MAGAZINE (Sept. 1, 2006, 11:57 GMT), http://news.bbc.co.uk/2/hi/uk_news/magazine/5305520.stm?ls.

² Tara Lynn Waters, Note, *Gimme Shelter: Why Courts Can’t Save Online Guitar Tablature, But the Music Publishing Industry Can (and Should)*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 253, 262 (2007).

³ James T. Tsai, *The Unlitigated Case: A Study of the Legality of Guitar Tablatures*, 2009 B.C. INTELL. PROP. & TECH. F. 070502, 1 (2009).

⁴ *About Ultimate-Guitar.Com*, ULTIMATE-GUITAR.COM, <http://www.ultimate-guitar.com/about/> (last visited Feb. 3, 2012).

⁵ Mike Hughlett, *Music Industry Frets Over Popular Guitar Web Sites*, CHI. TRIB. (Dec. 8, 2006) http://articles.chicagotribune.com/2006-12-08/news/0612080156_1_sheet-music-national-music-publishers-association-music-industry/2.

⁶ *Id.*

⁷ Nate Anderson, *Music Industry Threatens Guitar Tablature Sites*, ARS TECHNICA (Aug. 14, 2006, 4:48 PM), <http://arstechnica.com/old/content/2006/08/7498.ars> (quoting Robert Balch, Manager of Guitar Tab Universe).

⁸ The tablature websites may have the possibility of seeking declaratory judgment on the matter,

explains, “[t]hat [type of litigation] requires a whole bunch of money and a whole bunch of time and energy.”⁹ Thus, rather than a legal battle, which would require money and time likely unavailable to the hobbyists operating these sites, OLGA and the majority of tab sites in the United States who were sent these letters simply shut down; OLGA removed tabs to 34,000 songs available on its website.¹⁰ Thus, the merits of the copyright infringement claim with regard to tabs have never been heard or ruled upon by a United States court.

While both OLGA and Guitar Tab Universe shut down as a result of the “takedown” notices, MXTabs temporarily suspended use but was then acquired by the licensed sheet music publisher, Musicnotes, and in March of 2007, a revenue sharing plan was developed between MXTabs and the Harry Fox Agency, which represents many music publishers.¹¹ In this agreement, MXTabs shared “an undisclosed portion of [its] advertising revenue with music publishers, who in turn gave a portion to artists.”¹² A major complication with the deal is that each copyright owner had to agree to the use of a tab for their song on the website.¹³ While the Harry Fox Agency represents music publishers, it does not issue rights to print.¹⁴ It is unknown which owners have agreed or not agreed to publishing tabs on the site; however, in 2007, Hal Leonard, “the world’s largest music print publisher,” encouraged other music publishers not to license MXTabs because the site and revenue sharing plan did “nothing to abate copyright-infringing attitudes and behaviors.”¹⁵ Also, despite this agreement, allegations of infringement remained at issue: not all music publishers were on MXTabs and involved in the revenue sharing plan and other tabs sites without such revenue sharing plans remain available.¹⁶ MXTabs ran until the fall of 2011. It then suspended operations and partnered with Songsterr.¹⁷

which “enable[s] a person caught in controversy to obtain resolution of the dispute, instead of being forced to await the initiative of the antagonist.” Dorothy R. Auth et al., *Selecting Forum and Venue for Your Patent Litigation*, 997 PRAC. L. INST. PAT. COPYRIGHTS TRADEMARKS & LITERARY PROP. COURSE HANDBOOK SERIES 601, 632 (2010).

⁹ Hughlett, *supra* note 5 (internal quotation marks omitted).

¹⁰ Duffy, *supra* note 1.

¹¹ Waters, *supra* note 2, at 257. According to the Harry Fox Agency website, the agency’s duties include investigating “new business opportunities” and “pursu[ing] piracy claims” on behalf of the publishers it represents. *What does HFA do?*, HFA, <http://www.harryfox.com/public/WhatdoesHFAdo.jsp> (last visited Feb. 3, 2012).

¹² Bob Tedeschi, *Hoping to Move Guitar Notations into the Legal Sunshine*, N.Y. TIMES (Apr. 2, 2007) http://www.nytimes.com/2007/04/02/technology/02ecom.html?_r=1.

¹³ Nate Anderson, *Legal Guitar Tabs Return to the Web*, ARS TECHNICA (Apr. 2, 2007) <http://arstechnica.com/tech-policy/news/2007/04/legal-guitar-tabs-return-to-the-web.ars>.

¹⁴ *What does HFA do?*, *supra* note 11. The right to print is the ability to produce music or lyrics in a printed form. *Id.*

¹⁵ Waters, *supra* note 2, at 257.

¹⁶ A Google search for “guitar tabs” on Jan. 3, 2011, led to 3.8 million results. The first hit is the Russian-based, Ultimate-Guitar. Other tabs sites include: Fretplay, GuitarMasta, TabsDeluxe, 911Tabs, Songsterr, GuitarTabsCollege, AxeTab, and GuitarTabs.FM. All of these services boast free tabs.

¹⁷ MXTabs announced this partnership via their facebook page. *MXTabs.net- Facebook*,

In addition, a revenue sharing plan does nothing to solve the problems presented by international guitar tab sites. President of Hal Leonard, Larry Morton, claims that the Internet is like a “photocopier on steroids;”¹⁸ whereas before, people could make a photocopy of a tab for friends, the same image can now be posted online and seen around the world. International guitar tab sites, like Ultimate-Guitar.com, from Russia, are outside the scope of United States copyright law.¹⁹ American music publishers have yet to demand the removal of tabs from these sites.²⁰ Therefore, international tab sites can continue without being a part of the revenue sharing plan. These sites can be accessed by United States citizens because of the very nature of the Internet. For example, if a nation wants to block a connection to an Internet Service Provider (“ISP”) in another nation, it may do so. Nonetheless, two problems arise: to do so would block every website running via this ISP, not merely the objectionable ones. Moreover, the blocked website could simply register with another ISP and recreate the problem.²¹ This situation makes it nearly impossible for music publishers to collect revenue from all tab sites and causes concern among guitar tab enthusiasts (hereinafter “tabbers”) that they may not always be able to access the tabs they want. Due to the nature of the Internet, this Note proposes an international approach to solving the guitar tab website problem.

Music publishers and guitar players alike would be best served by reaching a compromise and developing an international forum for guitar tablature. The international forum would greatly reduce the uncertainty in this area of the law, which has not yet been litigated in the United States. This Note will explore the probable outcome of potential litigation of this issue: a ruling in favor of the publishers on a derivative claim even in light of tab sites’ fair use defense. Many scholars have contemplated that the tablature websites would not prevail if the case were to be litigated.²² Even if the tab sites lost in United States courts, because of the nature of the Internet, international guitar tablature websites would remain available. The United States’ commitment to copyright protection is not only domestic but expands to international

MX TABS.NET, <http://www.facebook.com/MXTabs> (last visited Feb. 10, 2012).

¹⁸ Hughlett, *supra* note 5 (quoting Larry Morton, president of Hal Leonard).

¹⁹ *See id.*

²⁰ The Russian site, Ultimate-Guitar.com, is still in operation as of Feb. 12, 2012. The site claims to follow intellectual property standards by identifying information that should be provided to the site by anyone believing their work has been violated. *DCMA/Copyright Policy*, ULTIMATE-GUITAR.COM, <http://www.ultimate-guitar.com/about/dmca.htm> (last visited Feb. 12, 2012).

²¹ Paul Przybylski, *A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content*, 9 VAND. J. ENT. & TECH. L. 927, 932-33 (2007).

²² *See, e.g.*, Tsai, *supra* note 3; Krist Caldwell, *Three Chords and the Truth: Analyzing Copyright Infringement Claims Against Guitar Tablature Websites*, 4 OKLA. J. L. & TECH. 41 (2009); Waters, *supra* note 2.

agreements, such as the Berne Convention,²³ the TRIPS Agreement,²⁴ and World Intellectual Property Organization (“WIPO”).²⁵ An international agreement on guitar tablature and development of a tablature website would allow for a wider community of tabbers to communicate with and educate one another. However, music publishers would receive the revenue from the international site instead constantly fighting new battles over tabs whenever a new tab site is developed.

Part I of this Note will begin with a primer on music theory, tabs, and how the music industry functions as a whole. Part II will analyze the copyright infringement claims on tabs and the likely outcome of any litigation in the United States. It will also discuss both derivative work rights for sheet music and audio recordings, and analyze the possibility of using a fair use exemption doctrine for tabs rights. Part III will focus on both proposed and attempted solutions to the problems with guitar tabs and the limitations on remedial action within a single country. Differences within copyright law and regulations between nations will be explored in Part IV. Finally, Part V will propose an international tablature forum, explain the problems such a forum would address, and respond to possible criticism of such proposed solution.

I. MUSIC THEORY, TABS, AND THE GREATER MUSIC INDUSTRY

A. *Guitar Tabs as they Relate to Music Theory*

Guitar tablature is not the same as traditional sheet music. It is based on the frets and strings of the guitar rather than on the traditional music staff. Below is a tab of the Elvis Presley song “Love Me Tender,” which is a beginner song for guitar players.

```
|-----|
|-----|
|---5-4-5-7---7---5-4---4-5---|
|-5-----7-----7-----5-|
|-----|
|-----|
|-----|
|-----|
|---5-4-5-7---7---5-4---4-5-|
|-5-----7-----7-----|
|-----|
```

²³ Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. TREATY DOC. NO. 99-27, available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

²⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, 1869 U.N.T.S. 299, available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

²⁵ WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, available at [wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P51_3806](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P51_3806).

```

|-----|
|-----|
|-5-5-5---5-5-5---5-----5-|
|-----7-5-7---|
|-----|
|-----|
|-----|
|-----|
|-5-5-6-5-----|
|-----7---7---5-4---4-5-|
|-----7-----7-----|
|-----|
|-----|26

```

It is obvious to even a casual observer that this is not traditional music notation, as it does not have a clef, five lines, bars, a tempo, or even music notes. To play a tab, it is not necessary to know how to read music, which leads to many self-taught guitar players learning based on tabs.²⁷ Tabs can be made from standard sheet music and tabs are sold in printed form but relatively few songs are published in this form in comparison to the number of songs composed.²⁸ It is often the case they are made after an experienced guitar player has listened to the songs and played along “by ear.”²⁹ This leads to foregoing the traditional indicators that appear on sheet music and just making a chart of which fret to play on which string. For this reason, “[w]riting tab is often subject to personal style and preference.”³⁰ As seen below, not only is “Stairway to Heaven” a more complicated song than “Love Me Tender,” it is also written differently. The names of the strings are written on the left hand side and there is a key for the guitar tricks it incorporates.

Led Zeppelin–STAIRWAY TO HEAVEN

```

/=slide
b=bend
r=rake
pb=prebend

```

²⁶ Ultimate-Guitar.com, Guitar Tab for Love Me Tender, http://tabs.ultimate-guitar.com/e/elvis_presley/love_me_tender_tab.htm (last visited Feb. 7, 2012). This song was chosen because it is a known song for beginners and happens to be the first song the author on guitar.

²⁷ Caldwell, *supra* note 22, at 46.

²⁸ Waters, *supra* note 2, at 262.

²⁹ Jocelyn Kempema, *Imitation is the Sincerest Form of . . . Infringement?: Guitar Tabs, Fair Use, and the Internet*, 49 WM. & MARY L. REV. 2265, 2268 (2008).

³⁰ Waters, *supra* note 2, at 262.

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```

E ----5-----|5-8-8-8b-8-5-5r---
B ----8-5-----|-----8/10
G --7b---7-5-7-5---|-----
D -----7---7-5---|-----
A -----8-|-----
E -----|-----
E -8-10-8-----|---5-----|
B -----10-8--8-10-|---8-5-----|
G -----10---|7b---7-5-7-5-----|
D -----|-----7---7-5-5-7-|
A -----|-----7---|
E -----|-----|
E -----|
B -----8pb-5-----|
G -5-5-5-0-----7-5-7p5-----|
D --7-----7---7p5-7p5---|
A -----8-|
E -----|
E -----8-|-----|
B ----5-----8-8-10---|15b-15-13-15-13-|
G ---5--7-5--5-7/9-----|-----|
D -5/7-----7-----|-----|
A -----|-----|
E -----|-----|
(10x)below
E -15b-15-12-|-----|
B -----|15b(up/down)p13---13---|
G -----|-----14-----|
D -----|-----|
A -----|-----|
E -----|-----|
E -15b---12-15-12-----15
B -----15-13--13-15-13--13-15b(hold)
G -----14-----14-----
D -----
A -----
E -----
(5x)below
E -----|---20p17-|
B -15b(let go)-13---|---17-----|
G -----14-|-----|
D -----|-----|
A -----|-----|

```

E -----|-----³¹

Tabs created for the same song by different musicians vary significantly because most are generated “by ear” rather than from sheet music. In response to this phenomenon, many tab websites also provide a forum for discussion about which tab is most like the actual song. However, tabs are generally not perfectly matched to the sheet music because “where one person might hear an A note, another might hear an A flat.”³² Ultimate-Guitar.com offers forums on playing, multiple tabs for many popular songs, and ratings about how accurate a tab is when compared to the song.³³

Tablature is based on the look of the guitar; guitars have a body with six strings running up a long neck, with a neck separated by frets.³⁴ A guitar generally has twenty-two to twenty-four frets depending on the model.³⁵ Therefore, the tab is a representation of the guitar’s six strings, where generally the top string on the tab represents the bottom string on the actual guitar, rather than a staff notating a tone based upon a scale. The guitar player can simply press his or her finger on the string and fret indicated.

B. *The Music Industry*

It is also important to have some insight into the music industry and music publishing to better understand tabs and where they fit into this system. A musical composition and a recorded music work each have separate copyright protection in the United States.³⁶ The music industry is divided between the distribution side, which is concerned with the sound recording copyright, and the publishing side, which is only concerned with the compositional copyright.³⁷ Though distinct, some music labels, which are on the distributional side of the industry, also have “sister” publishing firms.³⁸ For example, the record label EMI is associated with EMI Music Publishing.³⁹ Most songwriters “assign a percentage share of their compositional copyright to a third-party music publisher” who serves as an administrator for these musical compositions.⁴⁰ To complicate matters further, agencies, such as the

³¹ Ultimate-Guitar.com, Guitar Tab for Stairway to Heaven, http://tabs.ultimate-guitar.com/l/led_zeppelin/stairway_to_heaven_solo_tab.htm (last visited Feb. 8, 2012).

³² Waters, *supra* note 2, at 262.

³³ Home, ULTIMATE-GUITAR.COM, <http://www.ultimate-guitar.com/> (last visited Feb. 8, 2012).

³⁴ Caldwell, *supra* note 22, at 47.

³⁵ *Id.* at 47 fig.2.

³⁶ Tsai, *supra* note 3, at 1–2.

³⁷ Waters, *supra* note 2, at 258–59.

³⁸ *Id.*

³⁹ About EMI Music, EMI MUSIC PUBLISHING, <http://www.emimusicpub.com/about/index.php> (last visited Feb. 3, 2012).

⁴⁰ Waters, *supra* note 2, at 254.

Harry Fox Agency, then represent many music publishers.⁴¹ Either the publishing company or one of the original songwriters can give others license to use the musical composition; agencies cannot give printing rights for a song.⁴²

The aforementioned takedown letters received by tab sites were sent by music publishing companies rather than music labels.⁴³ The music publishing industry is run based on “supply and demand economics”; therefore, there are many compositions that will not be published as traditional sheet music and far more that will not be published as tablature.⁴⁴ It is unquestionable that the online tab sites are far more comprehensive than what is published and sold in music stores.⁴⁵ This basic information about how tab differs from traditional sheet music and how the music industry is organized will be important when considering the likely results of litigation on tablature.

II. U.S. COPYRIGHT INFRINGEMENT CLAIMS AND LIKELY LITIGATION OUTCOME FOR TABS

A. *Basics of Title 17 of the United States Code*

In order for music publishers to prove copyright infringement,⁴⁶ they must show ownership of a valid copyright on the musical composition or musical recording.⁴⁷ Title 17 of the United States Code is dedicated exclusively to copyright.⁴⁸ Since 1976, copyright protection is automatic as long as the work fits the criteria in Title 17;⁴⁹ one may register a copyright, but that is not a condition of copyright protection.⁵⁰ However, it is necessary to register a copyright in order to later sue for infringement in the United States.⁵¹ Copyright protection “subsists . . . in original works of authorship fixed in any tangible medium of expression.”⁵² The Copyright Act provides examples of works of authorship, covering both “musical works, including any accompanying words” and “sound recordings.”⁵³ Mirroring divisions in

⁴¹ See generally HFA, <http://www.harryfox.com/index.jsp> (last visited Feb. 3, 2012).

⁴² See Waters, *supra* note 2, at 254–55.

⁴³ See generally Hughlett, *supra* note 5.

⁴⁴ Waters, *supra* note 2, at 260–61.

⁴⁵ Kempema, *supra* note 29, at 2284–85.

⁴⁶ 17 U.S.C. § 501(b) (2006).

⁴⁷ See generally 17 U.S.C. § 102(a) (2006).

⁴⁸ See *id.* § 101(2006).

⁴⁹ “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.* § 102(a).

⁵⁰ *Id.* § 408(a) (2006).

⁵¹ *Id.* § 411(a) (2006).

⁵² *Id.* § 102(a).

⁵³ *Id.* The other works include: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes

the music industry, there are separate copyrights for the musical composition and the recorded work.⁵⁴ However, both sides of the music industry can hold copyrights in the compositions and recordings on which tabs are based, because the compositions and recordings are “original works of authorship.”⁵⁵

B. *The Digital Millennium Copyright Act*

Congress has updated Title 17 to include provisions pertaining to copyrighted material made available on the Internet. The Digital Millennium Copyright Act (hereinafter “DMCA”) was enacted on October 28, 1998.⁵⁶ It was an attempt to stabilize a world that “pits traditional distribution channels against an entirely new system” of music distribution.⁵⁷ Another goal was to implement the WIPO Copyright Treaty into United States law.⁵⁸ A provision in DMCA limits the liability of ISPs.⁵⁹ Although ISPs do not directly place the infringing material on the Internet, generally, service providers are subject to liability for allowing such content on their server.⁶⁰ However, DMCA provided a way for the ISPs to avoid this indirect copyright infringement. Recognizing that Internet content is often not “initiated by . . . the service provider” and that the process of placing content on the Internet is often “carried out through an automatic technical process,”⁶¹ liability is limited under these circumstances, provided the ISP comply with the objectives of copyright law (such as prohibiting “repeat infringers” on the server) and accommodate copyright holders in their pursuit of protection.⁶² These conditions led to the “takedown”

and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” *Id.*

⁵⁴ See Tsai, *supra* note 3, at 2.

⁵⁵ 17 U.S.C. § 102(a) (2006).

⁵⁶ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 6820 (codified as amended in scattered sections of 17 U.S.C.) (hereinafter DMCA).

⁵⁷ Heather Rafter et al., *Streaming into the Future: Music and Video Online*, 611 PRAC. L. INST. PAT. COPYRIGHTS TRADEMARKS & LITERARY PROP. COURSE HANDBOOK SERIES 395, 397 (2000).

⁵⁸ See *infra* pp. 28-30. This purpose is identified within the DMCA, prior to the substance of the statute. “An Act to amend title 17, United States Code, to implement the World Intellectual Property Organization Copy-right Treaty and Performances and Phonograms Treaty, and for other purposes.” DMCA, *supra* note 56.

⁵⁹ Jason R. Simon, *Why Copyright Should Save Guitar Tablatures*, 50 ARIZ. L. REV. 611, 616 (2008).

⁶⁰ *Id.* Because the ISPs are displaying infringing information, they could face claims of indirect liability for failing to remove infringing material from the provider.

⁶¹ 17 U.S.C. § 512(a)(1)–(2) (2006).

⁶² *Id.* § 512(i) (2006):

The limitations on liability established by this section shall apply to a service provider only if the service provider— (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures.

notices music publishers sent to those running tab sites and their respective ISPs in 2006.⁶³ These “takedown” procedures are detailed in 17 U.S.C. § 512(c)(3), they require a prompt response from the ISP who seeks to receive limited liability.⁶⁴ The DMCA “provided a more effective procedural mechanism by which music publishers could stop the proliferation of tablature.”⁶⁵ Since the takedown procedure is available to block websites that are accused of copyright infringement, it is now important to determine if there is a proper claim for infringement based on the fact that tabs are likely derivative works.

C. *Derivative Works*

Because many productions of copyrighted works are not exact replicas, Title 17 provides a “broad definition” of derivative works and the rights that extend from them for the copyright holder.⁶⁶ A “derivative work” is defined in the United States Code as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.⁶⁷

The copyright owner has “exclusive rights” to “prepare derivative works based on the copyrighted work.”⁶⁸ This begs the question as to whether guitar tablature constitutes a derivative work within the meaning of the statute and if the manner of production of such tabs makes a difference in the analysis.

To constitute a derivative work, the creation must in some way be distinct when compared to the original copyrighted work.⁶⁹ Some commentators think the tabs are original unto themselves,⁷⁰ yet others believe tabs are distinct from the original copyrighted material because “nothing substantive” is added.⁷¹ However, arguing that nothing

Id.

⁶³ Simon, *supra* note 59, at 617.

⁶⁴ U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 U.S. COPYRIGHT OFFICE SUMMARY 12 (1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

⁶⁵ Simon, *supra* note 59, at 617.

⁶⁶ James Johnson, *Fair Use Sheep of Infringing Goat? Derivative Work Rights and Fair Use as a Defense of Guitar Tablature*, 8 J.L. SOCIETY 153, 163 (2007).

⁶⁷ 17 U.S.C. § 101 (2006).

⁶⁸ *Id.* § 106(a)(2) (2006).

⁶⁹ *Woods v. Bourne Co.*, 60 F.3d 978, 989 (2d Cir. 1995).

⁷⁰ See, e.g., Johnson, *supra* note 66, at 165.

⁷¹ Waters, *supra* note 2, at 283.

substantive is added to create the derivative work opens up the argument that tabs violate reproduction rights under 17 U.S.C. § 106(1), so this argument is likely to also harm the potential use of tabs.⁷² In an opinion (hereinafter “Ringtone Opinion”), the Copyright Royalty Board has claimed that a derivative work “must exhibit a degree of originality sufficient enough to be copyrightable.”⁷³ Therefore, it is necessary to explore whether tabs exhibit a sufficient degree of originality, which has never been determined by a court. Music publishers would argue that because they produce separate books of tabs, there is enough originality for the tab to be copyrightable.⁷⁴ The publishers would claim this is sufficient to “recast,” “transform,” or “adapt” the copyrighted music as required under the statute’s definition of derivative work.⁷⁵ In contrast, the tab sites would counter that these works are meant to replicate the original songs and represent the key elements of how to play them without adding anything new to the original work.⁷⁶ Though tab sites may have a valid argument on this point, it is likely a court would agree that the work is recast and original in these circumstances.

The court is likely to agree that most tabs are original based on case law allowing slight originality to constitute a derivative work.⁷⁷ The Ringtone Opinion indicates that some, though not all, ringtones are derivative works.⁷⁸ For example, if a ringtone is a “simple excerpt,” it is less likely to be derivative; however, there are others that are highly elaborate and include material other than the excerpt.⁷⁹ Similarly, when very small changes are made from one version of a computer program to an updated version; the later product is “*potentially* a derivative work.”⁸⁰ It would be difficult to claim a tab is only an excerpt based on the differences between tabs and sheet music. Further, displaying a work in a different medium may be enough to create a derivative work. The Ninth Circuit has held that “mounting the preexisting, copyrighted individual art images without the consent” of the owner is a derivative work.⁸¹ Following this logic, affixing the song’s notes to a different

⁷² 17 U.S.C. § 106(a)(1).

⁷³ Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding 71 Fed. Reg. 64,303, 64,310 (U.S. Copyright Office Memorandum Opinion Oct. 26, 2006) [hereinafter *Ringtone Opinion*].

⁷⁴ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.”).

⁷⁵ 17 U.S.C. § 101 (2006).

⁷⁶ *Waters*, *supra* note 2, at 283.

⁷⁷ See *Feist*, 499 U.S. at 345; see also *Munoz v. Albuquerque A.R.T. Co.*, 38 F.3d 1218 (9th Cir. 1994); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001).

⁷⁸ *Ringtone Opinion*, *supra* note 73, at 64,313.

⁷⁹ *Id.*

⁸⁰ *SimplexGrinnel LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 206, 212 (S.D.N.Y. 2009).

⁸¹ See *Munoz*, 38 F.3d at 1218. In that case, defendant incorporated another’s copyrighted art into tiles. The mounting to the tiles was held to have the originality needed to be derivative. *Id.* However, the Seventh Circuit has disagreed on the same issue by likening the tile to a frame that

notational system is likely to have the originality needed to be a derivative work.

Assuming that a court would accept the music publishers' originality claim, the litigation of the derivative work question might progress differently depending on whether the publishers relied on the copyright protection of the sound recording or of the musical work. There is a three-prong test to establish copyright infringement, plaintiff must prove that (1) he holds a valid copyright, (2) the defendant had access to the copyrighted work, and (3) there is a "substantial similarity" between the works.⁸² Claiming the work is based on a sound recording may fail on the valid copyright prong, as derivative work rights would not be available here because 17 U.S.C. § 114(b) insists that for a sound recording to claim a derivative work right action the work claimed to infringe must have "the actual sounds fixed in the sound recording [which] are rearranged, remixed, or otherwise altered in sequence or quality."⁸³ This "limits the scope of the derivative work right," and tab sites would likely be able to succeed on the argument that the derivative claim is only available to "subsequent sound recording," which tab is not.⁸⁴ A copyright infringement claim on the theory that there is a derivative work or a copyrighted sound recording is not likely to succeed on the first prong of the infringement test.⁸⁵

The publishers alleging infringement on the theory of a derivative work right for music composition should at least pass the first bar as to whether there is a valid copyright because § 114 limit does not apply to music composition, only to the sound recording.⁸⁶ For this reason, "a claim of infringement on the derivative work right would be proper."⁸⁷ Turning to the second prong of the infringement test, the accused infringer has access to the copyrighted work to produce tabs because the idea behind tabs is to transcribe a known song for others to play.⁸⁸ This leaves the question as to whether the work is substantially similar to the original, which will likely be disputed. Music publishers have the stronger argument on this issue because although tabs are not exactly like musical composition in quality, the "intention of a listener going through the entabulation process is to create a representation of the original music."⁸⁹ It is true, as the tabbers would argue, that the key, the

lacks giving the work originality. *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997). Tabbers may argue that the tab process is akin to "framing" a musical composition; however, the practice seems to transform the notation rather than merely placing it on a tile or in a frame.

⁸² *Sid & Marty Krofft Tele. Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162-64 (9th Cir. 1977) *superseded on other grounds by statute*, 17 U.S.C. § 504 (2006).

⁸³ 17 U.S.C. § 114(b) (2006).

⁸⁴ Tsai, *supra* note 3, at 3.

⁸⁵ 18 AM. JUR. 2D *Copyright* § 92 (2011).

⁸⁶ *Id.*

⁸⁷ Tsai, *supra* note 3, at 6.

⁸⁸ *See Caldwell*, *supra* note 22, at IV-A.

⁸⁹ Tsai, *supra* note 3, at 6.

timing, the lyrics, and other elements central to the original musical composition might be changed or omitted when a work is in tab form. However, courts have established that judgment of whether a work is substantially similar is for laypeople rather than for experts to decide.⁹⁰ The layperson listening to a work played from tab compared to the work played from the musical composition is unlikely to notice a difference, even if differences exist.⁹¹ The tab sites could argue that the *Arnstein v. Porter* test, a 1946 Second Circuit decision (involving musicians Ira Arnstein and Cole Porter) over the similarity of a song and finding that “dissection of the song was unnecessary,⁹² should be replaced by an intended audience test.⁹³ A court would probably be persuaded by the music publisher’s argument that the tabs are substantially similar, even under this logic, because the intended audience of guitar tabs is often the lay listener. However, the fair use exception may provide some hope to tab sites in potential litigation.

D. Fair Use Analysis

The fair use exception is provided for in § 107 and allows for “reproduction in copies or phonorecords or by any other means” under certain circumstances.⁹⁴ The purposes listed in the statute are “criticism, comment, news reporting, teaching, scholarship, or research.”⁹⁵ It is suggested this exception has to do with not wanting copyright holders to have a monopoly for fear of discouraging learning.⁹⁶ The code gives four factors to consider for a work to fit into the fair use exception. The Supreme Court has indicated that “all [of the § 107 factors] are to be explored, and the results weighed together.”⁹⁷ The four factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

⁹⁰ See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

⁹¹ Tsai, *supra* note 3, at 6.

⁹² *Arnstein*, 154 F.2d at 468. Although the Second Circuit does apply a “more discerning” observer test when there are elements taken from the public domain. See, e.g., *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001).

⁹³ In 1990, the Fourth Circuit claimed the law on substantial similarity should be narrowed from *Arnstein* for the lay listener to decide substantial similarity only when the lay listener is the intended audience. *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731 (4th Cir. 1990). However, the court maintained that copyright claims with an intended audience of experts would allow expert analysis to decide what is substantially similar. *Id.*

⁹⁴ 17 U.S.C. § 107 (2006).

⁹⁵ *Id.*

⁹⁶ Johnson, *supra* note 66, at 159.

⁹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

(4) the effect of the use upon the potential market for or value of the copyrighted work.⁹⁸

These four factors would have to be applied to guitar tab to consider whether it conforms to the exception. This Note will now analyze each factor as it relates to tab sites.

1. Purpose and Character

First, guitar tab sites would try to prove the purpose and character of the use was original and was for teaching rather than profit. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court articulates that “central purpose of this investigation is to see . . . whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character.”⁹⁹ The Court was less concerned with the “worth of [a work]” than with the transformative nature.¹⁰⁰ *Campbell* was a case involving the parody of “Pretty Woman” in a 2 Live Crew song, and the work was found to be original and transformative despite the commercial use.¹⁰¹ Commerciality is not presumptive in the first factor analysis and is of “limited usefulness to a fair use inquiry” because most “secondary uses of copyrighted material,” even those passing the fair use test, are commercial.¹⁰²

Whether guitar tabs should be considered transformative in nature would be disputed in litigation. The music publishers might argue that tabs are simply a way to “supplant[]” the original music composition.¹⁰³ For certain tablature, created by viewing the sheet music or a commercial tab, this would seem to be inherently correct. Furthermore, on a claim against a simple tab, for example, “[g]uitar tabs that just list the chords for the song and give no visual indication,” the publishers’ argument may be persuasive because a very simple tab would seem to add nothing to the work.¹⁰⁴ Publishers might cite a recent Fourth Circuit decision involving the Baltimore Ravens football team, which held that a use of the Ravens logo was non-transformative when it merely identified the team again, as opposed to transforming the logo for another use.¹⁰⁵ Similarly, publishers would argue that the tab is simply a means of identifying the original song.

However, tabbers would likely counter that most tabs are

⁹⁸ 17 U.S.C. § 107.

⁹⁹ *Campbell*, 510 U.S. at 579.

¹⁰⁰ *Id.* at 582 (alteration in original) (citation omitted).

¹⁰¹ *Id.* at 583.

¹⁰² *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998).

¹⁰³ *Campbell*, 510 U.S. at 579.

¹⁰⁴ Laura Gary, *A Reason for Musicians to Fret: Copyright Infringement in Online Guitar Tablature*, 9 VAND. J. ENT. & TECH. L. 831, 852 (2007).

¹⁰⁵ *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 309 (4th Cir. 2010).

transformative works for several reasons. First, they might claim that tabs are derivative works, which means they are original.¹⁰⁶ Second, “the very process of transcribing popular songs into guitar tab [by ear] is transformative” because it “impose[s] [the tabber’s] . . . musical fingerprint onto the tab.”¹⁰⁷ One listener may hear a minor chord and another a major chord, one listener may hear a bend where another may not, and these differences have to do with the tabber’s perception and not the original composition.¹⁰⁸ Finally, more than one tab exists per song; for instance, there are around fifty guitar tab versions of “Stairway to Heaven” on Ultimate-Guitar.com without even considering the other guitar tab sites on which the song is likely to appear.¹⁰⁹ This suggests that interpretation of the listener is of primary importance to the form of online guitar tab. Oddly, tabbers’ probable arguments appear to be best suited for more complicated tabs despite the fact that generally, “the more detailed the tablature is the more likely it’s a violation [of copyright law].”¹¹⁰ This also begs the question of whether litigation would have to be solved on a tab-by-tab basis, which is what the Supreme Court suggests on the matter of parody.¹¹¹ Because a suit would include the tab site as a whole and not each individual tab, a question remains as to whether the more intricate tabs would be considered transformative in a way that simple tabs would not.

Even assuming a court would accept the argument that tablature is transformative, this is not dispositive; the other factors of § 107(1) need to be considered, including whether the work is commercial or non-commercial.¹¹² The individual tabbers are not paid and the visitors to the sites do not pay for the tabs.¹¹³ Furthermore, many tab sites operators claim not to have personally profited from them.¹¹⁴ That being said, there are advertisements on tabs sites that generate revenue.¹¹⁵ Though it is possible they only paid for the cost of operations, the music publishers could argue that this crosses the line into commercial activity. Additionally, *A&M Records, Inc. v. Napster, Inc.* includes in *dictum* that “direct economic benefit is not required to demonstrate a commercial use. Rather repeated and exploitative

¹⁰⁶ Tsai, *supra* note 3, at 9.

¹⁰⁷ Gary, *supra* note 104, at 852.

¹⁰⁸ *Id.*

¹⁰⁹ See Results to “Stairway to Heaven” search, ULTIMATE-GUITAR.COM, http://www.ultimate-guitar.com/search.php?title=stairway+to+heaven&page=1&tab_type_group=text&app_name=ugt&order=myweight (last visited Feb. 12, 2012).

¹¹⁰ *Music Industry Goes After Guitar Tablature Sites* (NPR radio broadcast Aug. 7, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5622879> [hereinafter *NPR Broadcast*].

¹¹¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

¹¹² *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998).

¹¹³ Gary, *supra* note 104, at 853.

¹¹⁴ See Hughlett, *supra* note 5.

¹¹⁵ *Id.*

copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.”¹¹⁶ The tabbers could argue the facts of *Napster* are distinguishable because the Napster site allowed the files of entire, exact sound recordings to be shared. However, a court may find the music publishers persuasive on this question. The tab sites would have a possibility of successfully arguing they are non-profit educational sites: “[t]he law is friendlier to a non-profit online community of musicians educating each other.”¹¹⁷ Many beginners to the guitar learn about the instrument via tabs, developing an ear for it themselves by playing in an easy manner songs with which they are familiar.¹¹⁸ While tabbers may have a persuasive argument on this point, it must be remembered that “teachers are not given carte blanche to infringe copyrights.”¹¹⁹ Furthermore, all of the factors of fair use must be weighed; no one factor is dispositive.¹²⁰

2. The Nature of the Copyrighted Work

The “nature of the copyrighted work” factor “seeks to favor more expressive and creative works over the factual and informational works.”¹²¹ The reason for this is that creative works are at the core of copyright protection as “intended” in the United States.¹²² As in *Campbell*, the original works in any potential litigation would be musical compositions, which are expressive and creative.¹²³ However, as the Court stated in *Campbell*, “[t]his fact . . . is not much help . . . in separating the fair use sheep from the infringing goats . . .”¹²⁴ For our purposes it is important only to note here that a musical composition is creative and, therefore, is entitled to more protection than a non-creative copyrighted work.¹²⁵

3. Amount and Substantiality Used

The third factor is the amount and substantiality of use of the copyrighted work, which is somewhat similar to the first factor: “the extent of permissible copying varies with the purpose and character of the use.”¹²⁶ Depending on the purpose or character, for example, the entire work may be able to be copied and be included as fair use.¹²⁷

¹¹⁶ *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1015 (9th Cir. 2001).

¹¹⁷ *NPR Broadcast*, *supra* note 110.

¹¹⁸ Tsai, *supra* note 3, at 9–10.

¹¹⁹ Gary, *supra* note 104, at 851.

¹²⁰ *Id.*

¹²¹ Tsai, *supra* note 3, at 10.

¹²² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998).

¹²⁶ *Campbell*, 510 U.S. at 586–87.

¹²⁷ *Waters*, *supra* note 2, at 268; *see also* *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 311 (4th Cir. 2010).

Courts will examine “not only [] the quantity of materials used, but [inquire] about their quality and importance, too.”¹²⁸ Copying the “heart” of a work can just as easily fail at this factor of the fair use test as using the entire work.¹²⁹ An inquiry into this question for guitar tab sites would need to look at the quantity and quality the alleged infringing works take from the original music compositions.

The amount of the music composition which is used to create guitar tab is “certainly less than the whole.”¹³⁰ There are other parts for other instruments, notations for tempo and key, lyrics, “and other nuances that are not otherwise captured by the tabs” that are a part of typical music compositions.¹³¹ Furthermore, some songs are tabbed in a rather simple way that gives the guitar player only the essential information to play the melody.¹³² It would be difficult for music publishers to claim that tabs on websites were copying the entirety of the musical composition.

However, the music publishers may be able to successfully argue that the tabs take the “heart” of the song based on the *Harper & Row* analysis of this factor.¹³³ The guitar tab at least enables the player to play the melody, and even the simplest tabs will give the verse and chorus.¹³⁴ The music publishers can argue the core of the song is the basic guitar part. As music sampling cases have held, there is no “magic number” for the degree of similarity or notes needed to make the song qualitatively substantially copied.¹³⁵ Common sequences of notes will not be found to be a substantial portion of the original copyrighted song, yet uncommon sequences may be.¹³⁶ Though taking the “heart” of the work is “not fatal to a fair use defense,” this factor is more likely to weigh in favor of the music publishers because generally tabs provide a complete guitar part which encompasses the spirit of the entire original work.¹³⁷

4. Impact on the Market

Finally, the last factor is the impact on the market for or value of the copyrighted work. This factor considers “not only the extent of market harm caused by the particular actions of the alleged infringer,

¹²⁸ *Campbell*, 510 U.S. at 587.

¹²⁹ *Harper & Row Publishers, Inc. v. Nation Ent.*, 471 U.S. 539, 565 (1985) (only 300 words of the book, *A Time to Heal*, were copied in *The Nation*, yet the Court found this very small excerpt to be a factor weighing against the defendant).

¹³⁰ Tsai, *supra* note 3, at 12.

¹³¹ *Id.*

¹³² See, e.g., *Love Me Tender*, *supra* note 26.

¹³³ *Harper & Row*, 471 U.S. at 565.

¹³⁴ *Waters*, *supra* note 2, at 279.

¹³⁵ *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1253–55 (C.D. Cal. 2002) (describing a history of sampling cases and the number of exact note sequences used).

¹³⁶ *Id.*

¹³⁷ Tsai, *supra* note 3, at 12.

but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’”¹³⁸ Therefore, a court would consider whether there is actual market harm and if there is harm in potential markets of online tabs sites.

Tab sites will attest that sales of electronic sheet music sold for about \$5 per song are growing, and therefore, the actual market harm to publishers is lessened because the sales are doing well.¹³⁹ In addition, many who play tabs are not able to read traditional sheet music and would not be in the market for such publication.¹⁴⁰ However, this entire argument depends on how the market, or potential market, is defined. For example, the market could be all music publications, traditional sheet music, guitar tabs, or guitar tabs available online.¹⁴¹ The publishers would claim the actual market was printed tab, which has been “to a large extent displaced” by online tab sites.¹⁴² The music publishers would assert the potential market is online tablature, claiming guitar tab sites, and their widespread use, have had a substantially adverse impact on the copyright owners.¹⁴³ Courts have been willing to look into potential markets.¹⁴⁴ However, if the potential market is viewed as too “hypothetical,” the factor may favor neither party.¹⁴⁵ This part of the analysis would turn entirely on the market the court chooses to accept.

5. Outcome of the Fair Use Analysis

While a court may conclude the use of tabs by online sites is educational and the market not substantially impacted, thus leading to a victory for the tab sites, based on the fair use analysis above, as other commentators have noted, it is more likely that the court would be persuaded by the copyright owners that the sites should be removed.¹⁴⁶ This expected result would put the music publishing industry in a stronger bargaining position when attempting solutions other than litigation.

¹³⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citations omitted).

¹³⁹ *Waters*, *supra* note 2, at 279.

¹⁴⁰ *Tsai*, *supra* note 3, at 13.

¹⁴¹ *Id.*

¹⁴² *Waters*, *supra* note 2, at 280.

¹⁴³ *Tsai*, *supra* note 3, at 13.

¹⁴⁴ *See Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 111 (2d Cir. 1998); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1994).

¹⁴⁵ *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (holding that a potential market for reduced-sized images for cell phone use was, at the time, too hypothetical to weigh in either party’s favor).

¹⁴⁶ *See, e.g., Tsai*, *supra* note 3; *Krist Caldwell*, *supra* note 22; *Waters*, *supra* note 2.

III. PROPOSED AND ATTEMPTED SOLUTIONS

There have been several attempted and proposed solutions to the tab site situation. This Note will now explore these proposals and offer a critique of each. While the publishers are likely to win if litigation occurs, the need will remain for publishers to provide online tab in some form because the tabbers have become used to having online tab available instantly for nearly any song and the public at-large may defend the small-time tabbers. Therefore, providing a middle ground would allow the publishers to avoid public relations problems.¹⁴⁷ An analogy previously drawn by casual music fans in the face of publishers is that the “98 pound[]” fans are opposing “5,000 pound[] . . . corporate monoliths.”¹⁴⁸ Reflecting this attitude, fans may eventually turn to boycott certain publishers that seek to completely take tab away. For this reason, “assimilation” may be a “much more successful policy than prohibition,” as the publishers decided was best to do in the case of “fake” music books.¹⁴⁹

The plan used in 2007 was the revenue sharing plan with MXTabs as mentioned in the introduction.¹⁵⁰ In this agreement, MXTabs shared “an undisclosed portion of its advertising revenue with music published, who in turn will give a portion to artists.”¹⁵¹ A major complication of the deal was that each copyright owner would have to agree to the use of a tab of their song on the website.¹⁵² In 2007, Hal Leonard, “the world’s largest music print publisher,” encouraged other music publishers not to license MXTabs because the site and revenue sharing plan did “nothing to abate copyright-infringing attitudes and behaviors.”¹⁵³ MXTabs stopped running as of fall 2011 and began a partnership with Songsterr.¹⁵⁴ It is unclear whether Songsterr uses the revenue sharing plan that MXTabs did. Furthermore, some tabbers consider the revenue sharing ventures to be “selling out” and choose to post tabs on other tab sites which remain available.¹⁵⁵

¹⁴⁷ See Waters, *supra* note 2, at 284–85.

¹⁴⁸ Krissi J. Geary-Boehm, *Cyber Chaos: The Clash Between Band Fansites and Intellectual Property Holders*, 30 SO. ILL. U. L. J. 87, 92-93 (2005) (describing fans boycotting the band Oasis in 1997 because of their suit against fan websites).

¹⁴⁹ Waters, *supra* note 2, at 273. Fake music books were books that “provided a sampling of the musical notation for a popular song on the front and essential song information, including copyright, on the back.” *Id.* Eventually music publishers began creating their own versions of them. *Id.*

¹⁵⁰ See *supra* notes 11–21 and accompanying text.

¹⁵¹ Tedeschi, *supra* note 12.

¹⁵² Anderson, *supra* note 13.

¹⁵³ Waters, *supra* note 2, at 257.

¹⁵⁴ MXTabs announced this partnership via their Facebook page. *MXTabs.net- Facebook*, *supra* note 17. Songsterr comes in both a free edition and with the option to pay roughly \$10 per month for Songsterr Plus, which includes a playback of the song, tempo control, and many other features. *Songsterr Plus*, SONGSTERR.COM <http://www.songsterr.com/a/wa/plus> (last visited Feb. 10, 2012).

¹⁵⁵ Tsai, *supra* note 3, at 16.

A possible solution would be legislative clarification as to whether this could be considered fair use by updating the statute for the digital age.¹⁵⁶ There are several drawbacks of such legislation. For instance, statutes, while quickly clarifying some issues, inevitably lead to further interpretive questions. Further, legislation would invite lobbyists, which will not likely lead to a popular solution among tabbers.¹⁵⁷ The recent attempts by Congress to pass the Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA), which were attempts to deal with intellectual property problems on the Internet generally, led to “an unprecedented online revolt” against the acts, and “the bills were essentially sunk.”¹⁵⁸ Also, the Internet is global, so changing only United States legislation would be a particularly limited solution.¹⁵⁹

Also, the Internet is global, so changing only United States legislation would be a particularly limited solution.¹⁶⁰

The publishing industry could create what would essentially be “iTab” (where instead of buying an iTunes, one could purchase a tab) as proposed by Tara Lynn Waters.¹⁶¹ Under this model, tabbers could purchase tabs on the Internet that would allow for a wider and more accurate selection of music than is available in print.¹⁶² However, while many tab players might be willing to pay, the continued existence of free tab elsewhere on the Internet would not make the solution entirely effective. This proposal is being attempted by some tab sites. Songsterr, for instance, has Songsterr Plus, which is available at about \$10 per month; however, the free version of the tab site still exists, and the paid edition simply allows users to do more.¹⁶³ While many tab players may be willing to pay, the continued existence of free tab elsewhere on the Internet would not make the solution entirely effective. If tabs for purchase could catch on and become popular, in the way that iTunes has, this could be a plausible solution.¹⁶⁴ Tabs could be sold one-by-one or by bundles, such as by album.¹⁶⁵ A concern is that iTunes did not solve the music piracy problem.¹⁶⁶ A great deal of

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 14.

¹⁵⁸ Leslie Harris, *PIPA / SOPA and the Online Tsunami: A First Draft of the Future*, ABCNEWS.COM, Feb. 2, 2012, <http://abcnews.go.com/Technology/pipa-sopa-online-tsunami-draft-future/story?id=15500925#.TzUiDeRr5EM>.

¹⁵⁹ Tsai, *supra* note 3, at 15.

¹⁶⁰ *Id.* at 15.

¹⁶¹ Waters, *supra* note 2, at 288.

¹⁶² *Id.* at 260–61.

¹⁶³ Songsterr comes in both a free edition and with the option to pay roughly \$10 per month for Songsterr Plus, which includes a playback of the song, tempo control, and many other features. *Songsterr Plus*, *supra* note 154.

¹⁶⁴ Waters, *supra* note 2, at 287–88.

¹⁶⁵ *Id.*

¹⁶⁶ *IFPI Publishes Digital Music Report 2009*, IFPI (Jan. 16, 2009), http://www.ifpi.org/content/section_resources/dmr2009.html (three year study on illegal downloading suggesting that 95% of music downloaded worldwide is done so illegally).

unauthorized music is still available for downloading.¹⁶⁷

Some tabbers advocate for tolerated use, especially of tabs not available for purchase elsewhere.¹⁶⁸ The problem with this solution is that takedown letters will likely prevail. For example, as soon as an artist objects to this use, the publisher will likely respond, contacting the ISP, which would want to take down the site immediately to avoid liability.¹⁶⁹ This is unlikely to be a stable solution.

Finally, there is a solution that would allow for copyright owners to decide whether they want their works to be licensed for online tab use.¹⁷⁰ As explained earlier in the Note, music publishers represent many copyright owners.¹⁷¹ This solution would allow for the individual owners to decide the question of what they want to be available for tab rather than the publisher deciding for all of the copyright owners they represent.¹⁷² There are websites that encourage such licensing by copyright owners on a global scale; for example Creative Commons allows for copyright owners to license through their website where the work is published.¹⁷³ The owners are allowed to choose a “set of conditions” to apply to their creation, and there are six available licenses based on a combination of whether the owner wishes to allow derivatives, commercial use, or wants the work attributed.¹⁷⁴ However, publishers are unlikely to accept this solution because they would have to determine the preference of the copyright owner of each composition they license, which creates a practical concern. Further, the publishers will receive no revenue from such a solution, so they are unlikely to comply.

IV. COPYRIGHT LAW INTERNATIONALLY

Since the problem of guitar tabs placed on the Internet is not limited to one country, the best possible solution would be an international one. Therefore, it is important to explore some ideas of international copyright protection. There is no “international copyright law” that will “automatically protect an author’s writings throughout the world.”¹⁷⁵ Whereas in the past, regulation of copyright was done at the “national (or subnational) level,” this system has become increasingly

¹⁶⁷ *Id.*

¹⁶⁸ Waters, *supra* note 2, at 285.

¹⁶⁹ See *supra* Part II (explaining ISPs and how they can avoid liability for copyright violations under the DMCA).

¹⁷⁰ Waters, *supra* note 2, at 286–87.

¹⁷¹ See *supra* notes 36–42 and accompanying text.

¹⁷² Waters, *supra* note 2, at 286.

¹⁷³ See *About The Licenses*, CREATIVE COMMONS, <http://creativecommons.org/about/licenses/> (last visited Feb. 5, 2012).

¹⁷⁴ See *id.*

¹⁷⁵ U.S. COPYRIGHT OFFICE, CIRCULAR 38A: INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 1 (2010) [hereinafter CIRCULAR 38A].

ineffective with the spread of the Internet, which knows no borders.¹⁷⁶ The United States Copyright Office indicates that “most countries offer protection under certain conditions that have been greatly simplified by international copyright treaties and conventions” yet warns that “some countries offer little or no copyright protection to any foreign works.”¹⁷⁷ The most recent international copyright agreement was the WIPO Copyright Treaty from 1996, which included digital works for the first time.¹⁷⁸

The WIPO Copyright Treaty includes digital reproduction rights for copyright owners.¹⁷⁹ This treaty clarifies that the Berne Convention’s Article 9 includes digital works in the author’s “exclusive right of authorizing reproduction of these works.”¹⁸⁰ Furthermore, the treaty gives copyright owners the right to control communication of their works through digital means, such as “on-demand’ services . . . or . . . posting [of] the work on the Internet.”¹⁸¹ Article 8 of the WIPO treaty explicitly states,

authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.¹⁸²

While this appears to indicate that music publishers would be able to enjoy copyright protection worldwide for Internet tab websites, there are several limits and drawbacks to the WIPO Copyright Treaty.

One concern is that not every country is a member of the WIPO Copyright Treaty.¹⁸³ There are currently eighty-nine nations where the treaty is in force, many of which, such as Greece, Italy, and Germany, only effectuated the treaty in 2010,¹⁸⁴ so it is not a long-standing copyright treaty in many countries. In fact, less than half of all countries in the world are members of the treaty. Furthermore, there are some countries that not only are not members of WIPO, but also are not

¹⁷⁶ Gary E. Marchant et al., *What Does The History Of Technology Regulation Teach Us About Nano Oversight*, 37 J. L. MED. & ETHICS 724, 729 (2009).

¹⁷⁷ Copyright Office, *supra* note 166, at 1.

¹⁷⁸ WIPO Copyright Treaty, *supra* note 25, art. 4.

¹⁷⁹ Selena Kim, *The Reinforcement of international Copyright for the Digital Age*, 16 INTELL. PROP. J. 93, 96 (2002).

¹⁸⁰ Berne Convention for the Protection of Literary and Artistic Works art. 9, *supra* note 23.

¹⁸¹ Kim, *supra* note 179, at 96.

¹⁸² WIPO Copyright Treaty, *supra* note 25, art. 8.

¹⁸³ *Contracting Parties, WIPO Copyright Treaty*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Feb. 5, 2012) (89 contracting parties as of February 2012).

¹⁸⁴ *Id.*

parties to any international intellectual property treaties.¹⁸⁵ Because not all nations are signatories of the treaty, even if nations did have a uniform system of implementation, there would still not be uniform international copyright protection.

The WIPO treaty, however, allows countries to determine how to implement the provisions, including those on digital communication.¹⁸⁶ This often leads to using “varying notions of domestic law to resolve these [copyright] issues rather than . . . a uniform law.”¹⁸⁷ There is worry that varying copyright law from different countries may not “encompass the unique characteristics of the Internet.”¹⁸⁸ Areas where national or state laws are applied include “jurisdiction, choice of law, and enforcement of judgments.”¹⁸⁹ An example of a jurisdictional issue is *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*. Yahoo!, based in California, was accessible in France and had Nazi-related materials on its server.¹⁹⁰ In 2000, a French court “issued an order requiring Yahoo! subject to a fine of 100,000 francs. . . per day- to destroy all Nazi-related messages . . .”¹⁹¹ In response, Yahoo! filed a complaint in California claiming the French court’s decision was “not recognizable or enforceable in the United States.”¹⁹² While the district court agreed with Yahoo!, the Ninth Circuit ruled that Yahoo! had to wait to vindicate its rights in the United States until French authorities brought an action in a United States court.¹⁹³ Thus, the “coexistence of conflicting forums leads to legal chaos.”¹⁹⁴ Though the WIPO treaty may be implemented in many countries, it is not done in a uniform manner; the same principles included in the treaty may apply to guitar tablature litigation in various countries, but the procedures in each country may be quite different.

Finally, because the treaty is not implemented in a uniform manner, some countries are more stringent than others about copyright protection. For example, English courts may not have been faced with

¹⁸⁵ CIRCULAR 38A, *supra* note 175, at 2–10. Afghanistan, Iraq, and Iran are examples of such nations. *Id.* at 2, 5.

¹⁸⁶ Christian A. Camarca, *Harmonization of International Copyright Protection in the Internet Age*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 435 (2007).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at II (International Copyright Protection System).

¹⁸⁹ *Id.*; see also Anita B. Frohlich, *Copyright Infringement in the Internet Age: Primetime for Harmonized Conflict-of-Laws Rules?*, 24 BERKELEY TECH. L. J. 851 (2009).

¹⁹⁰ *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 379 F.3d 1120, 1122 (9th Cir. 2004).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1126.

¹⁹⁴ Isabelle Rorive, *What Can be Done Against Cyber Hate? Freedom of Speech Versus Hate Speech in the Council of Europe*, 17 CARDOZO J. INT’L & COMP. L. 417, 419 (2009).

litigation on guitar tab sites because there was no legal alternative available, as was suggested in a BBC article.¹⁹⁵ In the article, a British lawyer explained that the music industry in Britain, only threatened litigation in the case of illegal downloading after a legal system, iTunes, was introduced.¹⁹⁶ The legal culture may simply be different in the United Kingdom and litigation less likely. Further, there are nations, such as Russia, where “copyright enforcement is infamously weak.”¹⁹⁷ Piracy has long been an issue in Russia, and although they are a party to the WIPO Copyright Treaty, “[s]ome observers believe that Russia’s reduced prospects of entering the WTO in the coming years because of the Georgian conflict are likely to delay improvements in copyright and intellectual property enforcement.”¹⁹⁸ For this reason, it may be harder for music publishers to bring or win suits about online guitar tabs in certain countries. Finally, some nations simply have less restrictive copyright law. Canada is an example of such a country: streaming copyrighted videos over the Internet is permissible under Canadian law.¹⁹⁹ Therefore, music publishers may have a problem even bringing a claim against guitar tab sites in certain nations. Because of these issues in international copyright law, a win for music publishers in a United States court would not be dispositive of all courts. Tabbers would likely still be able to access tab sites in other countries, because, for the reasons discussed above, tab sites will remain on the Internet in certain countries.

V. PROPOSAL OF AN INTERNATIONAL SOLUTION

Music publishers and guitar players alike would be best served by reaching a compromise and developing an international forum for guitar tablature. Domestic solutions are quite limited: “[p]urely domestic solutions are inadequate because cyberspace has no geographic or political boundaries and many computer systems can be easily and surreptitiously accessed from any where [sic] in the world.”²⁰⁰ The international forum would greatly reduce the uncertainty in this area of the law, which has never been litigated in the United States, on a worldwide basis.

Many scholars have predicted that the tablature websites would

¹⁹⁵ Duffy, *supra* note 1.

¹⁹⁶ *Id.* (paraphrasing a statement by Struan Robertson, Esq.).

¹⁹⁷ Melvyn J. Simburg et al., *International Intellectual Property*, 43 INT’L LAW 549, 569 (2009).

¹⁹⁸ *Id.*

¹⁹⁹ *Twentieth Century Fox Film Corp. v. ICraveTV*, 53 U.S.P.Q.2d 1831, 2000 WL 255989, at *7 (W.D. Pa. 2000). The defendants submitted “a declaration of a Canadian law professor, Michael Geist, which argues that defendants’ activities are permissible under Canadian law.” *Id.* The court held that since it was applying U.S. Copyright Act, the matter of Canadian law was not dispositive. *Id.*

²⁰⁰ Xiaomin Huang et al., *Computer Crimes*, 44 AM. CRIM. L. REV. 285, 331 (2007).

lose if the case were to be litigated.²⁰¹ Although the tabs sites' fair use claim would likely fail and thus the publishers have a strong likelihood of success in United States litigation, as indicated in Part II, a victory is not certain. However, the expected outcome of litigation would influence possible solutions to the issue, and would allow the music publishers to negotiate for more favorable terms than the sites. Therefore, in this proposal, consideration is given to the thought that the music publishers are in the stronger bargaining position if an international forum is to be created.

An international agreement on guitar tablature and development of a website would allow for a wider community of guitar tablature enthusiasts to correspond and to learn more about playing guitar. However, music publishers could also take the revenue from the international site. With this solution, the tabbers could freely enjoy their hobby, and the music publishers would have to worry less about identifying each new tab site that is created on the Internet, an international platform.

A. WIPO would Introduce the Forum

The proposal articulated should be introduced by WIPO's Standing Committee on Copyright and Related Rights. This is a reasonable place for the plan to be introduced because the committee already exists and has an annual meeting in Geneva and already claims copyright experts as members,²⁰² which would limit the costs of creating a new organization specifically to deal with this matter. Although there are weaknesses inherent in WIPO, as discussed earlier in the Note,²⁰³ it is not expected that creating a new organization to handle the issue would attract as many nations as WIPO or be run by as many copyright experts.

If the standing committee agreed to encourage all countries to sign onto an international forum for guitar tabs, then each country could request music publishers and other copyright owners to provide licenses that would allow tabs to be placed on the forum as derivatives of their original music compositions. The Internet forum could either be operated by a WIPO subcommittee, worldwide representatives of the music publishing industry, or a combination drawing from tab enthusiasts, members of the publishing industry, and copyright experts. A WIPO subcommittee would be the easiest, as far as cost is concerned, as it could be comprised of members of the already existing Standing

²⁰¹ See e.g., Caldwell, *supra* note 22; Tsai, *supra* note 3; Waters, *supra* note 2.

²⁰² See *Conferences, Meetings and Seminars: Standing Committee on Copyright and Related Rights*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/meetings/en/details.jsp?meeting_id=20208 (last visited Feb. 5, 2012).

²⁰³ See *supra* notes 183-99 and accompanying text.

Committee.²⁰⁴ However, since music publishers would be entitled to the revenue, they would be the most effective at running the forum because the better the website operated, the more revenue they would receive. The forum would allow tabbers to post tabs of music that had been licensed, and the music publishers would be the best at ensuring any tabs on the sites were rightfully posted. Furthermore, music publishers would make their revenue from advertising, and representatives of music publishers would likely be better at selling advertisement space than a WIPO subcommittee because music publishers already have relationships with related businesses and music companies that would buy such advertisements. Similarly, public criticism would be expected if a WIPO subcommittee was spending time to find advertisers rather than focusing on copyright issues. Therefore, it would be best for WIPO's copyright committee to appoint representatives from the music industry to run the international forum.

B. Advertising Revenue Should Fund the Forum

While some may argue that each participant should pay to use the forum rather than generating revenue through advertising, the advertising plan is overall more profitable for the website. The choice not to require each tabber to pay for entry to the forum is partially based on the idea that if the website required payment, tab websites would continue to be posted on the Internet from around the world, though not sanctioned by music publishers, leaving the status quo in place. Tabbers may be unwilling to pay because they still view the music publishers, and the entire music industry, as a "5,000 pound[.] . . . corporate monolith" and may be unwilling to join such a forum.²⁰⁵ Therefore, advertising revenue is the better solution for compensating music publishers for creating public access.

The forum's profits would go to the music publishers who agreed to be a part of the arrangement. Profits could be split based on which publishers contribute the most material to the site, which publishers have tabs used most often, or simply shared among the music publishers. What appears to be the best arrangement for profit is pro rata based on which publishers contribute the most material. This would encourage the publishers to make songs available on the site, which would, in turn, lead to satisfied tabbers on the forum. This system is in the best position to increase overall profits.

C. The Will of Interested Parties to Join the Forum

This proposal suggests a formal agreement through WIPO rather

²⁰⁴ The Standing Committee is a permanent committee within WIPO that meets twice a year in Geneva to discuss copyright issues. See *Conferences, Meetings and Seminars*, *supra* note 202.

²⁰⁵ See Geary-Boehm, *supra* note 148, at 93.

than an informal arrangement that would not involve an international organization or international governmental cooperation. While there are costs and benefits to either selection, the formal agreement will better serve the music publishers and the tabbers. For example, an informal agreement would require each music publisher to agree to the arrangement individually, similar to the MXTabs arrangement put in place in 2007,²⁰⁶ and there would really be no agency to pressure music publishers to do so. Furthermore, agreements that do not have international governmental cooperation, such as iTunes, certainly have not stopped illegal downloads of music on the Internet.²⁰⁷ While illegal downloads may decrease in some countries with informal agreements, they may increase in others as was recently seen in Great Britain.²⁰⁸ Informal arrangements are all that has been attempted in the music downloading field. Similarly, if an “iTabs” system were put in place, copyright infringement concerns would likely continue to arise frequently. In contrast, a formal arrangement would have both an international organization and states encouraging music publishers to join, which would encourage tabbers to exclusively use the legal site. More tabbers on the forum would mean more revenue for the music publishers, in turn. Though the proposal requires the political will of the international organization, overall, it would best serve the participants in the forum.

The political will to make an international agreement is essential to its function and impact.²⁰⁹ An example of this is the Cybercrime Convention of the Council of Europe, which “is open for signature for all countries”; however, each country must ratify it domestically.²¹⁰ While this is in effect for some countries, others, such as Russia, have rejected it because they did not want United States police gaining access “to computers owned by Russian men accused of defrauding U.S. banks,” which has led to a “stalemate” in the United Nations proposed cybercrime treaty.²¹¹ The political will to stop the problem was lacking. Russia, specifically, will potentially have more will to act in the guitar tab situation because it would not involve issues of police search and seizure, as the cybercrime agreement does. Also, because of Russia’s reputation for piracy, the Russians may want to support a legal universal online guitar tab site to bolster their reputation of not allowing piracy.²¹² Much like Russia, other nations that have reputations of allowing

²⁰⁶ See Tedeschi, *supra* note 12.

²⁰⁷ See *IFPI Publishes Digital Music Report 2009*, *supra* note 166.

²⁰⁸ Nate Mook, *Illegal Music Downloads up in UK, Down in US*, BETA NEWS (July 31, 2007), <http://www.betanews.com/article/Illegal-Music-Downloads-Up-in-UK-Down-in-US/1185908414>.

²⁰⁹ See Aviv Cohen, *Cyberterrorism: Are We Legally Ready?*, 9 J. Int’l Bus. & L. 1, 32 (2010).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See Simburg, *supra* note 197, at 165.

infringement to take place may fully support this agreement because guitar tab is not particularly politically sensitive. Supporting such a treaty is an easy way to enhance the reputation of such a country as combating infringement. WIPO's committee on copyright would have at least some will to act because this problem does impact publishers on an international level.

Some may question the will of music publishers to agree to a forum. Frankly, this issue will have to be decided by individual publishers. However, there is reason to suspect that if a government and an international organization are urging publishers to join the forum, they will have incentive to join this forum. It is expected that if a few publishers join, others will follow. Further, they will receive revenue for participation. Finally, if the forum is run by representatives of the music publishing industry, there may be a greater will to be a part of the forum because of the aspect of control by representatives from the publishers' own industry.

There are further advantages for the music publishers, which are expected to increase their enthusiasm for the proposal. Litigation would no longer need to be considered for those taking part, which avoids the cost of both initiating litigation and choosing to proceed with it. Also, a forum would reduce monitoring costs. Because the site would hopefully disable rogue tab websites internationally from attempting to form a website based on limited demand for the site, music publishers would not need to spend as much time trying to locate and stop other sites.²¹³ As described above, systems such as iTunes have not stopped the downloading problem in the music industry;²¹⁴ however, this more formal solution, that does not require payment from individual tabbers, is less likely to see the continuing problems faced by the record industry today.

The other groups that need the will to join are the tabbers and tab enthusiasts. Their will to participate in the forum will be strong because they would be able to receive legal, high quality tabs for free. Further, tabbers would no longer have to worry about removal of their favored tab site from the Internet and trying to find a new one. Ideally, the forum would be open for fans to use and comment on tabs that are posted. This interaction should make tabbers feel they are an important part of the process. Tabbers would be expected to have less hostility for the music publishing industry with the introduction of such a forum. Thus, the tab community can be expected to favor such an action.

²¹³ The process for doing so is explained in the DMCA. *See supra* note 64 and accompanying text.

²¹⁴ *See supra* notes 207–8.

D. *Criticisms of the Forum*

Though the benefits of such a solution are expected to outweigh any costs, there are potential criticisms to the proposal. First, a plan was already in existence with MXTabs. While this attempted solution may reduce the problem, the limits to the system, as described in detail in Part III are based on jurisdiction and publishers' lack of interest in being involved. Further, their recent partnership with Songsterr led to tabbers having to find a new site to use. Another critique is that the attitudes and mores regarding copyright vary worldwide, and the proposal of an international forum may limit the significance of each nation. This is a valid consideration; however, nations would be able to choose not to endorse the forum if they were particularly opposed to some aspect of it. Many international agreements already exist on copyright, dating back to the Berne Convention, which was originally ratified in 1896,²¹⁵ thus there is a history of combating copyright issues on an international level. Another argument is that the issue is too narrow and should be applied along with other music notation forms, such as sheet music more generally. While the purpose of this Note was to confront the issue specifically created by tabs, this solution may be able to be applied to other forms of music composition.²¹⁶ If there was a will to do this as well, the proposal could be expanded. Some may claim this proposal is very theoretical. The argument is valid and accepted, but solutions must often begin as theoretical. Others may indicate that the proposed solution is not fair to tabbers. However, there is the counterargument that most of those running tabs sites were not trying to profit but were merely hobbyists. There is nothing stopping these same hobbyists from contributing to the forum in the same manner. The profits will go to the group that would be likely to win in litigation. Finally, a criticism is that the governments of the world should not be aiding music publishers in such a way. However, the solution is not trying to protect only one company but the legitimacy of an industry and of copyright protection. While the forum would not be perfect, it is better for the involved parties than the current situation.

CONCLUSION

No matter the solution, guitar tabs on the Internet are not expected to be taken away entirely. There has been a steady demand for tab sites ever since OLGA was created in 1992.²¹⁷ The "takedown" notices leading to the removal of many sites has not diminished the demand for guitar tabs, as seen by the rise and fall of MXTabs²¹⁸ and the plethora of

²¹⁵ Berne Convention, *supra* note 23.

²¹⁶ Though expanding the proposal would require more research to see if the issues are identical.

²¹⁷ See Duffy, *supra* note 1.

²¹⁸ See Waters, *supra* note 2, at 257.

other tab sites that remain available.²¹⁹ Even though music publishers are more likely to win in United States litigation on a copyright infringement claim, tabbers will demand some way to get their product on the Internet. A free, easy way to gain instruction about how to play one's favorite songs on the guitar, without being able to read traditional sheet music, is almost certainly too popular an idea to fade with litigation.

Though there are alternative solutions, the international forum proposed by this Note would provide the most stable system to balance the needs of the tabbers and the copyright owners, by providing tabs to the audience that demands them, as well as respect and pay revenue to the copyright owners who otherwise would believe their work was being infringed. A formal system is proposed, rather than the informal system which was attempted through MXTabs, because MXTabs did not lead to other tab sites shutting down; MXTabs shut down instead.²²⁰ The formal system proposed in this Note is expected to eliminate most desire for other tabs sites, making monitoring much easier of those rogue sites that do operate. Furthermore, the system will remain free of cost to users, which should diminish the demand for alternative tab sites. As illustrated, the international guitar tablature forum through WIPO would be a better solution than the one currently in place.

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²¹⁹ See *supra* note 16 and accompanying text.

²²⁰ MXTabs announced this partnership via their facebook page. MXTABS.NET, *supra* note 17.

* J.D. Candidate, Benjamin N. Cardozo School of Law (2012); B.A., Marshall University (2008). I especially want to thank all of the editors who have helped craft and refine this piece—Nabeel Gadit, Caroline E. Glicker, Eric Null, Aleks Gelerman, Simon Bernstein, and Sarah Nadeau. I would also like to thank my parents both for unconditional love and for encouraging me to march to my own drummer; my colleagues for their support; and my friends and family for putting up with me throughout this process. © 2012 Lauren Myers.