

## JOHN PERRY BARLOW'S CALL FOR PERSUASION OVER POWER

JONATHAN L. ZITTRAIN

John Perry Barlow's insights were inseparable from his lyrical way of conveying them. Paragraphs like this from his seminal 1994 essay *The Economy of Ideas* come to mind:

What was previously considered a common human resource, distributed among the minds and libraries of the world, as well as the phenomena of nature herself, is now being fenced and deeded. It is as though a new class of enterprise had arisen that claimed to own the air and water.

What is to be done? While there is a certain grim fun to be had in it, dancing on the grave of copyright and patent will solve little, especially when so few are willing to admit that the occupant of this grave is even deceased and are trying to force what can no longer be upheld by popular consent.<sup>1</sup>

Barlow's expression mates joy and canniness, and one of his talents in writing about new technologies was to flip our conception of the status quo in order to correct it. In 1994, the conventional sense was that the Internet and its champions were heedlessly upsetting a longstanding set of relationships and legal entitlements, with copyright as a signal example. And while that was superficially true, it wasn't the whole story.

Copyright was a natural first area of contention during the mainstreaming of the Internet because there was readily-tallied money at stake; widespread Internet use absolutely stood to put a dent in established, legally-protected cash flows; and polarized cultures of righteousness had developed around views of the ethics of file sharing, also known as "piracy." The young hackers and dot-com founders responsible for much of the internet's mischief—having built the likes of Napster, Gnutella, Napigator, KaZaA—were, to the Hollywood establishment, right out of central casting as barbarians at the gate.

Barlow told us that those appearances were wrong. In fact, the settled relationships of copyright holders comprised the unusual artifice around the centuries-long production of entertainment. The practices of copyright might comfortably apply to the highly stylized dealings to carve up rights to the distribution of a movie, but the average citizen held

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<sup>1</sup> John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, 18 DUKE L. & TECH. REV. 8, 14 (2019).

an even longer-established set of expectations around performance and sharing with which the free transfer of bits dovetailed very well.

A glance at the U.S. copyright code by the time of Napster showed just how far Title 17 had quietly diverged from day-to-day reality. The idea that singing a song aloud at a birthday party could result in thousands of dollars in “damages” was counterintuitive, to say the least, even as there’s legitimate rationale for the core “performance right” within copyright. The statutory limitations to the right are tellingly mincing, such as 17 U.S.C. § 110(6), which establishes that notwithstanding the public performance right, there are some limited exceptions, such as:

performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization . . . .<sup>2</sup>

(It appears to be an open question whether the first gathering by a horticultural organization can be “annual” and thus qualify for the exception, or if litigants must wait until the following year to see if there is another one.)

The performance right was visited again in the 1998 Fairness in Music Licensing Act, which sought to settle a longstanding dispute between the NRA—that is, the National Restaurant Association—and ASCAP, the leading U.S. organization coordinating licenses for public performances of songs. The dispute was over restaurants’ playing of the radio while people ate. While radio stations already paid for the rights to broadcast music, ASCAP wanted restaurants<sup>3</sup> to have to license the music as well. The NRA made great hay of the fact that ASCAP had previously sent letters to Girl Scout camps asking them to license up,<sup>4</sup> and accused ASCAP of wanting royalties for kids singing Puff the Magic Dragon around campfires. ASCAP’s chief operating officer at first responded combatively: “They buy paper, twine, and glue for their crafts—they can pay for the music, too.”<sup>5</sup> ASCAP reconsidered and later

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<sup>2</sup> 17 U.S.C. § 110 (2000).

<sup>3</sup> *Music Licensing in Restaurants and Retail and Other Establishments: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. (1997).

<sup>4</sup> Elisabeth Bumiller, *Ascap Asks Royalties From Girl Scouts, and Regrets It*, N.Y. TIMES (Dec. 17, 1996), <https://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html>.

<sup>5</sup> Lisa Bannon, *Ascap Cautions the Girl Scouts: Don't Sing 'God Bless America'*, WALL STREET J. (Aug. 21, 1996), <https://www.wsj.com/articles/SB840575892377365000>.

said the demand was a mistake, but the political tide had turned. The Fairness in Music Licensing Act provided that no royalties were needed—at least so long as the restaurants were smaller than 3,750 square feet, and used no more than six speakers to play the music.<sup>6</sup> (Barlow's own view of ASCAP, for what it's worth: "I'm a member of ASCAP, and if you think that's the solution, I invite you to write some songs.")<sup>7</sup>

The music licensing and recording industry mentality clashed quite a lot with mix-tape culture. As file sharing became routine, the policy drawing board entertained increasingly desperate measures to preserve what in fact had never been—people had always shared music without practical legal burden; the Internet's new affordances posed genuine questions at the clash between what seemed like perfectly reasonable interpersonal behavior, and the new costs it was imposing on the industry. The industry's prior encounters with new technology had, at times, resulted in new restrictions on it. In 1984, the videocassette recorder came within one Supreme Court vote of being found to be an instrument of contributory copyright infringement, and thus illegal without licensing.<sup>8</sup> And in 1992, the music industry ensured through law that something called the "Serial Copy Management System" would be built into newly-emerging digital audio tape recorders, to prevent copyrighted material from spreading losslessly too well.<sup>9</sup> (Oddly, Title 17, which defines "children," never specifies what the SCMS actually is.)

It was against that backdrop that Barlow wrote. His observations of the culture clash were vindicated as the industry floated such drastic proposals as to "close the analog hole"<sup>10</sup> by making recording devices refuse to record music or images encountered in the wild that had "don't record me" dog-whistles placed within them. They proposed legislation such as the "SSSCA"<sup>11</sup> and "CBPTDA"<sup>12</sup> to mandate that all computing

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<sup>6</sup> Fairness in Music Licensing Act, 17 U.S.C. § 110 (1997).

<sup>7</sup> John Perry Barlow, Keynote Address at the Winter 1994 USENIX Conference: Stopping the Information Railroad (Jan. 17, 1994) (transcript available at John Perry Barlow, *Stopping the Information Railroad*, ELEC. FRONTIER FOUND. (Jan. 17, 1994), <https://www.eff.org/pages/stopping-information-railroad>).

<sup>8</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>9</sup> See Audio Home Recording Act, 17 U.S.C. § 1002(a) (1992).

<sup>10</sup> Eric Diehl & Teddy Furon, © Watermark: Closing the Analog Hole (July 2003) (paper presented at IEEE International Conference on Consumer Electronics).

<sup>11</sup> Security Systems Standards and Certification Act, Staff Working Draft, 107th Cong. (2001), available at <http://cryptome.org/sssc.htm>.

<sup>12</sup> Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2002).

equipment<sup>13</sup> have digital rights management software built in. There were outsized lawsuits<sup>14</sup> against people who swapped copyrighted files over peer-to-peer Internet services. There were legal threats against Internet service providers,<sup>15</sup> including universities.<sup>16</sup>

Very little of it endured. Most legislative proposals stalled in Congress, and the lawsuits against individual users were retired despite most targeted users choosing to settle. This might suggest a victory for Barlow's way of thinking—a certain peace emerged that reformalized commercial relationships around activities that, to the users, could still seem organic. But the copyright wars didn't see victory by one side or the other so much as a muddling through. Today, the chaos of self-published Web pages, hosted on individual Web servers, has given way to the carefully indexed homogeneity of DMCA-takedown-friendly Facebook,<sup>17</sup> including the automatic monitoring of private chat for the presence of links to file sharing sites (as they are found, they are redacted), and Facebook's silent tracking of all usage for the benefit of ad targeting.

Today music and movies are much less ripped and copied freely than they are subscribed and linked to like a utility—via one of a handful of streaming titans like Spotify, Tidal, Netflix, or Apple—with artists seeking to make a living from their work generally no better off<sup>18</sup> than they were before the Internet came about. Recording industry profits, after a downsizing upon leaving the era of \$15 compact discs, seem to have stabilized.<sup>19</sup> Even the American film industry—which is seeing

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<sup>13</sup> Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 2024–25 (2006).

<sup>14</sup> Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011).

<sup>15</sup> *RIAA v. Verizon*, ELECTRONIC PRIVACY INFO. CTR. (Apr. 7, 2004), <https://epic.org/privacy/copyright/verizon/>.

<sup>16</sup> Anne Broache, *RIAA Threatens 19 Universities with Lawsuits*, CNET (Oct. 18, 2007), <https://www.cnet.com/news/riaa-threatens-19-universities-with-lawsuits/>.

<sup>17</sup> Daniel Sanchez, *Facebook Promises Not to Rip Down Your Music Videos—If You Use Their Music*, DIGITAL MUSIC NEWS (Dec. 11, 2017), <https://www.digitalmusicnews.com/2017/12/11/facebook-sound-collection/>.

<sup>18</sup> Victor Luckerson, *Is Spotify's Model Wiping Out Music's Middle Class?*, RINGER (Jan. 16, 2019), <https://www.theringer.com/tech/2019/1/16/18184314/spotify-music-streaming-service-royalty-payout-model>.

<sup>19</sup> Felix Richter, *Rise of Digital Formats Stops the Music Industry's Decline*, STATISTA (Apr. 26, 2017), <https://www.statista.com/chart/4713/global-recorded-music-industry-revenues/>.

profit growth much slower than that of many global counterparts—appears to be outpacing the broader economy.<sup>20</sup>

Of course, defending existing profit flows was not Barlow's starting or ending point. The sentiments of Barlow's *A Declaration of the Independence of Cyberspace* transcend something as transactionally-based as the copyright wars. Rather, says Barlow, proposed new restrictions there:

would declare ideas to be another industrial product, no more noble than pig iron. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.<sup>21</sup>

What Barlow envisioned was a renaissance of person-to-person interaction, one unmediated by corporate marketing departments:

We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.<sup>22</sup>

Alas, from the standpoint of 2019, humane and fair have turned out to be tall orders. There remains a vibrant string of thriving, Lórien-like online communities of art and learning defined largely by their insularity. But the bulk of digital foot traffic has coalesced around sites known as much for meanness and harassment as for earnest exchange, coupled with demands by aggrieved users—rather than yesterday's corporate copyright holders—for intervention by the respective corporate overseers. These sites are not self-governed in content or in design. They are monetarily optimized consumer offerings as authentically community-driven as Disney World's Main Street USA.

And teenagers, or near enough, brought us this too. In his 2005 book *What the Dormouse Said: How the Sixties Counterculture Shaped the Personal Computer Industry*, John Markoff notes that:

Personal computers that were designed for and belonged to single individuals would emerge initially in concert with a counterculture

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<sup>20</sup> David Robb, *U.S. Film Industry Topped \$43 Billion in Revenue Last Year, Study Finds, But It's Not All Good News*, DEADLINE (July 23, 2018), <https://deadline.com/2018/07/film-industry-revenue-2017-ibisworld-report-gloomy-box-office-1202425692/>.

<sup>21</sup> John Perry Barlow, *A Declaration of the Independence of Cyberspace*, 18 DUKE L. & TECH. REV. 5, 6 (2019).

<sup>22</sup> *Id.* at 7.

that rejected authority and believed the human spirit would triumph over corporate technology, not be subject to it.<sup>23</sup>

But, as Markoff goes on to note, the barbarians of yesterday have themselves become the gatekeepers of today. Barlow naturally drew upon the cultural fault lines of 1960s America in limning the heroes and sure-to-lose villains of the digital world, but today those lines aren't quite so clear. The new boss turned out to be the same<sup>24</sup> as the old boss—and our conflicts can as easily appear to be with one another as between citizen and state, or consumer and conglomerate. The causes that Barlow embodied and stood for—marked by values of humanity, of openness, of adventure, of good humor, and of inclusion—are ones that endure at every layer of the digital stack. A synecdoche: Barlow's *A Declaration of the Independence of Cyberspace* remains free, but the authoritative version of *The Economy of Ideas* (as rendered in a 1994 issue of WIRED)<sup>25</sup> is . . . metered through a paywall.

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<sup>23</sup> JOHN MARKOFF, WHAT THE DORMOUSE SAID: HOW THE SIXTIES COUNTERCULTURE SHAPED THE PERSONAL COMPUTER INDUSTRY xv (2005).

<sup>24</sup> THE WHO, *Won't Get Fooled Again*, on WHO'S NEXT? (Track Records 1971).

<sup>25</sup> See John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1, 1994), <https://www.wired.com/1994/03/economy-ideas/> (last accessed Aug. 3, 2019).