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ESSAYS

“The Virus of Liberty”: John Perry Barlow, Internet Law, and Grateful Dead Studies

JOSEPH A. TOMAIN

In China, Germany, France, Russia, Singapore, Italy and the United States, you are trying to ward off the virus of liberty by erecting guard posts at the frontiers of Cyberspace.

—John Perry Barlow (1996)

In the mid-1990s, John Perry Barlow published two essays, influential to legal thought and beyond. Both essays invoke Thomas Jefferson to address the implications of digital communications technology for democracy and human freedom. In 1994, he published an essay in *Wired* magazine titled “The Economy of Ideas.” This same essay is published on the Electronic Frontier Foundation’s website as “Selling Wine Without Bottles: The Economy of the Mind on the Global Net.”¹ In 1996, while at the World Economic Forum in Davos, Switzerland, a slightly inebriated Barlow penned “A Declaration of the Independence of Cyberspace.”

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These two works served as the basis for a special issue of the *Duke Law and Technology Review* called *The Past and Future of the Internet: A Symposium for John Perry Barlow* (2019). Devoting a law review symposium to a songwriter is rare, but not unique. In 2005, *Widener Law Journal* published a symposium on Bruce Springsteen, *The Lawyer as Poet Advocate: Bruce Springsteen and the American Lawyer*. In 2011, *Fordham Urban Law Journal* published a symposium on Bob Dylan simply titled *Bob Dylan and the Law*.

The authors that contributed to the Barlow symposium are some of the most respected legal scholars today, including Yochai Benkler and Jonathan Zittrain from Harvard Law School, Julie Cohen from Georgetown Law School, Jessica Litman from the University of Michigan Law School, and Pamela Samuelson from Berkeley Law School. Other symposium contributors included author-activist Cory Doctorow and the Executive Director of the Electronic Frontier Foundation (EFF), Cindy Cohn. Barlow cofounded the EFF in 1990 as a non-profit advocacy organization that protects civil liberties and individual rights in the digital world (“A History of Protecting”). It is no exaggeration to state that the pages of this symposium issue are filled with insights and reflections from luminaries whose views have and continue to influence legal thought and action in what Barlow popularized as “cyberspace.”

Another luminary is Duke University law professor James Boyle, who served as guest editor of the issue. His brief introduction states that the symposium uses Barlow’s “Selling Wine Without Bottles” and “Declaration” as the starting place to reflect on the digital world in 2019, when the volume was published, asking what Barlow got right, what he got wrong, and what the future of our digital world might hold (2019a, 4). The symposium contributors were especially well qualified to participate in this reflective analysis precisely because they have been engaged in so-called “cyberlaw” scholarship or advocacy over the more than two decades since Barlow’s essays were first published. Boyle concludes by clarifying the symposium’s purpose and offering a personal tribute:

The articles gathered here do not seek to canonize John Perry or praise his ideas where our contributors believe they were simplistic or flawed: he would have found that offensive. Worse,

he would have found it boring. There is criticism here as well as praise. But, in their own way, these remarkable essays offer a memorial to his work, insight and humor, to his contribution to our world. We are all the poorer for losing him. I miss him. (2019a, 4)

This essay examines the legal scholarship in the Barlow symposium and frames it in the interdisciplinary terms of Grateful Dead studies. Part I focuses on the two Barlow essays that formed the basis of the symposium. Part II connects issues raised by the Barlow symposium to Grateful Dead studies.

I.

Of the two Barlow essays that provided the foundation for the symposium, the “Declaration” is much shorter than “Selling Wine Without Bottles”—less than 900 words compared to just over 9,000 words—but has had a much larger influence. During a 2018 debate about Internet Balkanization, legal scholar Paul Ohm summarized the essay’s impact by noting, “Many in the room have read it, and even if you haven’t read it, you’ve been influenced by it. Everyone who works in technology policy has felt the influence of this document” (Daskal, Ohm, and de Vries 2018, 15–16).

The “Declaration” can also be found in law school casebooks, such as James Grimmelmann’s *Internet Law: Cases and Problems* (2020). Barlow would be proud of Grimmelmann, a former law school intern at the EFF, for many reasons, including his pricing model—free, but with a “suggested price” of \$30.00 that provides one-third of net revenues to the EFF—and his prolific and normatively persuasive scholarly contributions. The charitable component of Grimmelmann’s casebook pricing model emulates the Grateful Dead’s philanthropic example. Inclusion of Barlow’s “Declaration” in law school casebooks, however, is far from the whole story. Others have responded to and challenged Barlow’s “Declaration of Independence” more than a decade after it was first published, including Alex Kozinski and Josh Goldfoot’s “A Declaration of the Dependence of Cyberspace” (2009) and Daniel Castro’s “A Declaration of the Interdependence of Cyberspace” (2013). An October 2021 Westlaw

database search returned 352 results that cite Barlow's "Declaration," including eleven law journal articles published in 2021 so far.²

Although the "Declaration" has received more attention than "Selling Wine Without Bottles," it has not aged nearly as well, as Boyle notes (2019b, 39). The "Declaration" has been described as a "polemic" (Werbach 2017, 903); "hyperbolic" (Mariotti 2005, 255); "drastic" (Lindahl 2013, 705); "grandiose" (Schultz 2006b, 6n16); and a document that "everyone knows ... was more of a rage-fueled rant than a serious proclamation" (Goldman 2018). In the Barlow symposium, Boyle provides a less dismissive and more apt description of the "Declaration" as a "deliberate provocation of the global elite at Davos" that nonetheless "invites pushback" (2019, 40). While Boyle views the "Declaration" in a more positive light, a brief review of the essay usefully illuminates the critiques leveled at it. There are four major claims in the "Declaration" that critics dispute.

First, Barlow's opening paragraph states, "Governments of the Industrial World, you weary giants of flesh and steel ... You have no sovereignty" in cyberspace. He argues that "Cyberspace does not lie within your borders" (Barlow 1996). Although not taking such a bright-line position, legal scholars in the 1990s also debated the ostensible borders of cyberspace and the limits of nation-state jurisdiction in this online realm (Johnson and Post 1996; Goldsmith 1998). Barlow was not alone in his aversion to government regulation of cyberspace in the mid-1990s. Viktor Mayer-Schonberger recounted a conversation he had with a European politician a year before Barlow wrote the "Declaration" who told him "in earnest that what the Internet needs is a void of laws, the chance—as he described it—to blossom before we destroy it through regulation" (2000, 572–73). Yet governments are capable of and actively engaged in regulating online activity, which was clear within ten years of Barlow's essay, if not earlier (Goldsmith and Wu 2006, 44–68). Barlow's statement that cyberspace is beyond the jurisdiction of governments is a primary critique of the "Declaration."

Second, the use of the term "cyberspace" itself is subject to criticism, especially in the context of understanding the limits of legal authority to regulate online technology. Fiction writer William Gibson coined

the term “Cyberspace” in a 1982 story, “Burning Chrome,” although most people associate the term with his 1984 novel *Neuromancer*, as the *Wired* magazine tribute to him notes (Wired Staff, 2009). *Wired* quotes a 2000 documentary about Gibson, *No Maps for These Territories*, in which he described the term as “evocative and essentially meaningless.” Some claim that the term “cyberspace” is an inaccurate and distracting metaphor because it creates the illusion that the online world is somehow separate from the physical world. As Grimmelmann notes, “This spatial vision of ‘cyberspace’ cast a long shadow on legal thought, especially when it came to jurisdiction” (2020, 56). Two seminal law review articles in the 1990s debated whether “Cyberlaw” (aka “Internet law”) was a worthwhile field of legal study (Easterbrook 1996; Lessig 1999). That debate continues today.

While Barlow popularized the term cyberspace in legal thought with the title of the “Declaration,” that is not the first appearance of the term in Deaddom. In a 1990 interview about founding the EFF, Mitch Kapor described Barlow’s pithy take on the term: “John’s one-sentence definition of cyberspace is ‘the place you are when you are on the telephone’—which brings it home to people” (Gans and Goffman 1990). A 1993 online discussion of electronic mailing lists for Dead ticket exchanges, which noted that these date back to 1973, came with the subject line, “The History of Deadheads in Cyberspace.” Yet the use of this “evocative and essentially meaningless term” has caused consternation and confusion in legal thought on the regulation of online technology, and Barlow’s use of it in the “Declaration” is subject to reasonable disagreement.

Third, Barlow’s invocation of the Golden Rule was critiqued by symposium author and Microsoft economist Benjamin Edelman. Edelman’s critique stems from his belief that the “Golden Rule presupposes participants of roughly equal power and status” (2019, 97). Barlow did indeed put heavy reliance on the Golden Rule in the “Declaration,” stating “The only law that all our constituent cultures would generally recognize is the Golden Rule.” Boyle disagreed with Edelman’s critique for two reasons. First, Boyle rejects the notion that the Golden Rule depends on relatively equal participants. To the contrary, “its principal function as a normative thought-primer is to force the more powerful to

restrain themselves by asking the question, ‘how would *I* like it if I were in the position of powerless supplicant in this situation?’” (Boyle 2019b, 49). Second, Boyle argues that the “problem [with the Golden Rule] is not moral coherence, but enforcement” (2019b, 48). Boyle also notes that a problem with applying the Golden Rule in cyberspace is that one of the participants is usually “not an actual moral being,” but a corporate entity (2019, 49). Edward, First Baron Thurlow, who served as Lord High Chancellor of Great Britain, recognized a similar problem centuries ago when he famously asked, “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”³ Thus, Boyle provided two reasons why he found Edelman’s critique of Barlow’s use of the Golden Rule unpersuasive.

In addition to Boyle’s two critiques of Edelman’s dismissiveness toward Barlow’s use of the Golden Rule, another one can be added. Barlow invoked the Golden Rule in the “Declaration” not because he believed its application in cyberspace was inevitable, but because it was aspirational. He closes the “Declaration” with a hope, a prayer, a wish: “*May* it be more humane and fair than the world your governments have made before” (emphasis added). Jonathan Zittrain addressed this line directly, lamenting that “Alas, from the standpoint of 2019, humane and fair have turned out to be tall orders” (2019, 141). While acknowledging our disheartening current state of affairs, Doctorow optimistically concludes, “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” (2019, 142).

Fourth, Barlow’s “Declaration” claimed that cyberspace is “an act of nature.” Some challenge that description because technology is an act of humankind, not nature. In this sense, cyberspace, if we should even use that term, is not “natural” at all. But language is ambiguous. As the U.S. Supreme Court stated in a seminal constitutional law decision from 1819, “Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense” (*McCulloch v. Maryland* 1819, 414). Perhaps Barlow’s use of the term “nature” should be understood differently than the way critics perceive it.

Looking back to “Selling Wine Without Bottles” helps explain what Barlow meant by “nature.” In that 1994 essay, he described the “nature of information” as an “activity,” a “life form,” and a “relationship.” He suggested that information “moves more like something from nature than from a factory” because it is intangible. Thus, another way to understand what Barlow meant by describing cyberspace as an “act of nature” is to interpret that phrase as referring to the flow of information and ideas. Like others, Barlow saw that cyberspace has the potential to democratize and better realize the nature of information because of the ease with which individuals can communicate with each other across the world.

This optimistic view of information flows, however, is not universal. Julie Cohen rejects the internet utopianism view regarding the “relationship between information and communication networks and human freedom.” She concludes that the utopian vision that increased information flows through communication networks leads to increased human freedom is “deeply ahistorical” (2019, 92). Sidestepping that debate, a closer look provides yet another way to interpret what Barlow meant by an act of nature, an interpretation that flows from Barlow’s understanding of the nature of information. Although not an act of nature in the way that a rainstorm or a tree is, cyberspace can be understood as act of nature if viewed as an act or embodiment of human nature. More specifically, cyberspace can be seen as the manifestation of individual and collective thought. Indeed, the full sentence in the “Declaration” calls cyberspace “an act of nature and it grows itself through our collective actions.”

Parts of “Selling Wine Without Bottles” also support this understanding. There Barlow begins with several lengthy quotations from an 1813 letter by Thomas Jefferson in which the term “nature” appears three times:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea.

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space.

Inventions then cannot, in nature, be a subject of property.⁴

Jerry Garcia's well-known remarks on being done with the music after it's played and allowing fans the freedom to share it freely are consonant with Jefferson's views on the limits of property ownership over intangible ideas, as Gary Burnett has noted (2009, 704).

This epigraph not only sets the stage for Barlow's focus in "Selling Wine Without Bottles" (i.e., his concerns about the propertization of information in the digital age), it also helps illuminate what he meant when describing cyberspace as an act of nature in the "Declaration" two years later. In both essays, Barlow used "nature" to describe the flow of information and ideas among people and across time for the betterment of all. In "Selling Wine Without Bottles," Barlow begins by invoking the language of a Founding Father who also sought to cabin the strictures of law on the flow of information and ideas because they harm the collective end. In the "Declaration," Barlow sought to help "invent the future" by understanding cyberspace as an act of collective human nature, where "We will create a civilization of the Mind" that will not be stunted by laws of terrestrial governments that seek to enclose information. Barlow's use of the term "nature" in these two essays helps the reader better situate what is at stake if we allow the capture of information by government or private actors: we risk the loss of individual and collective humanity to artificial constructs that are designed to serve mankind, but too often oppress that which makes up human nature. Or, as Amy Kapczynski put it when discussing the enclosure movement of informational capitalism, "Perhaps this is just a refrain of an old story: powerful actors can appropriate liberatory language for their own aims because legal doctrines and abstract arguments are malleable" (2020, 1496).

EFF Executive Director Cindy Cohn and Cory Doctorow also provide positive perspectives on the "Declaration" that help clarify what Barlow meant by "act of nature" and the purpose of that essay as a whole. On the day Barlow died, Cohn shared the news in a post on the EFF website, writing:

Barlow was sometimes held up as a straw man for a kind of naive techno-utopianism that believed that the Internet could solve all of humanity's problems without causing any more. As

someone who spent the past 27 years working with him at EFF, I can say that nothing could be further from the truth. Barlow knew that new technology could create and empower evil as much as it could create and empower good. He made a conscious decision to focus on the latter. (Cohn 2018)

Doctorow made a similar point in the concluding paragraph of his symposium essay:

Barlow's legacy, then, isn't a foolish belief that history would steer clear of dystopia of its own accord; rather, his legacy is the noble belief that we, together, pluralistically and through collective reasoning and collective action, could navigate the dangerous waters we find ourselves in, patch the holes the rocks knocked in our ship, and find our way to a better land. (2019, 68)

A closer look at the "Declaration" supports both Cohn's and Doctorow's perspectives. Barlow wrote, "In our world, all the sentiments and expressions of humanity, from the debasing to the angelic, are parts of a seamless whole, the global conversation of bits. We cannot separate the air that chokes from the air upon which wings beat." This understanding of humanity's relation to technology echoes an argument in Marshall McLuhan's 1964 book, *Understanding Media: The Extensions of Man*, where he noted that technology could be nothing more or less than what we are as human beings. Doctorow's view is also consistent with McLuhan's understanding of technology: "'Tech' is not a force unto itself. Technology's imperatives are the imperatives of the people who design, control, and use technology" (2019, 63). In other words, what Barlow meant by "act of nature" is better understood to refer to human nature, as opposed to nature itself. If so, this obviates those critiques of the "Declaration," particularly the critique that he truly believed that cyberspace existed outside the authority of terrestrial governments.

Yet twenty years after publishing the "Declaration," Barlow appeared to stand by the characterization that his critics imposed on it. In a 2016 interview, Barlow maintained that "The main thing I was declaring was that cyberspace is naturally immune to sovereignty and always would be. I believed that was true then, and I believe it's true now" (Greenberg 2016). One year earlier Barlow was perhaps more forthcoming. When

Jacob Silverman blamed the influence of the “Declaration” for the “Orwellian” shift of technology as used by both governments and Silicon Valley, Barlow responded by clarifying his intent:

[J]ust as Alan Kay said, “The best way to predict the future is to invent it,” I knew it’s also true that a good way to invent the future is to predict it. So I predicted Utopia, hoping to give Liberty a running start before the laws of Moore and Metcalfe delivered up what Ed Snowden now correctly calls “turn-key totalitarianism.” (Barlow 2015)

Cory Doctorow’s essay, “Barlow’s Legacy,” begins with an epigraph quoting the famous line from George Orwell’s *1984*: “Who controls the past controls the future; who controls the present controls the past” (2019, 61). The quotation seems to allude to Barlow’s response to Silverman’s attack. Overall, Doctorow’s essay helps set the record straight by providing a more contextual understanding of Barlow’s intent in writing the “Declaration.” For example, he notes that Barlow’s call for a free internet required “some kind of ethical commitment” or face a “dystopian future.” Indeed, Barlow cites the Golden Rule as a key component for his vision of cyberspace. Then again, one year later, the enigmatic Barlow seemed to confirm that he meant what he said in the *Declaration* regarding cyberspace being free from control by government actors. Given these conflicting statements, perhaps the best way to understand Barlow’s “Declaration” is that it resists easy interpretation, much like lyrics or poetry. After all, it is written poetically, not as an instruction manual or white paper with specific recommendations for legislative reform. That may have been wise, since one aspect of the “Declaration” that is not subject to reasonable debate is its lasting influence.

While the “Declaration” addresses government regulation of the internet writ large, “Selling Wine Without Bottles” focuses on private actors. At the time, Barlow believed that “Notions of property, value, ownership, and the nature of wealth itself” were undergoing seismic shifts. More specifically, his overarching concern here is the propertization of information. Barlow worried that digital technology made it possible to convert information into property in ways that are harmful to society and antithetical to the nature of information as he envisioned it.

This perspective was seen as a threat to some private actors. According to Barlow, Bill Gates responded to “Selling Wine Without Bottles” by withdrawing both his personal support and Microsoft’s support from the EFF. Gates “let it be known that any major contribution to EFF from a Microsoft employee could be grounds for dismissal” (Barlow 2018, 184).

“Selling Wine Without Bottles” offers two central examples to illustrate Barlow’s concern. First, he focuses on the disruption to our understanding of copyright law caused by the move from physical copies to digital copies. Second, he notes that we are experiencing a fundamental change in our economic system as we move from a manufacturing economy to an information economy. On both accounts, Barlow accurately described changes that are even clearer and no less concerning today. In the context of copyright law, Barlow noted that “books froze their contents into a condition which was as challenging to alter as it was to reproduce.” His metaphor was that intellectual property in the physical world was protecting the bottle, not the wine. Because “these bottles are vanishing”, our current understanding of intellectual property has become unmoored. As a technical legal matter, Barlow’s description is inaccurate. Copyright law does not protect the container, it protects the content that is “fixed in a tangible medium of expression” (17 U.S.C. § 102). But Barlow seemed to understand this technical requirement of copyright law because he asked, “How many of our assumptions about [copyright] have actually been about its containers rather than their mysterious contents?” It was a prescient question. The vanishing bottles have indeed disrupted our understanding of copyright law.

In 2015, two legal scholars made a similar point in a law review article, following up a year later with a book, *The End of Ownership: Personal Property in the Digital Economy*, devoted to the topic (Perzanowski and Schultz 2015; 2016). The authors noted that “Copyright law sets up an inevitable tension between the intellectual property of creators and the personal property of consumers” (2015, 1211). In short, as an intellectual property creator’s rights increase, the consumer’s personal property rights of that intellectual property decrease. They referred to the hard copy of a book, for example, as a “proxy” that helped balance these rights. This reference to hard copy as a “proxy” echoes Barlow’s 1994 question about

our assumptions of the container. Now that hard copies are vanishing, the balance of rights between a copyright holder and consumer has been disrupted and arguably become even more unbalanced in favor of the copyright holder.

For example, once a consumer purchases a hard copy book, she has the right to sell that book. This rule is known as the “first sale doctrine” and is codified under U.S. law (17 U.S.C. § 109). The consumer cannot make copies of the book and sell those, but she can sell the copy she purchased because that copy is her personal property, even though she does not own the copyright to the text. The move from physical copies to digital copies has broken our centuries old reliance on the hard copy as proxy for the balance of rights between consumers and copyright holders, as Jessica Litman notes (2019, 127).

Making matters worse, often times the seller’s terms of service claim that the purchase of a digital copy is not a “sale” but a “license” (Litman 2019, 133). Framing the transaction as a “license” means that the seller is seeking to prohibit the purchaser from relying on something like the first sale doctrine or believing she owns the digital copy forever as she would a hard copy of the same copyrighted work. In other words, one does not own the digital copy, but merely has a revocable license to use it under the terms and conditions imposed by the digital provider. Litman conceptualizes the move from the physical to the digital not as the absence of bottles, but rather as “make-believe bottles.” Litman evokes imaginary bottles to describe how the Copyright Act has been reinterpreted, even in the absence of any textual amendments to the relevant portion of the statute.

The Copyright Act defines “copies” as “material objects.” Litman notes that the transition from physical to digital means there is no longer a “material object” and that this is “precisely the characteristic that Barlow argued digital files lack.” From her perspective, even though the statutory definition of “copies” has not changed since 1976, a “modern revisionist interpretation” of the Copyright Act has simply “read the words ‘material objects’ out of the statutory definition.” Litman’s concern is not limited to the “mental gymnastics” it takes to create imaginary bottles so that digital works stay within a statutory definition that requires “material objects.”

Her primary concern is that these imaginary bottles allow copyright holders to exert even more protection over their works than they could when they sold physical items. Barlow would not be surprised that the industry would “keep trying to create” new “bottles.” Like Litman, he, too, was concerned with how such moves would harm consumers.

Barlow was not, however, solely concerned with consumers of information. He was equally if not more concerned with how the move from physical to digital goods could harm creators. He feared that “creating a world economy primarily based on goods which take no material form ... may be eliminating any predictable connection between creators and a fair reward for the utility or pleasure others may find in their works.” Disputes between musicians and streaming services regarding appropriate compensation serve as one example to show that Barlow’s concerns about creators have come to fruition (Bosher 2020). In short, Barlow’s 1994 claim that “vanishing bottles” will disrupt existing notions of intellectual property to the detriment of creators and society has not only been proven true, it remains unresolved today.

The second central point in “Selling Wine Without Bottles” considers a major shift in the economy at large. By 1994, Barlow believed that an “economy which consists almost entirely of information ... may become the dominant form of human trade, and if we persist in modeling economics on a strictly monetary basis, we may be gravely misled.” Unfortunately, Barlow’s concern has come into sharp relief today. Litman notes that Barlow was at least partially correct in predicting that “information itself was supplanting money as our dominant currency.” Information about us is the lifeblood of Big Tech. Many so-called “free” services are not free at all. Individuals pay with their information and thus privacy, not money. In turn, the entities collecting this information monetize it and make excessive profits from our personal information.

Two of the best works confirming the salience of Barlow’s concern are Shoshanna Zuboff’s 2019 book, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, and Julie E. Cohen’s 2019 book, *Between Truth and Power: The Legal Constructions of Informational Capitalism*. Zuboff raised the alarm that surveillance capitalism is threatening democracy itself, largely because of its erosion

of human dignity and individual autonomy. Though Zuboff's tone and at times alarmist perspective have drawn critics (Cuellar and Huq 2020), it is hard to dismiss the argument that private actors have strong economic incentives to use their power in ways that are harmful to individuals, society, and democracy. As Barlow noted, "serious privacy issues would arise if everyone's computer were packed with digital spies." Cohen's book provides a broader perspective by showing how law itself has protected the rise in private power, particularly in the context of informational capitalism. In 2020, the *Yale Law Journal* published Amy Kapczynski's review of these two books, which in a way continues the conversation Barlow began in his two essays.

Of course, at the time Barlow published his essays, he was not alone in his views, nor were his fears unique, as he made clear. He cited Alvin Toffler's *The Third Wave* (1980), for example, and Toffler is only one of many thinkers who predate Barlow on the topic of the disruption caused by digitization of information. Nor did all of Barlow's predictions come true. For example, his belief that "the failure of law will almost certainly result in a compensating re-emergence of ethics as the ordering template of society" seems the opposite of the current state affairs, as Boyle noted (2019b, 40). Also, Barlow underestimated the ability of law to evolve to continue providing overly strong protection for copyright in a digital world, as Pamela Samuelson and Kathryn Hashimoto point out (2019, 103). Despite those inaccurate predictions, Barlow's 1994 "Selling Wine Without Bottles" is an early effort to highlight how the shift from physical to digital could harm content creators and the development of shared cultural creation. These issues have evolved (or devolved) since 1994 and remain problematic today, as the Barlow symposium made clear.

"Selling Wine Without Bottles" and the "Declaration" provided the impetus for the 2019 Barlow symposium. Together, these two essays argued for the protection of the flow of information free from the constraint of powerful private or government actors so that individuals and society could flourish. One reason why Barlow believed the free flow of information could serve these goals was the "inexplicable pleasures of information itself" (Barlow 1994). He identified these inexplicable pleasures to include the "joys of learning, knowing, and teaching." Part II

engages in these joys by showing how the Barlow symposium connects with the interdisciplinary field of Grateful Dead studies.

II.

The “joys of learning, knowing, and teaching” are evident and encouraged traits in Grateful Dead studies. Band historian Dennis McNally believes that “after lengthy, disciplined preparation and study” academics “are—or should be—free to examine and investigate whatever phenomena capture their attention” (2012, 5). A PhD himself, McNally contends that the connection between the Grateful Dead and academic scholarship is not as distant as skeptics might believe, citing Grateful Dead Productions’ “general lack of greed” as one reason why the Dead were “much closer in spirit to the academic world than one might imagine.” But the more important reason is that the “Dead scene, just like the academic world, consciously prized thought” (2012, 9).

The influence of Barlow’s pioneering thoughts on law and technology are a particularly relevant area for exploration in Grateful Dead studies for at least two reasons. First, Barlow’s initial interest in the internet stemmed from his desire to learn more about the “strange and mysterious culture of the Deadheads”, ultimately concluding that the Dead “pre-figured the internet” (Barlow and Greenfield 2018, 147; 183). Second, like other new and non-traditional areas of study, research on Deadheads likely would have been diminished if “we had been living in the pre-cyber era,” as sociologist Rebecca Adams noted (2000, 35). Her work began attracting the attention of students from other colleges and universities, including Robert Freeman. His shift from folklore studies to law school was inspired in part by his interactions with Barlow, whom he met during his research for his master’s thesis, courtesy of Adams. Without the internet, connections like this might have never been made.

Nicholas G. Meriwether once described a major characteristic of the conference meetings devoted to the Dead as the “surprising yet compelling ways” that themes within this interdisciplinary endeavor link together (2013/2014, 6). That neatly describes the connections between the Barlow symposium and Grateful Dead studies, five of which are detailed below and briefly summarized here. First, there are limits on anarchism. Second,

those limits are based in part on the need to confront the human tendency to engage in myopic self-interested behavior. Third, myopic self-interest is problematic because it interferes with shared cultural creation. Fourth, shared cultural creation is normatively desirable because it reflects something deeper, our spiritual nature and connection to each other. Fifth, to allow our spiritual connectedness to flourish we need to protect shared cultural creation with legal rules, but law alone is not enough. Thus, the fifth and final theme in Part II builds off an essay in the *Bob Dylan and the Law* symposium to show “Why Law Needs Music.”

“The Limits of Anarchism”

A myth about the Grateful Dead and the law is that they “have absolutely nothing to do with one another” (Fraser and Black 1999, 20). To be sure, anarchy (or chaos) is undeniably a cherished quality for Barlow and the Dead because of its ability to help better understand reality and bring about positive change. In Kapur and Barlow’s 1990 interview, Kapur stated that “We’re both interested in dislocations of consciousness, because we think that’s a central element to understanding how weird the world is: to understand how everybody’s mind has gotten genuinely bent, especially by technology, especially by digital media” (Gans and Goffman 1990). Similarly, Garcia extolled the virtue of chaos in several interviews, most famously in his *Rolling Stone* interview with Charles Reich and Jann Wenner, where he argued: “Formlessness and chaos lead to new forms. And new order. Closer to, probably what the real order is” (1972, 128). Twenty years later Garcia stated that, “If the band has something to protect, it’s the integrity of the experience, which remains shapeless and formless. As long as it stays that way, everything’s okay” (Meier 1992).

Whether it be the musical segment of “Space,” spinners twirling in arena concourses, or the parking lot scene before and after shows, one could reasonably view a Grateful Dead concert as involving a heavy dose of anarchy. Indeed, Carol Brightman’s 1998 book on the Dead is entitled *Sweet Chaos: The Grateful Dead’s American Adventure*. But if describing the Dead experience as anarchic is accurate, it is incomplete. There are at least two ways in which the Dead sought order, and sometimes law. First, the parking lot scene at venues jeopardized the band’s ability to tour in

the 1980s, prompting the band's "reluctant admission that the utter tolerance practiced in the parking lot had to end", as McNally put it (2000, [8]). Second, the Dead relied on copyright law to protect their creative works (Balter-Reitz 2015/2016). Chaos could be useful, but anarchy had its limits.

On its face, Barlow's "Declaration" rejected any government role in cyberspace because he wanted to protect individual and societal freedom from the tyrants of the industrial world. Several Barlow symposium authors, however, noted that anarchy has limits in cyberspace. Yochai Benkler explicitly states that "we need to internalize the limits of anarchism" (2019, 84). There is a role for law to play in regulating online technology. For Benkler, a desirable political economy of technology involves a "genuine three-way interaction between state, market, and commons-based production specifically or social, nonmarket production more generally" (2019, 84). Benkler's vision could also describe how the Dead approached their work. Of course, that three-way interaction was not without its difficulties, such as when city councils or universities sought to ban the Dead from performing in their towns or on their campuses, as legal scholar Adam Kanzer has discussed (1992).

Julie Cohen's essay leaves no doubt that cyberspace needs law. Thoughtfully framing the intent of Barlow and like-minded cyberlaw scholars in the 1990s, she then assesses the current state of affairs. "As both Barlow and the cyberlaw scholars who took up his call recognized, [the "Declaration"] was not so much a statement of fact as it was an exercise in deliberate utopianism. But it has proved prescient in a way that they certainly did not intend" (2019, 85). Cohen notes that the absence of laws in cyberspace (or at least enforcement of existing laws) has often led to dystopian outcomes, such as the lack of protection for "the guarantees that supposedly protect the fundamental rights of internet users, including the expressive and associational freedoms whose supremacy Barlow asserted" (2019, 85). This critique is not directly aimed at Barlow or the "Declaration" itself, but at the concept of internet utopianism and how it has failed to achieve its noble goals. She argues that the utopian vision of an open internet largely free from government regulation has come at great cost, including lack of privacy, inadequate data protection, and the

rise of informational capitalism. Moreover, Cohen's 2019 pre-pandemic essay was prescient in identifying how the internet has become "fertile breeding grounds for conspiracy theories (including coordinated campaigns to foster denialism about climate change, vaccination, and similar matters)" (2019, 88).

Although Cohen's critiques are not a complete rejection of internet utopianism, or at least the ends it sought to achieve through an unregulated cyberspace, she concludes that "Advancing human freedom through the absence of law was never really in the cards" (2019, 96). Cyberspace is "inextricably embedded in real-world societies" and requires real-world institutions to achieve the noble goals set forth in the "Declaration" (2019, 89).

In "Revisiting Barlow's Misplaced Optimism," Edelman builds on themes in Cohen's essay. He critiques the "Declaration" for its "techno-utopianism," which he finds "far removed from reality" and "needlessly skeptical of plausible institutions to bring improvements" (2019, 97). Although Boyle takes issue with Edelman's critique of the Golden Rule's role in the "Declaration," here he points out that "It is hard to deny that Edelman wins that argument" (2019, 49). Edelman highlights some government successes in tech policy including "reining in some of the most clear-cut violations of copyright" (2019, 98). The Dead's use of copyright law lends support to Edelman's view that government institutions play a positive and essential role in balancing competing societal interests.

In his autobiography, Barlow describes his decision not to reapply to Harvard Law School in the early 1970s as stemming from "the realization that if I became a lawyer, my job would be to constantly sow doubt, fear, paranoia, and distrust" (Barlow with Greenfield 2018, 87). Barlow's distaste for lawyers did not diminish over time, but he did not always dissuade fellow travelers. Robert Freeman described how meeting Barlow as part of his folklore master's thesis research changed the trajectory of his career path, leading him to volunteer for the EFF and eventually become a lawyer. Freeman found himself "far more inspired by [Barlow's] defense of free speech principles than intimidated by his hatred of lawyers" (2000, 76). And clearly, Barlow's aversion to lawyers did not extend to the law, as his cofounding of the EFF demonstrates.

Anarchism has its limits; so does the law. Peter Jaszi's essay, "What Didn't Happen: An Essay in Speculation," reminds us to "celebrate the power of inaction" (2019, 162). When Congress was considering extending the duration of copyright protection from life of the author plus fifty years to life of the author plus seventy years, Jaszi told a Senate hearing in 1995 that this extension would not be the last. Instead, it would be a "down payment on perpetual copyright" with future extensions not far behind (2019, 163). That has not happened—yet. In any case, Barlow understood the power of Congressional inaction. In his memoir, Barlow recounts a conversation he had in the Senate gallery with Ann Simpson, the wife of Sen. Alan Simpson. As they both watched the Senate in session, he commented, "God, it's a marvel they get anything done," prompting her to reply, "It's grace they don't do more" (Barlow with Greenfield 2018, 235).

"The Myopic Pursuit of Self-Interest"

In his 1990 interview with Barlow, EFF cofounder Mitch Kapor expressed concern about the pervasive short-sightedness of corporate and human behavior and their destructiveness. "It's not only the pursuit of self-interest," he worried, "it's the myopic pursuit of self-interest that focuses on very short-term issues" (Gans and Goffman 1990). In "Selling Wine Without Bottles," Barlow addresses the risk of private power by warning that the "greatest constraint on your future liberties may come not from government but from corporate legal departments." At least two Barlow symposium essays address the topic of unbridled self-interest.

First, Doctorow's essay addresses harms caused by concentration of power in the tech industry, claiming that "Bigness multiplies all the risks of tech" and singles out Facebook as a "one-stop shop for mass-scale manipulation" (2019, 66). A 2021 multipart investigation by the *Wall Street Journal*, "The Facebook Files," strongly confirms Doctorow's concerns regarding that company (Horwitz et al. 2021). Part of Doctorow's solution for undoing the harms of concentrated power involves confronting the pernicious effects on society caused by viewing self-interest as a virtue. As he puts it, "Generations of elevation of selfishness to virtue has produced a public discourse where espousing a belief in human goodness

marks you out as a patsy at best and a dangerous idiot at worst” (2019, 65). In his essay on Deadhead vending, Matthew Sheptoski argued much the same:

The “official word” tells us that as individuals we are islands unto ourselves, each pursuing our own economic self-interest and trying to maximize our profit, and that this is the way life should be. Such notions lead to a direct breakdown in the realization of our interdependence with other human beings. (2000, 179)

Doctorow lauds Barlow for “insisting long before it was obvious to most people, that getting the internet’s future right would be a necessary precondition to getting humanity’s future right” (2019, 67).

Second, Benkler heads off any misconceptions regarding Barlow’s view on markets that may result from a misreading of “Selling Wine Without Bottles.” That essay is “not against markets or payments as such, but rather a resistance to the totalizing vision of commodity exchange as all there is” (2019, 78). Barlow made this point himself in a 2000 essay that revisited “Selling Wine Without Bottles,” riffing on one of its alternate titles, “The Economy of Ideas.” In “The Next Economy of Ideas,” Barlow commented that “I’m forever accused of being an antimaterialistic hippie who thinks we should all create for the Greater Good of Mankind and lead lives of ascetic service. If only I were so noble” (2000).

The Dead provide a counterpoint to the myopic self-interest that engulfs the American way for at least three reasons. First, the Dead’s business approach demonstrates an alternative and commercially successful path, as Barry Barnes (2012b) and others have shown. Barlow acknowledged that directly, stating he was “forced to admit that a lot of characteristics that Barnes identifies as being central to our business style are accurately defined and may actually be useful now to different organizations” (2012b, xxviii). The Dead’s approach to music distribution is the quintessential example, which included setting aside a tapers section at concerts and allowing fans to freely trade recordings of their shows. Although the Dead organization relied on law to protect its intellectual property rights, it used a more nuanced approach than the myth that it ruthlessly pursued such protection suggests (Balter-Reitz 2015/2016).

In 2006, Mark Schultz argued that the music distribution approach used by the Dead and other jam bands could serve as a model to transform how copyright holders protect their works and develop their markets (2006a). Schultz encouraged copyright holders to adopt norms of reciprocity as part of their business strategy, instead of an overreliance on fear of and punishment by legal sanction. His call for copyright holders to include reliance on social norms as part of their commercial strategy has not come to fruition, but it has not been forgotten. In 2019, a law school's journal published a blog post titled, "Listen to the Music Play: How Relaxed Copyright Enforcement has Allowed the Grateful Dead and Phish to Make Money" (Crockett-Verba 2019). Other Dead scholars have suggested that the Dead's commitment to maintaining their ethos while operating a commercial business is an approach that can be applied beyond copyright law. Following the Dead's model could result in a "more democratic, participatory, realistic, and egalitarian regime of collective, self-governing communities" that rigid and deterrent-focused legal regimes often impede (Fraser and Black 1999, 37).

One reason why the Dead's nuanced business approach has probably failed to take hold more broadly is that the "unique ethical relationship that the Grateful Dead have created with the Deadheads" is not easy to replicate (Balter-Reitz 2015/2016, 57). According to Dennis McNally, Garcia's description of the Dead's relatively anti-commercial stance was part of "a system of ethics" (2012, 11). Barlow also emphasized ethics as a necessary condition for progress, peace, and happiness in cyberspace and beyond.

Second, Garcia's leadership role in the Dead offers a counterpoint to that of the typical business leader. It is well documented that Garcia was a "reluctant band leader" (Meriwether 2015/2016, 3), but "There was no doubt who the leader was" (Brightman 1998, 15). Garcia seemed to intuitively know the risks of power. Asked why he did not use the stage as a platform for political pronouncements, he replied, "I couldn't do it. The power is frightening" (Meier 1992). Reflecting on Facebook, Doctorow notes, "It's not merely that Mark Zuckerberg is wrong about how people get along, it's that no one is right enough to wield that power" (2019, 66). Garcia's reluctance to be the leader of the Dead and his aversion to

imposing his beliefs represent an ethical and opposite view of leadership, as Barry Barnes (2012b) has explained.

Third, the mentality of some lot vendors provides another alternative to a myopic self-interested approach. Benkler wrote that, properly understood, “Selling Wine Without Bottles” calls for “resistance to the totalizing vision of commodity exchange as all there is” (2019, 78). Some Deadhead vendors share this vision of the limited role of the marketplace. Sheptoski concludes that vending at shows was “much more than an economic activity” (2000, 163). For many, it served the purpose of being able to continue attending shows, as opposed to “making money as an end in itself” (2000, 163). As a result, these vendors “complemented and reflected” the ethos of the Dead culture, practicing “values focused not on naked self-interest and the maximization of profit, but on fairness, kindness and general concern for one’s fellow beings, manifested in vending” (2000, 175). This balanced approach to touring with a band is not limited to the Dead. In 2021, a Phish message board user commented that “I sold koozies at Bonnaroo, didn’t make a ton of money but got enough cash for everything I needed on the tour/lot” (handsNfeetRmangos 2021).

One reason why Barlow symposium essays, Grateful Dead studies, and the band’s actual business practices reject a myopic self-interested approach is because of a shared vision about the nature of music. As Benkler noted, music is a “social relationship” and markets must allow for “robust commons-based cultural production” (2019, 79).

Shared Cultural Creations

The Grateful Dead experience is a compelling example of shared cultural creation. Barlow described the nature of a Dead show as “participatory”, a quality that allowed and required each audience member to be a “creative listener” involved “in the creative process in some way” (Gans 2002, 174)—and, most importantly, “not just for themselves individually but also collectively, for the group” (Brightman 1998, 149). This shared cultural creation is a result of the intentionally inclusive ethos the Dead shared with their audience. As Meriwether noted, “The Dead profoundly understood that their approach to performance relied on and explicitly included their audience” (Meriwether 2015/2016, 8).

A fundamental part of that inclusive ethos was the widespread availability of free concert recordings. Barlow once remarked that the “proliferation of tapes” was “probably the single most important reason” for the Dead’s popularity (McNally 2002, 386). Tapers and collectors have treated Garcia’s comments about the band’s permissive view of ownership over live recordings as “sacred writ” (Burnett 2009, 704). This perspective is consistent with the notion that audiences play some role in a creative process that at a surface level appears to be only the effort of the musicians.

Not only did the audience play some usually intangible role in the creative process of the Dead concert experience, songs became part of fan identity and the Deadhead community, whether through attending a live performance or listening to a recording (Balter-Reitz 2015/2016, 50). Michael Madow made a similar point in the context of the right of publicity, which protects the ability to prevent others from profiting off of one’s name, image, or likeness without consent. Madow believes that the value in one’s right of publicity is not solely an individual creation. Instead, it is “the product of a complex *social* ... process in which the ‘labor’ (time, money, effort) of the celebrity herself (and of the celebrity industry, too) is but one ingredient, and not always the main one” (Madow 1993, 195). Therefore, an individual should not have exclusive control over how her name, image, or likeness is used by others because a legal regime that allows an individual too much power in this context unduly interferes with the “expressive and communicative opportunities of the rest of us” (Madow 1993, 146). In short, both the value in one’s name, image, or likeness and musical experiences are communally created to some significant degree.

Several essays in the Barlow symposium call for the law to recognize and protect the collective nature of creative activities. Though he recognizes his and Barlow’s optimism regarding the creation and protection of a robust public domain in cyberspace, Benkler concedes that view is “much harder to sustain” today because of the existing online landscape. Despite the open access nature of basic internet protocols, there are a small number of powerful companies that have great control over how the network is used (Benkler 2019, 81).

Samuelson and Hashimoto note that Barlow “unsurprisingly” cited the Dead’s concert recording and trading practices to support his position that the enigma of digitized property can be solved in ways that do not unnecessarily limit the flow of creative works in the public domain. However, the Grateful Dead’s permissive approach to the distribution of creative works is not an isolated example. The authors highlight the growth of the Creative Commons (CC) since it began in 2003, noting that “over 1 billion creative works are now available under CC licenses on millions of websites” (2019, 125). Additionally, they mention the vast number of scholarly publications freely accessible in digital repositories hosted by universities. They urge lawmakers to “not screw things up by adopting stronger copyright rules that will inhibit rather than promote the progress of science, as the Constitution directs” (2019, 126). This plea, however, faces an uphill battle because over time copyright law developments have gone only in one direction: greater protection for copyright owners at the expense of the public domain.

Jaszi’s essay explicitly addresses this trend, crediting Barlow’s ideas for enabling us to see the public domain “less as a repository for disregarded cultural cast-offs and more as a rich mine of source material” (2019, 171). Highlighting the “potential value inherent in the unowned,” Jaszi notes that part of that value is the freedom to experiment (2019, 171; 172–73). Appreciating the value in the freedom to experiment is common ground for Barlow, Garcia, Grateful Dead scholars, and the authors of several essays in the Barlow symposium.

In “Dancing on the Grave of Copyright?”, Anupam Chander and Madhavi Sunder begin by noting that “Barlow was right about where the economy would go. He was wrong that intellectual property would not follow” (2019, 145). Barlow accurately predicted the move from an economy based on ownership to one based on service and/or experience. Eschewing Barlow’s bottle metaphor, the authors offer a “critique ... premised on the nature of art itself,” asserting that the commodification of experiences has resulted not only in the “enclosure of speech,” but also the “enclosure of cultural practices” that “has serious implications for humanity” (2019, 147). They provide several examples of intellectual property owners aggressively asserting rights over the creative works of

fans, including a pop-up bar in Chicago with a *Stranger Things* theme receiving a cease-and-desist letter from Netflix. According to Chander and Sunder, the expansion of rights to limit follow-on fan creations presents a “threat to fundamentally human activity, such as the ability to play, imagine, learn with others, and to reference the cultural works that shape our lives and societies” (2019, 148). Their view of the essential role that shared cultural creation plays in human life and community is consistent with the Dead’s inclusive ethos and what underlies Barlow’s two essays. Like Chander and Sunder, Barlow knew that shared cultural creation is essential to humanity. Thus, he sought to protect cyberspace from concentrated private and public power because such influences are impediments to collective creation.

Barlow understood the importance of community. In 1982, he noted that “very few people in this country come from a community in the first place. They come from a suburban area where you live in your house and the next guy lives in his. That’s being lost hand over fist as America becomes more suburban and less country-oriented” (Gans 2002, 177). Four years later, he warned that “America, for whatever reason—and corporate policy has a lot to do with it—is erasing the whole idea of community, and people need that desperately” (Gans 2002, 262). And he praised Deadheads for “pursuing the revolution” of community (Gans 2002, 265). Barlow framed the Dead’s project as answering that need: “A lot of what we are selling is community. That’s our main product; it’s not music” (Gilboa 1992, 18). Or, as Balter-Reitz once summarized Barlow’s view: “The process of owning and sharing music has a kind of secular ‘sacredness’ to it, a religious overtone that includes an ethical imperative to treat others and the band with respect” (Balter-Reitz 2015/2016, 50).

Spirituality and Oneness

Garcia cherished those moments at shows when “the whole room becomes one being” (Lydon 1990, 122), a remark that many fans embrace as pointing to the spiritual element of Dead concerts. Although spirituality was an integral part of Barlow’s life, this ethereal concept plays no role in the Barlow symposium. This section addresses that absence by showing that Barlow’s thought cannot be understood without some sense of the

role that spirituality played in his essays, advocacy, and his role with the Dead.

In a 1982 interview, Barlow commented that what he studied in college “was theology, as much as anything else” (Gans 2002, 169). In 1997, Barlow remarked that he did not believe in the soul until he met his fiancée, Cynthia Horner (Glass 1997), but he wrote in his autobiography that “very little about my life has not been a form of spiritual exploration” (2018, 72). His understanding of the Dead reflected that orientation, noting that “there’s something transcendent about the experience itself that probably causes people to get into a spiritual kind of relationship to it that they wouldn’t with a lot of other very fine bands” (Gans 2002, 176).

In 1986, Barlow described the Dead as a “very ill-defined religious phenomenon” that “has a lot to do with music on one level, but less and less the further up you go” (Gans 2002, 261). Phil Lesh expressed a similar sentiment when he described the Dead as “something close to religion ... in the sense of the actual communing” (Brightman 1998, 82). For Barlow, the core of that was art itself. In the “Next Economy of Ideas” (2000), Barlow articulated his “creed”: “Art is a relationship with the Holy.” Even legal scholars have noted that the “artist is merely a channel through which the art flows.” Inspiration links art and the law because both “Lawyers and artists share this connection with their work” (Lee 2005b, 867). Barlow realized the spiritual or religious aspect of the Dead soon after he began to work with the band.

Around 1973, he mused aloud to Robert Hunter that the Dead phenomenon was “turning into a cult, or a religion, or something.” After Hunter agreed, Barlow noted: “So far it doesn’t have any dogma, which makes it kind of OK as a religion ... it just doesn’t seem to have a belief system yet.” To which Hunter replied: “If it’s going to get a belief system, it’s going to be because of us. We will provide it” (Barlow 2012a, 21). Thus, from early on, the Dead’s two main lyricists envisioned their role as providing some sense of communal spirituality for the Dead experience through their lyrics. Stanley Spector has written about the role lyrics play in a spiritual context. In a comparative analysis of the philosophical concept of *ethos* in Plato, Nietzsche, and the Dead, Spector observes that “music has the power to affect character” (2013/2014, 35). Spector

emphasizes that there “is not one clearly defined Grateful Dead *ethos*, but a cluster of allusions and images” (2013/2014, 40). Rightly so. Those who have made claims of a singular Grateful Dead ethos have faced critiques for such a narrow understanding (Pelovitz 1999, 56). One example illustrating divergent ethea within Deaddom that is relevant to a discussion of cyberspace are the various reactions to the Internet Archive’s November 2005 decision to limit access to the Dead recordings they host (Burnett 2009). Yet Spector correctly identifies lyrics as exemplifying one ethos of the Dead (2013/2014, 41). Discussing Plato’s view of music, Spector notes that “music’s power is that it can move the soul ... [and both] mode and rhythm are subordinate to and supportive of lyrics” (2013/2014, 37). Contemporary research by cognitive and neuroscientists continues to support this ancient wisdom. Perhaps then it is no surprise that one essay from the *Bob Dylan and the Law* symposium explains “Why Law Needs Music.”

“Why Law Needs Music”

When band friend and occasional Grateful Dead lyricist Robert M. Petersen faced a felony charge for unlawful possession of a “narcotic” (i.e., marijuana) in 1966, he wrote a letter to the judge extolling the virtues of the US Constitution but deriding the legal system for destroying human freedom by prosecuting his case (Petersen 2001). Reflecting on his experience at the January 14, 1967, Great Human Be-In in Golden Gate Park, which occurred shortly after his arrest, he referred to the gathering as a place “to worship and rejoice at the perfect beauty of all things in creation ... [with the] unconquerable germ of love flowing everywhere, everything.” Lamenting the gulf between the law and society, he concluded: “And that day I thought that perhaps it is not we who are ahead, but you who are behind (2001, 29).

In her *Bob Dylan and the Law* symposium essay, “Why Law Needs Music,” Renee Newman Knake explains that music can influence and transform society in ways that often elude the law’s ability to do so, in part because of music’s staying power (Knake 2011). She offers Dylan’s song “The Lonesome Death of Hattie Carrol” as one example. William Zantzinger received a six-month sentence for killing Hattie Carrol, a black

server at a Baltimore Hotel. That brief jail time, however, was not the worst punishment Zantzinger faced. In an interview, Zantzinger claimed that the song ruined his reputation in ways the jail sentence never could (Knake 2011, 1316).

Music can even transform the law because of the way it weaves its indelible effects into the hearts and minds of listeners, a quality that statutes and court decisions generally lack. The Springsteen symposium also alludes to the idea that law needs music or poetry. Further, the Barlow symposium is a testament to the notion that law needs music, or at least someone who has deeply lived in both worlds. Finally, the concept that law needs music is not foreign to Grateful Dead studies, Barlow, Garcia, and others.

In reflecting on the 1960s, Garcia shared what he found most compelling from that era: “For me, the lame part of the Sixties was the political part, the social part. The real part was the spiritual part” (Goodman 1989, 73). Yet, even if Garcia “tended toward the apolitical,” as Dennis McNally put it (2012, 10), Melvin Backstrom contends that the “Dead represent one of the most significant attempts in the latter half of the twentieth century to fulfill John Dewey’s understanding of artistic experience as integral to the realization of an appropriate balance between collective power and individual freedom” (2019/2020, 35). Although Brightman’s book *Sweet Chaos* has been criticized for its “overly political interpretation,” it lends support to Backstrom’s view that the Dead were more political than commonly perceived (Meriwether and Weiner 2003, 74). Peter Richardson believes the Dead “displayed an uncanny ability to tap the nation’s inexhaustible and transformative utopian energies,” which “resembled Walt Whitman’s imaginary new breed of artists” who can affect politics more than traditional, direct approaches to political change (Richardson 2015/2016, 24; 24–25). As Richardson notes, “In reviewing youth-oriented social and political movements of the 1960s, American historians often distinguish between two groups that did not always play well together: political activists and hippies.” Harvard Law Professor Mark Tushnet (2021) recently discussed two events that speak to Richardson’s argument in his essay, “‘Rock ’n’ Roll’ and ‘Roll Over Beethoven’: Tom Stoppard and Critical Legal Studies.”

At Yale Law School, around 1969–70, students set up a type of commune in a courtyard between residential halls. Around the same time, Yale law professors David Trubek and Rick Abel started a reading group that was a “harbinger of what became critical legal studies.” According to Tushnet, “These two events can be taken as representative of alternative paths to social transformation—roughly, the cultural path and the path to change through self-consciously directed political action.” Garcia exemplified and expressed a preference for the cultural path. Barlow took both paths.

Barlow believed in effectuating social transformation through the power of the cultural path. In 1986, Barlow commented, “What the Grateful Dead does is work on consciousness, which is the best way to approach politics anyway. You change consciousness, and politics will take care of itself” (Gans 2002, 26). This view is consistent with Barlow’s general approach to writing lyrics for the Dead. While Hunter and Barlow made a conscious effort to help shape the “religion” of the Dead through their lyrics, they also agreed to “never write anything that could be easily taken as dogma” (Barlow 2012, 21). “Throwing Stones” notwithstanding, Barlow was correct when he concluded that “you will find very little preaching in our songs—*very* little.” Thus, Barlow’s (and Hunter’s) contributions to the Dead are quintessential examples of creators knowing that law needs music because music exercises a transformative effect on individuals and groups in ways that law or dogmatic religion often cannot achieve. Of course, Barlow’s role in effectuating social transformation is not limited to his lyrical contributions to the Dead, as his cofounding of the EFF makes clear.

Conclusion

Barlow has been variously described as an “internet evangelist,” “cyberpundit,” “peripatetic futurist,” “political activist,” and an “early thinker on the metaphysics of the Internet” (Richards and King 2013, 45; Aoki 1998, 452; Aoki 1996, 1306; Kow and Nardi 2012, 677; Tapia 2019, 1165). Barlow was more modest, calling Mitch Kapor and himself the “Laurel and Hardy of cyberspace” (Barlow with Greenfield 2018, 182). However one characterizes him, what remains clear is Barlow’s impact

on internet law and legal thought. As Boyle notes, “for many of us, these essays started a conversation” (2019a, 3). That conversation continues today.

The word “virus” tends to carry a negative connotation. But when Barlow wrote about the “virus of liberty” in the “Declaration,” it was more than just an example of poetic license. He used the term as a metaphor for the power of the internet, or cyberspace, to help democratize the world by empowering humanity’s individual and collective freedom. As he explained almost two decades after writing the “Declaration,” he “predicted Utopia, hoping to give Liberty a running start” in cyberspace. The virus Barlow references can be understood as a type of computer virus borne of humanity and the nature of information that seeks to immunize cyberspace from “Governments of the Industrial World.” Merriam-Webster’s definition of “virus” includes the variant, “a computer program that is usually disguised as an innocuous program or file, that often produces copies of itself and inserts them into other programs, and that when run *usually* performs a malicious action (such as destroying data or damaging software)” (emphasis added). Barlow believed in the potential of new communications technology to improve information flows and thereby better allow the nature of information to flourish.

Although Barlow provides an appealing and positive vision, not everyone shares this view. Julie Cohen calls this understanding of technologically enabled information flows “deeply ahistorical.” Further, the past few decades of the internet era show that the Golden Rule vision of cyberspace is not a reality. Ransomware, revenge porn, and mass-scale manipulation for profit that results in widespread election disinformation are just a few glaring examples that show there is a place for law in cyberspace. Paraphrasing Cohen, a role for law in cyberspace is practically inevitable. Yet Barlow thoughtfully chose to lend his voice to those who might be oppressed by the government or corporate actors.

Not only did Barlow lend his voice, he did so successfully in two ways. First, through his lyrics, he helped create a powerful cultural path for social transformation. Both his and Hunter’s lyrics continue to inspire the lives of countless individuals through recordings, live concerts by many bands, and other ways. Second, his cofounding of the EFF is a clear

example of Barlow pursuing the traditional path for social change by working within institutional structures. The EFF continues to be a strong advocate for the principles underlying the “Declaration” and “Selling Wine Without Bottles.” Cindy Cohn credits Barlow’s early focus on government power as one reason why we are better off than we might have been without his foresight and direct legal action (Cohn 2019, 72).

Barlow’s two essays could each be viewed as paradoxical. From one perspective, the *Declaration* makes the provocative and unrealistic claim that the online world is immune from government authority. Similarly, “Selling Wine Without Bottles” makes an unrealistic prediction that copyright law will not survive the transition from physical to digital copies. In both instances, Barlow missed the mark about the future of so-called cyberspace. But this perspective is incomplete, at best.

In “Selling Wine Without Bottles,” Barlow acknowledged that “Laws developed prior to consensus usually serve the already established few who can get them passed and not society as whole.” This admission undercuts his claim that copyright law will collapse. He knew the law to be a powerful tool to protect the powerful few. Law often adapts to protect status quo powers. In the context of racial and gender discrimination, legal scholar Reva Siegel coined the phrase “preservation-through-transformation” to describe how the law preserves existing inequality through “changes in rule structure and justificatory rhetoric” (1997, 1112; 1113). Barlow sought to help dismantle this broken paradigm in the context of copyright law and the regulation of cyberspace more generally. In the words of Zittrain, “one of [Barlow’s] talents in writing about new technologies was to flip our conception of the status quo in order to correct it.” This perspective is consonant with Barlow’s view that he wrote the “Declaration” because “a good way to invent the future is to predict it.”

So what is one to make of his bold claims and failed predictions? The most eloquent line of Cohn’s essay is when she compares Barlow’s and her approaches for achieving the same goal: protecting individuals and society from oppressive government and corporate power. “In retrospect, we both had useful strategies for convincing different audiences to protect freedom online,” she reflects. “It’s just that I aimed for the Supreme Court while Barlow aimed for the sky” (2019, 71). No wonder

Barlow commented in his *This American Life* interview that “I really feel like the stratosphere is my church” (Glass 1997).

That offers an insight into the Barlow paradox. After all, words are the tools of the poet and lawyer alike, as the Springsteen symposium noted, identifying several former poets turned lawyers (Lee 2005a, 725; 867). While Barlow was not a lawyer, he was no stranger to the law, and he could very easily be classified as poet. Barlow used his words in both the legal and artistic realms to inspire and help effectuate change. If his poetic language did not always translate well to the staid world of the language of law, then it is a reminder that poets speak differently than legal scholars, and Barlow’s critics may have taken his artistic license too literally.

Barlow foresaw the risks posed by digital communication technology, as well as the opportunities it afforded. He chose to focus on hope, even in the face of despair. The introduction to the *Bob Dylan and the Law* symposium makes a very similar point, calling Dylan’s works an expression of his refusal to surrender or despair (Levine 2011, 1278). Hope and despair are also central themes in the Bruce Springsteen symposium; all of these forums link the roles of lawyers and poets (Lee 2005a, 719; 725; Lee 2005b, 867; 871–72).

In his 1994 eulogy for his fiancée Cynthia Horner, Barlow remarked that “All hope has at times seemed unjustified to me. But groundless hope, like unconditional love, is the only kind worth having. Its true name is faith” (Barlow with Greenfield 2018, 212). In the context of suffering the incalculable pain of unexpectedly losing a loved one, Barlow’s sentiment also gets at the underlying purpose of his two essays. There he sought to provide hope for the future of cyberspace and for humanity in general, even if at times that hope seems unjustified.

In that light, resolving the Barlow paradox is easy. Barlow approached life with groundless hope. He did so in his role as a writer, lyricist, and thinker, both in his work with the Grateful Dead and with the EFF. His belief in groundless hope informs the two essays that served as the foundation for the Barlow symposium. That belief is as much a part of what makes Barlow worthy of study as his ideas. The challenge of those ideas has endured, but so has the belief that drove him to predict the

future by inventing it. His legacy should inspire others to engage both the cultural and political paths with “groundless hope,” because protecting the “inexplicable pleasures of information itself” from enclosure by private and public actors requires collective action. The future is here, indeed.

NOTES

1. The essay in the *Duke Law and Technology Review* issue reprinted the version published on the EFF website and uses that title, “Selling Wine Without Bottles: The Economy of the Mind on the Global Net.” According to Barlow, the essay has been variously titled “The Economy of Ideas”, “Wine Without Bottles”, and “Everything You Know About Intellectual Property Is Wrong” (Barlow with Greenfield 2018, 183).
2. Westlaw database, “Secondary Sources: Law Reviews & Journals”, using the Boolean search terms: “(“John Barlow” or “John Perry Barlow” or “John P. Barlow”) & (Declaration /s Independence /s Cyberspace)”, conducted October 4, 2021. Results on file with author.
3. This doctrine continues to inform legal thought today (cf. Coffee 1981). Garcia understood the Grateful Dead’s corporate form in similar terms. In a 1980 internal business report, Garcia referred to the band’s corporate form as a “legal fiction, not a working reality” (Lesh 2005, 258).
4. Quotes taken from the epigraph to “Selling Wine Without Bottles.” For the original letter from Thomas Jefferson Letter to Isaac McPherson, August 13, 1813, see National Archives, <https://founders.archives.gov/documents/Jefferson/03-06-02-0322>.
5. Cindy Cohn discusses this exchange (2019, 70–71). For the original *Washington Post* article, see Silverman 2015a; the book from which it is derived is Silverman 2015b. Barlow’s response appeared two days later (Barlow 2015).

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