

Cyberspace Must Exceed Its Grasp, or What's a Metaphor? Tropes, Trips and Stumbles on the Info Highway

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[A] rule of law should not be drawn from a figure of speech.

Justice Stanley Reed¹

INTRODUCTION

If Justice Reed had been writing today about copyright on the Internet, rather than half a century ago about education, he might have observed, similarly, that a rule of law should not be *withdrawn* because of a figure of speech. And yet, the often-heard argument that the law of copyright should be withdrawn with respect to the Internet rests precisely on an overly-literal interpretation of the figures of speech surrounding digital communication.

As the Internet increases in popularity and importance we hear everywhere around us claims that copyright law no longer "works" and should be radically reformed or abandoned altogether. Typical of these claims are the sentiments expressed by Ithiel de Sola Pool:

Established notions about copyright become obsolete, rooted as they are in the technology of print. The recognition of a copyright and the practice of paying royalties emerged with the printing press. With the arrival of electronic reproduction, these practices become unworkable. Electronic publishing is analogous not so much to the print shop of the eighteenth century as to word-of-mouth communication, to which copyright was never applied.²

This of course is like saying that because the law "Thou shalt not kill" arose in an era of clubs, knives, and spears, it should be obsolete now that we have guns, nuclear bombs, and intercontinental missiles. The de Sola Pool argument, which looks so reasonable and intellectually

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1. *McCollum v. Board of Education*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

2. ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 214 (1983).

insightful on its face, actually is an assertion that once it becomes easy to harm someone, it should no longer be unlawful to do so.

The truth is, however, that the development of a technological environment in which it is easier to violate others' rights makes protection of those rights more important, and arguably more difficult, not "obsolete." Internet libertarians, policy theorists of the Electronic Frontier Foundation, and others who make the claim that the law of copyright "will not work in cyberspace" have allowed their thinking to become muddled by treating figures of speech as if they were literal truth.

In this Essay, I will focus on three such metaphors, and show briefly how the arguments that copyright law is "unworkable" in the Internet context are based on a misreading of these metaphors. The first metaphor is the use of the term "cyberspace" to apply to the Internet; the second is the tendency to describe Internet communication as "going" somewhere. Both of these metaphors mistakenly suggest a space in which enforcement—and, indeed, violation—of any law is impossible. The third metaphor is the "wine and bottles" analogy, set forth by John Perry Barlow³ in his widely circulated article, "The Economy of Ideas,"⁴ to show the alleged inapplicability of copyright law to digital communications. This metaphor seems crafted to support an anticopyright argument that deliberately overlooks the very essence of what copyright law actually protects—not ideas, and not specific media of communication, but the original expression of authors.⁵

I. IN CYBERSPACE, EVERYONE CAN HEAR YOU SCREAM

The first of the three metaphors, "cyberspace," suggests a nonexistent space in which enforcement of the law is impossible. It is generally accepted that the term "cyberspace" was coined by science fiction writer William Gibson in his groundbreaking novel *Neuromancer*.⁶ What is not as widely acknowledged is that the term is

3. John Perry Barlow is a rancher, a songwriter, a futurist, and one of the foremost spokesmen of the Electronic Frontier Foundation.

4. John Perry Barlow, *Wired 2.03: The Economy of Ideas* (visited Mar. 26, 1997) <<http://www.hotwired.com/wired/2.03/features/economy.ideas.html>>.

5. See U.S. CONST. art. 1, § 8, cl. 8.

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Id.

6. WILLIAM GIBSON, *NEUROMANCER* 51 (1984).

deliberately metaphoric. Gibson used the term "cyberspace" to describe a futuristic information environment in which actual and artificial intelligence are indistinguishable, and human organisms can be wired to hardware that enables the organisms to access and communicate directly with one another.⁷

As amazing as the Internet is, it falls somewhat short of this fanciful vision. More to the point, while it is literally dazzling for Gibson to portray his novel's information network as a kind of "space," it is neither accurate nor particularly helpful to regard the Internet as "cyberspace."

The Internet is not a place, it is a medium. The term "Internet" identifies a means by which a computer may communicate and exchange information with many others. This information exchange does not occur in some mythic realm called "cyberspace;" nor, as some maintain, in an artificial existence known as "virtual reality." It occurs in the same familiar earthbound social context as do the exchange of mail, radio and television signals, and phone calls.

Given the current overuse of the word "virtual" in the Internet context, it is worth remembering what "virtual" really means, if only to clarify what it is that people who use the term "virtual reality" may fail to understand. Some years ago a popular dishwashing detergent's advertising campaign boasted that it "leaves dishes virtually spotless." This apparently had an appealing ring to the company, its ad agency, and its customers, perhaps because it resonated with a metaphoric association between "virtue" and spotlessness. But the ring went sour when someone pointed out that "virtually spotless" meant that some spots were left on the dishes!

That's because "virtual" means "almost but not quite."⁸ "Virtual reality" is not reality, but is supposed to be enough like reality to be mistaken for it; even though virtual reality is an image, an illusion.

Why is this important? Because the argument that copyright is "unworkable in cyberspace" proceeds from the self-contradictory assumption that "cyberspace" both is and is not a place. If it is truly "virtual," then it is not real, and thus does not exist. Yet if it is "cyberspace," it is by definition "space," and thus exists as a place. In fact, the digital transfer of information via the Internet takes place neither in a nonexistent realm nor in a "space" apart from the so-called

7. *Id.*

8. One definition of virtual is "being such in power, force, or effect, though not actually or expressly such." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2125 (2d ed. 1987). Virtually is defined as "for the most part; almost wholly; just about." *Id.*

"real world." We may use spatial metaphors for convenience in describing the Internet experience, but the Internet, as previously noted, is not a place, but a medium. Similarly, the World Wide Web, Usenet and E-mail are not "parts" or "areas" of the Internet—they are simply different ways of using it.

The oft-heard argument that intellectual property law does not apply in cyberspace because cyberspace is not "the real world" is absurd.⁹ When we exchange information via the Internet, we do not "visit" some "other world," any more than we do when we make a telephone call or watch television. The digital exchange does not occur in some "other place," any more than a telephone call between people in two different parts of the world can be said to escape real world law (and jurisdiction) altogether.

In an effort to justify his approach to Internet communication as taking place in a "new world," futurist John Perry Barlow explains his affinity for using the term "frontier":

Indeed, one of the aspects of the electronic frontier which I have always found most appealing—and the reason Mitch Kapor and I used that phrase in naming our foundation—is the degree to which it resembles the 19th-Century American West in its natural preference for social devices that emerge from its conditions rather than those which are imposed from the outside.¹⁰

But the very concept of "outside" is meaningful only if one takes literally the purely metaphoric proposition that the "electronic frontier" is a *place*. If the metaphor is not taken literally, the electronic frontier is seen for what it actually is: a new, technologically enhanced way of performing very old tasks and reaffirming very old relationships that are still governed and controlled by the fundamental principles of behavior embodied in what we call law.

The truth is, no technology yet developed has been so new, so different, as to suspend the rules of behavior, and the sense of place on which those rules depend. The rules may have to be refined, redefined, and applied in new ways, but we should not throw out the baby of law with the bathwater of outdated technology—not if we believe that the rule of law and what it stands for are more than a passing fad.

9. See Barlow, *supra* note 4.

10. *Id.*

II. DO YOU WANT TO STAY HOME TODAY?

The second of the three metaphors, "traveling," is used to describe the experience of using the Internet and is closely tied to the mistaken notion that the Internet is a "place." Microsoft's slogan, "Where do you want to go today?" notwithstanding, anyone who has used the Internet knows that you do not "go" anywhere when you use it, any more than you do when you watch television or make a phone call. The very phrase "on the Internet" is a misnomer. We do not "go on the Internet"—we *use* the Internet. Nevertheless, taking too literally the image of an "Information Superhighway," people have embraced the idea of "surfing" the net, "visiting" a Web "site," or "going to" a bulletin board or "chat room."

I am not suggesting that there is anything wrong with using metaphors to describe the Internet experience. Such expressions color and enrich our language. Even when they are iterated as if they were literal truth rather than metaphoric description, little harm is done. When such iteration, however, is held out as the basis for an overhaul, if not a complete discarding, of our law of intellectual property, then colorful expressions turn dark and dangerous.

The person who takes literally the idea of "visiting a Web site" comes to think of Internet access as a way of *looking at* someone else's files. In fact, Internet access is a way of *copying* someone else's files, keeping the copies for yourself, and even distributing them to others, possibly after adding your own significant (and possibly misleading) alterations. The difference between looking and copying, and the implications of that difference for copyright law are easily discernible.¹¹

Once the Internet is viewed as a medium, rather than a place, the question arises whether and to what extent the Internet should be subject to governmental regulation. Unlike the question of whether pre-existing principles of statutory and common law should apply to the behavior of Internet users, the question of governmental regulation

11. I leave aside, as beyond the scope of this Essay, the objection that a Web site owner invites copying by virtue of having established such a site. That fact does not eviscerate copyright law in the Internet context any more than the fact that one has to make a copy of a software application in order to use it has destroyed copyright in the software context. It merely dictates the use, with Web files, of clarifying licensing language similar to that employed in software marketing.

turns on whether the Internet is a communication medium, a broadcast medium, or a publishing medium.¹²

The general consensus at this juncture is that the Internet is a publishing medium.¹³ If this is the proper view of the Internet, then it is a two-edged sword: it immunizes the Internet from all but the most narrowly-tailored regulatory restraints, but it reaffirms the necessary reach of copyright law. Copyright law was never a means of protecting authors from their public;¹⁴ rather, it was a means of protecting authorized publishers from being ripped off by unauthorized publishers.¹⁵

This fundamental conception has not changed, but it has necessarily taken on new meaning now that everyone can be a publisher. For example: Professor Pamela Samuelson argued that the First Sale Doctrine¹⁶ should apply in permitting the redistribution of a copyrighted work by Internet without violating copyright law.¹⁷ This disingenuous suggestion overlooks the fact that under the First

12. Interestingly, would-be regulators of the Internet have not allowed themselves to be sidetracked by the red-herring issues of whether the Internet is a place or whether using the Internet is a kind of travel.

13. See, e.g., *ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996) ("The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be 'published' on the Web.").

14. Indeed, it is not so conceived today, as evidenced in the substantial body of law interpreting and applying the "fair use" principles, a subject beyond the scope of this essay. See, e.g., 17 U.S.C. § 107 (1996).

§ 107. Limitations on exclusive rights: Fair use

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

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

15. 17 U.S.C. §§ 106, 106A (1996).

16. 17 U.S.C. § 109 (1996).

17. Pamela Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 RUTGERS COMPUTER & TECH. L.J. 323, 331 (1990).

Sale Doctrine you do not get to give away your copy and keep it too,¹⁸ whereas in digitally transferring a legally-acquired electronic copy, that is exactly what you are doing—and what the person to whom you “give” your “copy” is doing, along with everyone to whom that person gives a copy, *ad infinitum*.

Arguments like those posed by Mr. Barlow and Professor Samuelson are meaningful only if one takes literally the metaphor of the Internet as a “place” in and to which one “travels.” Once we remind ourselves that it is simply a medium for the transfer of information between real human beings in real jurisdictions with real relationships governed by real laws, the notion of a copyright-free Internet melts into absurdity. There is no better way of seeing this than by looking, with fresh eyes, at Mr. Barlow’s widely quoted article on the subject.

III. OLD BOTTLES, OLDER WINE

John Perry Barlow’s oft-cited article “The Economy of Ideas”¹⁹ proceeds from a fundamental misapplication of metaphor. Mr. Barlow notes that, under intellectual property law, “One didn’t get paid for ideas but for the ability to deliver them into reality. For all practical purposes, the value was in the conveyance and not the thought conveyed.”²⁰ From this, Mr. Barlow concludes that, “In other words, the bottle was protected, not the wine.”²¹

This is nonsense and you do not have to be a copyright lawyer to see it. Mr. Barlow has loaded the dice in favor of his position by ignoring what the law and common sense tell us about the nature of authorship. He is correct that one does not get paid for ideas. It is a fundamental precept of copyright law that ideas are not protectable.²² However, from this precept, Mr. Barlow jumps to the conclusion that it is the “bottle”—the “conveyance”—that is protected.²³ What he has left out altogether is the *expression*—the very thing that comprises

18. 17 U.S.C. § 109(b) (1996).

19. Barlow, *supra* note 4.

20. *Id.*

21. *Id.*

22. 17 U.S.C. § 102(b) (1996) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”).

23. See Barlow, *supra* note 4. “Additionally complicating the matter is the fact that along with the disappearance of the physical bottles in which intellectual property protection has resided, digital technology is also erasing the legal jurisdictions of the physical world and replacing them with the unbounded and perhaps permanently lawless waves of cyberspace.” *Id.*

authorship and that copyright law specifically protects.²⁴ Ironically, Mr. Barlow misunderstands his own metaphor. In the wine-bottle analogy, the wine in the bottle is not the unprotectable "idea" but the protected *work*.

Mr. Barlow's reasoning goes something like this: Because you cannot protect an idea, the only thing you can protect is the physical method of conveying that idea—be it a compact disk, a printed and bound book, a framed reproduction or whatever.²⁵ Since the digital transfer of information by the Internet is arguably not a physical conveyance, Mr. Barlow claims that copyright law is obsolete and inapplicable to the Internet; thus, presumably, there can be no infringement in the Internet context, and everything becomes free.²⁶ The proposition that nothing physical is transferred in digital communication may be alarming to those of us who always thought that electrons were physical (extremely tiny, but physical nonetheless).

Mr. Barlow was no doubt pleased to see the recent Georgia decision in which the court held that a faxed contract did not qualify as a "writing" because a fax is "a series of beeps and chirps along a telephone line . . . an audio signal via a telephone line containing information from which a writing may be accurately duplicated" but not a writing itself.²⁷ This is exactly like saying that an unauthorized publication of the latest Tom Clancy bestseller was not an infringement because it was merely specks of ink on paper.

Copyright law has never purported to protect "the bottles"—the CDs, floppies, books, prints or pictures—but rather the *original expression*²⁸ embodied therein. Mr. Barlow's fundamental error is assuming that intellectual property protection is tied to material objects in the material world and therefore cannot apply in the Internet context, where the definition of materiality begins to break down. In fact, however, intellectual property law has always concerned itself with

24. 17 U.S.C. § 102(a) (1996) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of *expression* . . .") (emphasis added).

25. See Barlow, *supra* note 4. Barlow asserts that:

Even the physical/digital bottles to which we've become accustomed—floppy disks, CD-ROMs, and other discrete, shrink-wrapped bit packages—will disappear as all computers jack-in to the global net . . . once that has happened, all goods of the Information Age . . . will exist either as pure thought . . . that one might behold in effect . . . but never touch or claim to "own" in the old sense of the word.

Id.

26. See Barlow, *supra* note 4.

27. Georgia Dep't of Transp. v. Norris, 474 S.E.2d 216 (Ga. Ct. App. 1996).

28. See *supra* note 24 and accompanying text.

the immaterial, purporting to protect precisely such intangibles as "authorship," "originality" and "expression"—and *not* whatever "bottles" they happen to come in.

Mr. Barlow is right that ideas themselves have no commercial value. That is one reason they are unprotected. But CDs, floppies, books and pictures are not the containers of mere unprotectable ideas; they are containers of protected *expression*. Mr. Barlow has left out the original work itself, the only actual subject of copyright.

To be applicable, Mr. Barlow's analogy would have to allow for *three* elements—the idea, the expression, and the medium. Instead, Mr. Barlow gives us only "wine" and "bottle," which he equates to idea and medium, respectively. As an example, consider the novel *Jaws*, by Peter Benchley. The *idea* of *Jaws* might be identified as "obsessed guy goes to sea to do battle to the death with a big sea creature." Copyright law does not protect that idea—or *any* mere idea—because it is general and ought to be available for others to use.²⁹ The medium of the novel *Jaws* may vary: ink on paper, a tape-recorded vocal reading, or coded digital signals. Copyright law does not protect such material media; it protects the expressive work those media contain—the specific sequence of words that Peter Benchley wrote in *Jaws*.

Now if we go back to Mr. Barlow's "wine-bottle" analogy, the bottles are the books, tapes, or CDs containing *Jaws*. But the wine is not the unprotectable, general "idea"; it is the specific, protectable work of authorship, *Jaws*. Indeed, in the actual wine business, the wine in each bottle is a particular, unique expression of some more general "idea" such as "a dry claret," "a pinot grigio," or "a sparkling rosé."

In identifying the "wine" in his analogy as unprotected ideas, Mr. Barlow has left protectable expression out of the equation. He would like us to conclude that, once it is *possible* to transmit and view *Jaws* without the cumbersome inconvenience of a printed book, a role of film, an audiotape, a videotape, or a compact disk, it will be *permissible* to do so. This is yet another expression of the notion that once it becomes easy to take something that does not belong to us, we should all be allowed to do so—as if law embodied nothing more than the moral fashion of the moment.

29. Indeed, the "idea" of *Jaws* can also be found in Hemingway's *The Old Man and the Sea*, in Melville's *Moby Dick*, and in parts of Collodi's *Pinocchio* and the Old Testament Book of Jonah.

Digital communication via the Internet means we may no longer have to pay a CD manufacturer and distributor, or a book publisher and a bookstore, for the "bottles" in which the work is conveyed. But that does not mean that the work itself no longer has value, or that the author should not be compensated for his effort. Unlike a bottle, expression is not just a container for an idea. A work of original authorship refines, elucidates, and transforms the fundamental unprotected idea, makes it something people *want*—for entertainment, education, information, or whatever purpose. The wine is what people want. A bottle is just a way of getting it home without spilling it.

Mr. Barlow's "wine-bottle" analogy suggests that people buy, for example, CDs for the ideas they contain, and that once the CDs are no longer necessary, the remaining ideas should be free because they are not the proper subject of copyright. He leaves out the music itself, the original expressive work that people really *want* when they buy that CD. People listen to music, not ideas.

That is why the invention of phonorecording had, over time, an impact on the market for live music, but not on the market for music itself. Audiocassettes damaged the market for LPs, and CDs destroyed it altogether; but neither of these innovations harmed the market for music. Forms of music come and go; the music itself is what people want to buy. If the appearance of new containers does not change the fundamental principles of copyright law, then neither should the disappearance of containers altogether, because the containers have never been the object of intellectual property protection.

In a particularly reckless use of terminology, Mr. Barlow writes: "Freed of its containers, information is obviously not a thing."³⁰ His use of the term "freed" calls to mind a maxim often misattributed to Mr. Barlow himself, that "Information wants to be free." Mr. Barlow is quick to reattribute the statement to Stewart Brand,³¹ but is less quick to acknowledge that the term "free" in Mr. Brand's context meant "available without restriction," *not* "available at no cost."

As an indication of what norm he expects to replace the rule of law with, Mr. Barlow refers us to oral culture: "But soon most information will be generated collaboratively by the cyber-tribal hunter-gatherers of cyberspace."³² Once again he is on the trail of the wrong metaphor. Similar to de Sola Pool, Barlow embraces the notion

30. This is not obvious at all, unless Mr. Barlow subscribes to a much more restricted definition of "thing" than the rest of us.

31. Barlow, *supra* note 4.

32. *Id.*

that Internet communication is more like an exchange of oral rather than printed information, without ever seeming to notice that the information being exchanged is in printed words and graphics. The fact that those words and images appear evanescently on a screen rather than permanently on a printed page in no way changes their fundamental nature. Internet communication is, quite simply, a print medium. As long as the ideas we share with one another through Internet are manifested predominantly in visible alphanumeric strings that have linguistic meaning, this will continue to be true, and Internet culture will remain much closer to the print world of Gutenberg than to the oral culture of Homer.

Because Mr. Barlow grounds his argument in the misconception that communication consists only of "ideas" and "containers," and omits the all-important "works of original authorship," his conclusion that copyright law does not apply to Internet communications is not to be trusted.

IV. CONCLUSION

The satirical American novelist Kurt Vonnegut Jr. boasted that *Mother Night* was the only novel he wrote whose moral he knew. The moral is: "We are what we pretend to be, so we must be careful about what we pretend to be."³³ If, for the purposes of the application of traditional law and the principles that underlie it, the Internet is what we pretend it is, then we must be *very* careful about what we pretend it is.

33. KURT VONNEGUT, JR., *MOTHER NIGHT* at v (1961).