



FEDERALLY SPEAKING



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Prior columns and Compilation Issues are available on the U.S. District Court, WDPA, website:

<http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>.

WIT & WISDOM

FLYSPECKING. Previously we have observed that, while to some of our readers certain of **Federally Speaking's** news items “may appear to be incredible or incredulous,” in reporting on the **Federal** legal scene, in the words of *Will Rogers*, we “don't make jokes,” we “just watch the government and report the facts.” [17] If the antics reported upon do incur some levity, *Victor Borge* reminds us that perhaps we are engaging in the most effective form of communication as he advises: “Laughter is the shortest distance between two people.” At least one member of the Federal Judiciary, *U.S District Court Magistrate Judge Stephen L. Crocker*, would appear to agree, as shown in his recent erudite opinion in *Hyperphrase v. Microsoft*, No. 02-C-647-C (WD Wisc, July 1, 2003), where he responded to a violation of his formal **Anti-Flyspecking Order**. It seems that that perennial “bad boy” Microsoft, in e-filing its **Summary Judgment** motion, failed to comply with the **Scheduling Order** and midnight “e-filing” deadline rule. “In a scandalous affront to the court's deadlines, Microsoft did not file its **Summary Judgment** motion until 12:04:27 a.m. on June 26, 2003, with some supporting documents trickling in as late as 1:11:15 a.m. ... Microsoft's insouciance so flustered Hyperphrase that nine of its attorneys [all then individually named by Judge Crocker] ... promptly filed a motion to strike the **Summary Judgment** motion as untimely. *Counsel used bold italics to make their point*, a clear sign of grievous iniquity by one's foe” [emphasis added]. The Court, however, distaining such “flyspecking,” showed mercy: “Wounded though this court may be by Microsoft's four minute and twenty-seven second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow Hyperphrase on some future occasion in this case to e-file a motion four minutes and *thirty* seconds late, with supporting documents to follow up to *seventy-two* minutes later [emphasis *not* added]. Having spent more than that amount of time on Hyperphrase's motion, it is now time to move on to the other Gordian problems confronting this court. Plaintiff's motion to strike is denied.” Judge

Crocker, in addition to leaving Hyperphrase “crooked up” and “hyper” and “phraseless,” has perhaps, indeed, shortened the communications gap for the remainder of these proceedings. [32]

FED-POURRI™

WHISTLING “SECRET SQUIRREL” UNCAGED! Did you know a squirrel could whistle? “Secret Squirrel ... maliciously bombarded the computer system of an El Segundo computer messaging company [Tornado Development Inc.] with thousands of email messages,” or so asserted the March 25, 2003 Press Release of the **U.S. Department of Justice**, for which Secret Squirrel was squirreled away in 2002 for “16 months in federal prison ... under the ‘**Computer Fraud and Abuse Act**’,” and was required to submit “to unannounced searches of his computers, to advise future employers about this conviction and ... to receive psychological counseling.” Secret Squirrel is the computer handle of Bret McDanel. Now, in response to McDanel’s post-incarceration appeal on **First Amendment** grounds and on grounds of lack of “intent” to “maliciously bombarded the computer system” by e-mailing warnings of security flaws, the **DOJ** has deleted this **Press Release** and “confessed error” in this case to the **U.S Ninth Circuit Court of Appeals**, admitting that it had no proof that McDanel intended to impair the integrity of Tornado’s system, and asking the **Ninth Circuit** to reverse the Secret Squirrel’s conviction. The **Computer Fraud and Abuse Act** makes it criminal to “knowingly cause the transmission of information and as a result of such conduct, intentionally cause any impairment to the integrity or availability of data, a program, a system, or information without authorization,” and is meant to punish those who intend to disrupt computer systems through the introduction of computer viruses, Trojan horses, mail bombs, and the like. Here, apparently, the **Feds** went “nuts” in their whirlwind desire to cage Tornado’s whining whistling Secret Squirrel. Reportedly, the **Assistant U.S. Attorney** “confessing error,” has acknowledged that this prosecution occurred because the whistleblowing McDanel had engaged in “three e-mail attacks” for the purpose of warning customers that hackers could get into Tornado’s computer system, and doing so only after McDanel asked Tornado to fix the system, “but Tornado declined to do so,” which resulted in Tornado’s system crashing and “caused \$5,000 in loss.” It has been suggested that cards be printed for all **Federal prosecutors** reminding them that: “*Whistleblowing good! Whistle-Quelching and Cover-Ups bad!*” [34]

ASHCOFT ATTACKS SPCA IN WDPA. The Western District of Pennsylvania (WDPA) has yet another claim to fame. It has been chosen as U.S. Attorney General John Ashcroft’s kick-off venue for the government’s latest **War**. Not the **War On Saddam**, or the **War On Terrorism**, or the **War On Drugs**, or the **War On Child Pornography**, but the **War On Sexual Portrayals by Consenting Adults (SPCA)**. His office in WDPA recently obtaining a 10-count indictment against Robert Zicari (a/k/a Rob Black) and Janet Romano (a/k/a Lizzie Borden), owners of the Extreme Associates website. It is reported that the **SPCA** battle plans were on the drawing board before 9-11, but that unfortunate and untimely tragedy, and intervening and intertwined **Wars Against Terrorism and Saddam**, delayed the first **SPCA** barrage being fired until now. But true to his original agenda, from his **SPCA War Command Post** high atop the “**Spirit of Justice**” and “her ‘exposed right mammary’” in the **U.S. Justice Department Rotunda** [13], he appears to have now commanded, as Shakespeare’s Mark Antony had: “**Cry havoc! And let slip the dogs of war**” on **SPCA**’s throughout the land. Apparently, all of the other **Wars** are sufficiently “won” or under control, and there is sufficient **compelling Federal government interest** here, so that another battle front needed to be opened and scarce resources, that would not be better utilized fighting the already blazing other “good fights,” needed to be allocated to its prosecution (previously the **Feds** had “**let sleeping dogs lie**” on this front for over a decade). Cleverly, the battle was not joined in LA where defendants abide; where presumably at least some of the male and female mail and Internet customers also

resided; and from where the materials showing the consenting adults consensually doing the allegedly illicit consensual acts were broadcast and/or distributed. The apparent test of legality being “**community standards**,” did the AG fear LA’s standards were not puritanical enough for him? And by the bye, if the test is and does remain **community standards**, whose standards are to apply? The **SPCA’s** were distributed from LA and received not only in WDPA, but also over the Internet, *everywhere else in the world* including LA, London and Lisbon. But presumably they were not intended to be seen or actually seen in public theaters anywhere. They were viewed in private on “Boob Tubes” (pun intended), or in the privacy of one’s own abode. So is or should the “**community standards**” be those of LA, WDPA, NYC, the Internet generally (porn being the Internet’s biggest business and a driving force behind the technological development of the Internet), the community of viewers who access the Extreme Associates website, each viewer’s own home, or, per chance, the Earl of Ash’s croft? Then too, questions of **constitutionally protected free speech**, and the ramifications of the recent **U.S. Supreme Court** decision overturning the **Child Pornography Prevention Act of 1996** (*Ashcroft v. The Free Speech Coalition*, 535 U. S. 234 (2002)), will have to be battled over. All in all, while we do not know if any dogs appeared in the **SPCA’s** under attack, the **Feds** seems to be taking on dogs of cases. But, isn’t it common wisdom that it is best to continue to “**let sleeping dogs lie?**” [32]

“CAN THE HAM – NO SPAM?” In **Pennsylvania** we have had the “no call list” law in effect for a while now to protect us from **Telephonic Spam**. No unwanted calls during dinner, after dinner or before dinner! It works and it’s great! Fifty-one million households have now, in effect, posted through the **Federal Trade Commission** “No Trespassing” notices on their private telephones. While, apparently, the **FTC** did not have authority to collect or post such notices at first, **Congress** with unbelievable speed has fixed that. Now, another **Federal Judge** tells us that this program violates the **First Amendment** as being unequally applied. You all know your columnist is a great supporter of the **First Amendment** and **free speech**. Without it you probably would not be reading this column. But you can also properly post your private property to selectively deny access to your yard, doors or windows, to undesirable pamphleteers or others who may disturb your quiet enjoyment of your private property. Sure the **U.S. Supreme Court** has recently held that local government cannot do so, at least with regard to non-commercial speech, but you as a private individual surely can. In most jurisdictions trespassing is a crime called, strangely enough, “**criminal trespass**,” which normally occurs when a person enters or stays on the property of another *without the owner’s consent*. In **Tennessee**, for example, “the law assumes that the person knew they didn’t have the owner’s consent if the owner or someone with the authority to act on behalf of the owner personally communicates this fact to her, or if there’s a fence around the property or if there’s a sign or other posting on the property that’s likely to be seen by intruders”(*Martindale-Hubbell*). Since fifty-one million householders, acting individually, have so notified certain telemarketers through their agent, the **FTC**, in a manner so that these telemarketers now know they are unwanted intruders on the private property of another, to continue to so intrude would be a crime, and there certainly can be no **First Amendment** violation here unless the common law and legislatively recognized crime of **criminal trespass** is itself **unconstitutional** (and cross burning, littering and other intrusions on private property would also be protected **free speech**). The question then also presents itself, would the same legal analysis and procedures be applicable to and available for controlling **Computer/E-Mail Spam**? Indeed, as reported in *Federally Speaking* No. 6 (“*The Fax, Just The Fax, Ma’am!*”) and the *First Internet & Copyright Compilation Issue*, the **Federal Communications Commission** (**FCC**) attacks **Fax Spam** under the **Telephone Consumer Protection Act of 1991**, which provides that: “No person may transmit an advertisement describing the commercial availability or quality of any property, goods or services to fax machine without express permission or invitation,” and under which, “in addition to **FCC** fines, consumers can seek from broadcasters of junk faxes, in state court,

up to \$1,500 for each violation, and do so as Class Actions.” So what do you think – “Can the Ham! No Spam”? [33 & 6]

WHAT'S WITH THE RIAA AND THE DIGITAL WARS? The Recording Industry Association of America (RIAA) is playing all kinds of war games, apparently out geeking the geekiest of the College Greeks! Most recently the RIAA tracked a college student through the file-sharing program Manolito P2P, linked his computer's Internet service provider (ISP) address to his University's network, and served the University with a subpoena to get his/her name. The RIAA was using here the pre-litigation subpoena power it lobbied for and got under the **Digital Millennium Copyright Act of 1998 (DMCA)**. Indeed, one **U.S. Senator** reportedly has commented that "the **DMCA** subpoenas give copyright holders more power to go after suspected copyright violators than **U.S. Law Enforcement Agencies** have to seek information on terrorists." So far the RIAA has allegedly brought over 340 legal proceedings and coerced well over 156 settlements, apparently primarily from music lovers of college age. However, forces are aligning to rein in the RIAA. Recently, the ACLU moved to quash one such subpoena served on a Boston College coed on the grounds that the subpoena violated the student's **U.S. Constitutional rights of privacy** (Internet user anonymity) and **due process**. Though the coed did succumb to the RIAA's coercion and settled, the ACLU has advised that this "does not mean we're giving up the challenge to the procedures the RIAA is using or the statute itself that purportedly authorizes this subpoena." Then too, there are negative **Congressional** reactions to the combatant tactics of the RIAA. Thus, as was reported in *Federally Speaking* No. 23 ("**Digital Wars And Fair Use**"), in 2002 the **Digital Media Consumers Rights Act** was "introduced in **Congress** ... as a counterattack in the 'Digital Media Wars,' to preserve the time-honored **Doctrine of Fair Use,**" which the **DMCA** purportedly "outlawed," and very recently **U.S. Senator** Sam Brownback (R-Kansas) has introduced legislation to stop the RIAA and others from compelling the revealing by ISP's of their suspected copyright-infringing clients' identities prior to the filing of civil litigation. It remains to be seen if the Geeks, the Greeks or the Industrialists will prevail in these Digital Wars. [35]

BACK ISSUES. This column often deals with materials and stories continuous in nature, and may "bring issues back" or even "back into issues." To aid the reader in getting the "whole story," the **U.S. District Court for the Western District of Pennsylvania** has graciously made all back issues and Compilation Issues of *Federally Speaking* available on their web site at <http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>. The column numbers and the bracketed [] numbers refer to the column numbers in the *Federally Speaking Index* on the WDPa website.

*This **THIRD Special Internet & Copyright Compilation Issue** of the editorial column **Federally Speaking** brings together, with a modicum re-editing, most of the Internet, Copyright and Computer related materials covered since the **Second Special Internet & Copyright Compilation Issue**. Such materials appearing in the first 24 issues will be found in the **First Special Internet & Copyright Compilation Issue**, all available on the Internet (see above). **The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, this publication or the author.** The purpose of **Federally Speaking** is to keep the reader abreast of what is happening on the Federal scene, with the threefold objective of being educational, thought provoking, and entertaining. Please send any comments and suggestions you may have, and/or requests for information on the **Federal Bar Association** to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX: 412/566-1088; E-Mail: bjlipson@wgbglaw.com).*

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