



FEDERALLY SPEAKING



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THE DASTAR TRILOGY

WAS DASTAR DASTARDLY? The U.S. Supreme Court has recently handed down, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, No.02-428, 539 U.S.____ (June 2, 2003), an interesting (in the “may you live in interesting times” Chinese curse sense) and fun decision, delving into such areas as *Coca-Cola* passing off *Coke* as *Pepsi*, plagiarizing plagiarists, and the eternal “search for the source of the Nile,” which is reported on here in “*The Dastar Trilogy*.” Trilling? Thrilling? We will leave that for you to decide. What is of concern in this part of our trilogy is whether Dastar was: A dastardly dark star in the Fox Universe; A poor hen in the fox house; A commercial star just carrying out business as usual; Or none of these? As the **High Court** relates this tale, in 1995 “Dastar purchased eight beta cam tapes of the *original* version of the *Crusade* television series, which is in the **public domain**, copied them, and then edited the series” and “released a video set entitled *World War II Campaigns in Europe*.” The full name of “*Crusade*” was *Crusade in Europe* and was based on “I Like Ike” Eisenhower’s book of the same name. Doubleday, the book’s publisher “registered it with the **Copyright Office** in 1948, and granted exclusive television rights” to Fox. “Fox, in turn, arranged for Time, Inc., to produce a television series, ... and Time assigned its **copyright** in the series to Fox.” However, in 1977 Fox let this Times TV **copyright** “timeout,” though in 1975 or 1976 the book’s publisher had “renewed the copyright on the book as the ‘**proprietor of copyright in a work made for hire**.’” As added twists, the **Ninth Circuit** has “held that the **tax treatment** General Eisenhower sought for his manuscript of the book created a triable issue as to whether he intended the book to be a **work for hire**, and thus as to whether Doubleday properly renewed the **copyright** in 1976;” and in 1988, Fox had “reacquired the television rights in General Eisenhower’s book, including the exclusive right to distribute the [public domain] *Crusade* television series on video and to sublicense others to do so.” So, what do you think? Did Dastar act dastardly? The **High Court**, apparently, did not think his hands were dirty enough not to hand him the victory in this case, finding, as you will learn in parts two and three, that since Fox “did not renew the **copyright** on the

Crusade television series, which expired in 1977, leaving the television series in the public domain,” Dastar’s actions were lawful. However, the **Court** did note in footnote 2, that the “**copyright** issue is still the subject of litigation, but is not before us. We express no opinion as to whether petitioner’s product would **infringe a valid copyright** in General Eisenhower’s book,” such as, presumably, by the *Campaigns* video quoting verbatim, without attribution, “likely” liked passages from Ike’s book. [30]

DASTAR: THE IP SOCIAL COMPACT, “A CAREFULLY CRAFTED BARGAIN.” “The Congress shall have the 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. . .” So says the **U.S. Constitution (Art. I, §8, Clause 8)**. Known to **authors** as the “**Copyright Clause**” and to **inventors** as the “**Patent Clause**,” it is the basis of our **Intellectual Property Social Compact (“IP Social Compact”)** with them. Recently the **U.S. Supreme Court** in *Eldred v. Ashcroft*, 537 U. S. 186, 208 (2003), while upholding **Congress’** extension of the time period of the **copyright monopoly**, confirmed that the words in this **IP Social Compact** “for limited times” meant that “**Congress may not** . . . created a species of perpetual **patent** and **copyright**” (*Dastar Corp. v. Twentieth Century Fox Film Corp.*, No.02-428, 539 U.S.____ (June 2, 2003), emphasis added; see also *Federally Speaking*, No. 24). Now, in *Dastar*, the **High Court** has further clarified the **rights** and **limitations** applicable to “Authors and Inventors” under this **IP Social Compact**. In the words of the **Supreme Court**: “The rights of a **patentee** or **copyright holder** are part of a *carefully crafted bargain*” (*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U. S. 141, 150.151 (1989)), the “purpose” being “to reward manufacturers” and authors with a “period of exclusivity . . . for their innovation in creating a particular device” or work (citing *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U. S. 23, 34 (2001); and, in general, “unless an intellectual property right such as a patent or copyright protects an item, *it will be subject to copying*. *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U. S. 23, 29 (2001),” emphasis added. Thus, if not so protected, or “once the patent or copyright monopoly has expired, the public may use the invention or work *at will* and *without attribution*” or ascribing as to source, for the “right to copy, and to copy without attribution, once a **copyright** has expired, like the right to make (an article whose **patent** has expired), including the right to make it in precisely the shape it carried when **patented**, *passes to the public*. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, 230 (1964); see also *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 121.122 (1938).” *Dastar, supra*; emphasis added. [30]

Dastar: COPYRIGHT OR RIGHT TO COPY? So that’s the “*carefully crafted bargain*” embodied in the **IP Social Contract!** But does that really mean that **Federal** law actually lets authors “*plagiarize*” the non-copyrighted works of others? So held the **High Court** in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, No.02-428, 539 U.S.____ (June 2, 2003), as it could not find that **§43(a) of the Lanham Act** “created a species of perpetual **patent** and **copyright**, *which Congress may not do*. See *Eldred v. Ashcroft*, 537 U. S. 186, 208 (2003). . . . **Section 43(a) of the Lanham Act** prohibits actions like **trademark infringement** that deceive consumers and impair a producer’s goodwill. It forbids, for example, the **Coca-Cola Company’s** passing off its product as **Pepsi-Cola** or reverse passing off **Pepsi-Cola** as its product.” But, “reading **§43(a) of the Lanham Act** as creating a cause of action for, in effect, *plagiarism*, the use of otherwise unprotected works and inventions without attribution, would be hard to reconcile with our previous decisions. . . . And of course it was neither Fox nor Time, Inc., that shot the film used in the *Crusade* television series. Rather, that footage came from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film Board of Canada, and unidentified Newsreel Pool Cameramen. If anyone has a claim to being the *original* creator of the material used in both the *Crusade* television series and the *Campaigns* videotapes, it would be those groups, rather than Fox. *We do not think the Lanham*

Act requires this search for the source of the Nile and all its tributaries. ... In sum, reading the phrase ‘**origin of goods**’ in the **Lanham Act** in accordance with the **Act’s** common-law foundations (which were *not* designed to protect *originality* or *creativity*), and in light of the **copyright** and **patent** laws (which *were*), we conclude that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” Emphasis, in part, added. “*Federally Speaking*,” the answer, thus, appears to be “yes,” provided you duly attribute those parts of a **copyrighted** work exhibiting that author’s ‘**originality** or **creativity**.’” Accordingly, it would seem that you need not attribute a quote from the public domain *St James Bible* to anyone, even if taken from a new copyrighted work. Not to the author of this new work! Not to St. James! And not even to the Supreme Being! So attribution, No! Divine Retribution, question mark? Professorial or “Professorial” retaliation, you bet! [30]

FED-POURRI™

HATCH: THREE BYTES AND YOUR FRIED! Under traditional **Muslim law** a thief would have a hand chopped off for the same crime that under **Western Law** he would have some time stolen from his life (“a theft for a theft”). The former would be considered illegal under the **U.S. Constitution** as “cruel and unusual punishment.” The latter would be acceptable as “punishment befitting the crime,” which is the true meaning of the biblical concept of “an eye for an eye.” (Before this biblical “ethical advance” it was “a life for an eye.”) U.S. Senator Orrin Hatch (R-Utah), Chair of the **U.S. Senate Judiciary Committee**, seems to want to return to pre-biblical and/or traditional Muslim concepts; at least as far as the dastardly white collar crime of **Federal Copyright Infringement** is concerned. According to Hatch, “destroying their computer ... may be the only way you can teach somebody about copyrights.” In modified pre-biblical/traditional Muslim terms, if the technique or technology would be available, this is how Senator Hatch’s “Hatchet Plan” would work: A music thief goes to grab copyrighted sheet music, gets a mild slap or shock on the wrist, and is told “naughty-naughty.” He tries it a second time, gets a stronger blow or shock and is told “this is your final warning.” He tries it once more and his hand is chopped off or disintegrated. Substitute “music download” for “sheet music” and “computer” for “hand” and you have the Hatchet Plan. While the two warnings are a nice modern touch, this would be a giant step backwards in the ethical development of Western law, not to mention the lack of **constitutionally** required “**due process**,” which requires, with or without warnings, “conviction before execution,” and trial by a real life judge and jury, and not by a computer program or technology. But, even putting aside the lack of constitutionally, it is clear that the frying of costly computer equipment of “*de maximus*” value would be an “unbefitting” punishment for the alleged theft by an individual of electronic bytes of relatively *de minimus* value. This plan was proposed by Hatch in response to a computer industry representative’s assurance before the **Senate Judiciary Committee** that: “No one is interested in destroying anyone’s computer,” to which Committee Chair Hatch responded: “I’m interested.” Please be assured, this author will not fry you if you copy from this **copyrighted** column (though a credit line would be nice and should be given). Also, *who pays us* to pass their electronic waves transporting such music through our air space, homes, property and person? [30]

LIBRARIES CENSORED? They say, “the third time’s a charm,” but is it? Can purveyors of porn no longer “charm” children into their webs of pornography on public library computers financed by **Federal funds**? With three dissenters, so seems to say the third and final **Court** (*U.S. v American Library Assn., Inc.*, 539 U. S. ____ (2003)), in ruling on **Congress’** third attempt to censor the Internet. Previously the **U.S. Supreme Court** had thrown out the **Communications Decency Act of 1996** as being an **unconstitutional** infringement of **free speech** (*Reno v. American Civil Liberties Union*, 521 U. S. 844 (1997)); and had kept in place the ban on the enforcement of the **Child Online**

Protection Act of 1998, while seeking further information (*Ashcroft v. American Civil Liberties Union*, 535 U. S. 564 (2002)). See *Federally Speaking* Nos.15 and 17, May and July 2002. Now, in *American Library* the **High Court** has found “**facially constitutional**” the **Children’s Internet Protection Act of 2000 (CIPA)**, which forbids public libraries from receiving Federal monetary assistance for Internet access without installing software to “block” minors from accessing pornographic material “harmful to them,” and which contains a provision regarding unblocking upon the request of an adult. What does this mean and not mean? It means the **CIPA** is **constitutional “on its face.”** It does not mean that libraries are pornography-free zones or that the viewing of pornography in libraries has been criminalized. Under the **CIPA**, libraries that do not utilize **Federal funds** for Internet access need not block pornography; and libraries “**may**” permit adults to access pornography upon their request for “**bona fide research or other lawful purposes,**” 20 U. S. C. §9134(f)(3).” Then too, as several Justices have clarified, it does **not** mean that this **Act** is “home free,” as there is still room for “**as-applied**” challenges: “If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user’s election to view **constitutionally** protected Internet material is burdened in some other substantial way, that would be the subject for an **as-applied** challenge, not the **facial challenge** made in this case. See *post*, at 5–6 (Breyer, J., concurring in judgment [“We here consider only a **facial challenge** to the **Act** itself”]). Kennedy, J., concurring in judgment. “If the **Solicitor General’s** representation [“that the statute permits individual librarians to disable filtering mechanisms whenever a patron so requests”] turns out to be honored in the breach by local libraries, it goes without saying that our decision today would not foreclose an **as-applied** challenge. See also *ante*, at 5-6 (Breyer, J., concurring in judgment); *ante*, at 1 (Kennedy, J., concurring in judgment).” Souter and Stevens, dissenting opinions. So is this **censorship**? According to Stevens, Souter and Ginsburg it is! Why? Because of “overblocking” by the filtering software, and because under the **CIPA** if “a library attempts to provide Internet service for even *one* computer through an E-rate discount [“the E-rate program established by the **Telecommunications Act of 1996** entitles qualifying libraries to buy Internet access at a discount”], that library must put filtering software on *all* of its computers with Internet access, not just the one computer with Erate discount” (emphasis **not** added). A library cannot even decide to only “put filtering software on the 5 computers in its children’s section.” Also because the “unblocking provisions simply cannot be construed, even for constitutional avoidance purposes, to say that a library must unblock upon adult request, no conditions imposed and no questions asked. ... And of course the statute could simply have provided for unblocking at adult request, with no questions asked. The statute could, in other words, have protected children without blocking access for adults or subjecting adults to anything more than minimal inconvenience... I would hold in accordance with conventional strict scrutiny that a library’s practice of blocking would violate an adult patron’s **First** and **Fourteenth Amendment** right to be free of Internet censorship ... The abridgment of **speech** is equally obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit. ...This **Court** should not permit **federal funds** to be used to enforce this kind of broad restriction of **First Amendment** rights ...” Stevens and Souter (joined by Ginsburg), dissenting opinions. Does this then mean that the three “*Charmed Ones*” themselves may be blocked? Oh, no, not the mermaid scenes! [31]

INACCURATE CRIMINAL RECORDS NOW OK? So claim the Electronic Privacy Information Center and eighty-six other civil rights advocacy groups in a letter to Mitchell E. Daniels, Jr., Director of the **Office of Management and Budget (OMB)**, sent in light of the recent **U.S. Department of Justice (DOJ)** policy shift which “administratively discharged the **FBI** of its statutory duty to ensure the accuracy and completeness of the over 39 million criminal records it maintains in its **National Crime Information Center (NCIC)** database” and in the ‘**Central Records System and National Center for the Analysis of Violent Crime** systems.” These organizations want the **OMB** to “exercise its

oversight responsibilities under 5 U.S.C. §552 by reviewing and revising the **FBI's** recent rule” exempting the **NCIC** system “from the accuracy requirements of the **Privacy Act of 1974**” (Implementation, 68 Fed. Reg. 14140 (Mar. 24, 2003); to be codified as 28 C.F.R. pt. 16). “For the past thirty years, the **FBI** has operated the **NCIC** database with the **Privacy Act** accuracy requirement in place. The relevant provision requires that any agency that maintains a system of records, ‘maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individuals in the determination’” (5 U.S.C. §552a(e)(5)). They point out that incorrect data can ruin lives, and assert as Justice O’Connor did in her concurrence in *Arizona v. Evans*, 514 U.S. 1, 16-17 (1995), “that it would be unreasonable, however, for a police department to depend upon a record keeping system that has no accuracy safeguards and routinely leads to false arrests,” and “that if procedures were not in place to help ensure the accuracy of the data, evidence collected during those arrests could be suppressed.” The **DOJ** counters by stressing the value of having non-confirmed information included because it may subsequently provide greater insights. Shades of “greater security” or shades of 1984? [28]

INTERNET PUBLISHER: SUE ME WHERE? The *Hartford Courant* and the *New Haven Advocate*, both in Connecticut, published and posted on the Internet articles describing Virginia’s Wallens Ridge State Prison as a harsh “cut-rate gulag,” with a Warden, plaintiff Stanley K. Young, who allegedly encouraged “abuse of inmates,” advocated “racism,” and displayed Confederate memorabilia in his office. The newspapers were particularly interested because the State of Connecticut, to alleviate overcrowding, had contracted with Virginia to place approximately 500 mainly minority prisoners under Warden Young’s “southern hospitality” and personal care in Virginia. Young brought suit against these newspapers for libel in the **U.S. District Court for the Western District of Virginia**, alleging **personal jurisdiction** there because by posting these allegedly defamatory articles on the Internet, which were accessible throughout Virginia and the World, injury was caused him in Virginia. Understandably, defendants moved under **Rule 12(b)(2)** for dismissal for lack of **personal jurisdiction**. Reversing the **U.S. District Court’s** holding that under Virginia’s long-arm statute there was **personal jurisdiction** because “the defendants’ Connecticut-based Internet activities constituted an act leading to an injury to the plaintiff in Virginia,” the **Fourth Circuit** held that “a court in Virginia could not **constitutionally** exercise jurisdiction over the Connecticut-based newspaper defendants because the defendants did not manifest an intent to aim their websites or the posted articles at a Virginia audience.” *Young v. New Haven Advocate*, No. 01-2340 (4th Cir., Dec. 13, 2002). Apparently the **Fourth Circuit** has exhibited more “southern hospitality” than the **District Court** or Warden Young, but what if a California or National publication had prepared and/or posted these articles? For **personal jurisdiction** must the “aim” be that of a sharp shooter or a shotgun shooter? [26]

CAUGHT IN THE INTERNATIONAL WEB! *Federally Speaking*, to avoid being caught in the Canadian “web,” we must keep a constant “eyes north” lookout. The **Canadian Competition Bureau’s** Annual Report is helpful in this regard. For example, ... we are alerted that on “April 24, 2001, the Bureau, along with competition agencies from 12 countries, participated in the launch of a Web site that allows consumers to file complaints on the Internet about e-commerce transactions with foreign companies,” which has grown to 17, and now includes the **Australian Competition and Consumer Commission, the Belgian Federal Administration for Economic Inspections, the Canadian Competition Bureau, the Danish Consumer Ombudsman, the Finnish Consumer Ombudsman, the Hungarian General Inspectorate for Consumer Protection, the Japanese Cabinet Office, NCAC, METI, JFTC, the Korea Consumer Protection Board, the Latvian**

Consumer Rights Protection Centre, the Mexican Procuraduria Federal del Consumidor, the New Zealand Ministry of Consumer Affairs, the Norwegian Consumer Ombudsman, the Polish Office for Competition & Consumer Protection, the Swedish Consumer Ombudsman, the Swiss State Secretariat for Economic Affairs, the United Kingdom Office of Fair Trading, and the U.S Federal Trade Commission, as well as the Organization for Economic Cooperation and Development (go to: <http://www.econsumer.gov/>). ... Which means eyes east, west and south, also! [25]

CYBER-SLEUTHING! From years of corporate counseling it has been a “rule of thumb” that if you want the **Government** to bring a case they won’t, and if you don’t want the case brought they will! During my **Food, Dug and Cosmetic** days, I vividly remember amassing a case full of vivid “passing off” examples, by a major interstate supermarket chain, of private label groceries with label designs and coloring virtually identical to the brand name products (including those of my client), and shipping this case with a detailed analysis to the **FTC**. The **FTC**, of course, kept the case of groceries, while rejecting the legal case. But times may be a changing! In *U.S. v. ElcomSoft and Dmitry Sklyarov* (NDCA, CR-01-20138RMW), discussed in “*Digital Wars And Fair Use,*” *Federally Speaking*, No.23, as stated therein, “Adobe, the producer of the subject ‘e-books’ ... handed the **FBI** the case on a ‘cyber-platter.’” According to the affidavit in this **Federal Criminal Prosecution** of **FBI** Special Agent Daniel J. O’Connell, assigned to the **FBI’s High Tech Squad** at San Jose, California, “Adobe purchased a copy of the ElcomSoft unlocking software over the Internet ... Thereafter, ElcomSoft ... electronically sent the unlocking key registration code from ElcomSoft [in Russia] to the purchaser (Adobe) in San Jose, California ... A review [by Adobe] of the opening screen on the ElcomSoft software purchased showed that a person named Dmitry Sklyarov is identified as being the copyright holder” of this AEBPR unlocking software. “Adobe learned that Dmitry Sklyarov is slated to speak on July 15, 1001 [sic: 2001] at a conference entitled Defcon-9 at Las Vegas Nevada” and advised me that “Sklyarov is scheduled to make a presentation related to the AEBPR software program” there. The **Government** arrested and indicted Sklyarov when he visited the U.S. for this conference. From Adobe’s viewpoint, a great result. Adobe was able to drop its civil lawsuit and let the **Government** proceed criminally in its stead. (For another viewpoint, see **Digital Wars, supra.**) Thus, the bottom line of this “Heads Up” for plaintiff counseling is it may be worth a shot to do some “**cyber-sleuthing,**” and then “sic the **Feds** on them.” If successful, it could be cheaper, harsher and more effective. However, the “Heads Up” bottom line for defense counseling is more ominous: “**Fed** bullets may be a flying, keep you bottoms low and heads down!” [25]

VIDEO-CONFERENCING A NO-NO. In an unprecedented action, at least in the last decade, the **U.S. Supreme Court** by a 7-2 vote refused to adopt a proposed **Federal Judiciary Rule** change submitted to it by the **U.S. Judicial Conference**. This proposal was among those drafted by the **Judicial Conference** in conformity with the 9/11 terrorism-inspired **USA Patriot Act**. The proposal was to permit the “**video-conferencing**” of witness testimony to allow greater access to international witnesses at criminal trials, especially at anti-terrorism trials. Speaking for the majority, Justice Antonin Scalia advised of concerns over violation of the **Sixth Amendment’s** right to confrontation. “Virtual confrontation might be sufficient to protect virtual **constitutional** rights,” he explained, but “I doubt whether it is sufficient to protect real ones.” Proposals that were accepted by the **U.S. Supreme Court** and forwarded to **Congress** for objection, included the permitting of: a) video-conferencing of arraignments and first appearances (so long as defendants consent); b) the disclosure by lawyers of grand jury information to federal law enforcement agents and national security officials upon the filing of disclosure petition (**Rule 6(e) 3C**, which is pursuant to **Section 203 of the Patriot Act**); and c) magistrates issuing search-and-seizure warrants outside their normal areas of jurisdiction (**Rule 41(a)**, which is pursuant to **Section 219 of the Patriot Act**). Without

Congressional objections, the new Rules became effective December 1, 2002. [US Supreme Court Compilation Issue]

DOPPELGANGER PROTECTION ACT. Webster defines a doppelganger as “a ghostly copy of a living person.” We define it here as a “non-material or ‘ghostly’ electronic copy of a living (still under **Copyright**) paper article.” Justice Ginsburg, writing for the 7-2 majority of the **U.S. Supreme Court**, has rejected the notion that such a “Doppelganger,” also know less colorfully as an “electronic database copy,” remains covered by the **Copyright** on the print edition of the newspaper or magazine, as being still part of a statutorily permitted revision of that original print edition. She based her finding primarily on the fact that the typical database user, such as LEXIS/NEXIS users, did not retrieve an entire newspaper or magazine, but merely the individual article that was sought. Materializing from the Nether Realm the nebulous “**Doppelganger Protection Act**,” the **High Court** therefore held that, without the author’s permission, a newspaper or magazine publisher is barred by the **Copyright Act** from distributing such Doppelgangers of its freelance print articles through electronic databases. *New York Times v. Tasini*, 533 U.S. 483 (2001). [US Supreme Court Compilation Issue]

THE MAGIC LANTERN OF JUDICIAL SUPERVISION. When we think of a “Magic Lantern” we envision a primitive “moving” picture device or, perhaps, Aladdin rubbing his Genie generator. No longer. In the 21st Century “Magic Lantern” will now refer to a “Trojan Horse” type computer program. According to **PC World**, Magic Lantern is being developed by the **FBI** to be planted by an agent “in a specific computer by using a virus-like program.” Once planted, this keystroke logger “will render encryption useless on a suspect’s computer” by capturing “words and numbers as a subject types them (before encryption kicks in), and will transmit them back to the agent.” According to **FBI** spokesperson Paul Bresson: “It’s no secret that criminals and terrorists are exploiting technology to further crime. The **FBI** is not asking for any more than to continue to have the ability to conduct lawful intercepts of criminals and terrorists.” Jim Dempsey, Deputy Director of the **Center for Democracy and Technology**, is concerned about the lack of prior notice of such “searches and seizures” as required by the **Fourth Amendment** to the **U.S. Constitution**: “In order for the government to seize your diary or read your letters,” Dempsey advises, “they have to knock on your door with a search warrant,” but Magic Lantern “would allow them to seize these without notice. ... The program would not only capture messages you sent, it would capture messages that you wrote but never sent.” The main concern here appears not to be the use of new technologies, but the apparent lack of appropriate **judicial supervision**. Previously, **Federally Speaking** has reported on the use by agencies such as the **FBI** of “Carnivore” devices, which scan “through tens of millions of e-mails and other communications from innocent Internet users as well as the targeted suspect” (*Federally Speaking*, No. 8), and how the **Patriot Act** tries to regulate their use “by excluding general access to the ‘content’ of the messages and by requiring Carnivore Reports to **Congress**” (*Federally Speaking*, No. 10). Perhaps what is truly needed is the light of the “Magic Lantern” of **judicial supervision** to keep out the darkness of the Trojan Horses of the overzealous? [US Supreme Court Compilation Issue]

COPYRIGHT UNLIMITED. The **U.S. Supreme Court** decided this term that “the author’s life plus 70 years” is within the “limited” **copyright** contemplated by the **U.S. Constitution**. Thus, even under this extended term that can significantly exceed 120 years, the **Constitution**, though not all its **Amendments**, has outlived its copyright, if any, though not its usefulness. But what, if any, of the **Bible’s copyright**? *Unlimited, many may say!* (See *Eldred v. Ashcroft*, No. 01-618, 537 U.S. ___ (2003).) [US Supreme Court Compilation Issue]

“OPENNESS” CLASSIFIED SECRET! Under the auspices of the **Central Intelligence Agency (CIA)**, the **National Research Council Board on Life Sciences** convened a Committee to oversee a workshop to “identify issues surrounding the publication of genomic data for bio-terrorism threat agents,” and then to “author a report summarizing the discussions at the workshop and providing recommendations and/or ideas about policy options.” According to the “*Secrecy News*” of the Federation of American Scientists’ “Project on Government Secrecy” (Volume 2003, No. 28, April 2, 2003), the consensus at the workshop was that while “the threat was real and, in fact, quite serious ... ‘*openness* in scientific research is the only way to go’. ... On the morning of April 2, [2003,] however, the workshop participants were informed that the final summary report of the workshop *advocating openness* would be *classified*” (emphasis added). *News of the Weird*, in its May 11, 2003 column, felt that this “irony” was worthy of note. [28]

SCALIA’S FREE SPEECH BLACKOUT. The Cleveland City Club, according to its president James Foster, chose **U.S. Supreme Court** Justice Antonin Scalia for its “**Citadel of Free Speech Award**” because he has “consistently, across the board, had opinions or led the charge in support of **free speech.**” As reported by Associated Press, however, the Justice told the Club that he wanted this blackout, that he “insisted on banning television and radio coverage.” Barbara Cochran, president of the Radio-Television News Directors Association, was quick to point out to her counterpart at the City Club that: “The irony of excluding journalists from an event designed to celebrate **the First Amendment’s** guarantee of **free speech** is obvious to all. The decision to discriminate against the electronic media, especially when the City Club traditionally allows videotaping of its speakers, is reprehensible.” Similarly, Vice President and Executive Producer of C-SPAN, Terry Murphy, advised that this decision “begs disbelief and seems to be in conflict with the award itself. ... How free is speech if there are limits to its distribution?” In defense of this action, a request to block news coverage is not unusual or unique for **U.S. Supreme Court** Justices. The question remains was it judicious or prudent for a member of the Judiciary to do so, especially relating to this area of jurisprudence? [28]

POST SCRIPT: To some readers certain of our news items may appear to be incredible or incredulous. However, Federally Speaking just reports on the Federal legal scene. Will Rogers succinctly summed it up when he quipped: “I don’t make jokes. I just watch the government and report the facts.”

THANKS BE TO GOOGLE! An author’s lot can seem lonely at times. You may be communicating with many readers, yet without feedback it can feel like you’re spitting into the wind. That’s why I like cocktail parties and receptions. Not just for the mind expanding fluids and “printable” tidbits, but for the feedback that you actually have readers, and for the “beguiling” affects of the expanded conversational topics which flow freely from the mixture of these fluids and the research done for the columns (yes, writing these columns takes research). That’s also why authors like to see their words quoted and more widely disseminated in scholarly works and other publications. Thanks be to *Google!* A recent *Google* Internet search uncovered all of the above. First it revealed your columnist’s Lawyers Journal writings quoted in “*Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations,*” by Professor of Law Bruce H. Kobayashi of George Mason University School of Law, where, citing from Lipson, *Local Firm Sends Competitor to Jail*, 2 Lawyers J. 6 (2000), at footnotes 66 and 85 (www.gmu.edu/departments/law/faculty/papers/docs/02-04.pdf), he credits that article with the intelligence that “Carbide Graphite, with a market share approximately equal to that of Showa Denko, received leniency under the Antitrust Division’s Leniency Policy and paid a zero fine,” and

that at “the time of sentencing, the \$135 million fine imposed on SGL and the \$10 million dollar fine imposed on its CEO, Robert J. Keochler were the largest ever imposed against a corporation and an individual.” Then it revealed that even vocal utterances had found their way into the pages of the *Lawyers Journal* and beyond. Thus, John D. Messina, in his *University of Pittsburgh Law Review* Comment, “**Lawyer + Layman: A Recipe for Disaster! Why the Ban on MDP Should Remain,**” at 62 *Pitt Law Review* 367, 377-378 (lawreview.law.pitt.edu/volumes/vol62i2/Messina-%20367%20R.pdf), did so with your columnist’s words as Chair of the ACBA “Unauthorized Practice of Law Committee,” quoting from “Rachel Berresford, *Beat ‘em or Join ‘em: The Multidisciplinary Practice Debate,*” 1 *The Lawyers Journal*, July 1999, at page 1 (also reprinted as part of the *American Corporate Counsel Association (ACCA) MDP InfoPAK* at <http://www.acca.com/advocacy/mdp/berresford.html>), to wit, “[e]ven if the American Bar Association adopt[ed] this recommendation [by the ABA committee appointed to research the issue of MDP’s] it [would] have [had] no effect in Pennsylvania, unless the Supreme Court of Pennsylvania decide[d] to change the PA Rules of Professional Conduct.” Then too, *Juris, the Duquesne University School of Law News Magazine*, carried a parallel report of your columnist’s presentation to U.S. Supreme Court Justice Sandra Day O’Connor of “the first Carol Los Mansmann Award for Distinguished Public Service” (see <http://www.juris.duq.edu/winter2001/justice.htm>; and see also the *Federally Speaking* columns for October and November, 2001). Thanks be also to *Google* for finding that the San Antonio Chapter of the Federal Bar Association re-prints of various *Federally Speaking* columns in their *Newsletters*, such as December 2001 (<http://www.fedbarsatx.org/Newsletters/June%202002%20Newsletter%20.doc>), and June 2002 (<http://www.fedbarsatx.org/Newsletters/December%202001%20Newsletter%20.doc>). Thank you San Antonio, we will remember the Alamo!

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 **Second 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 to date in 2003. Such materials appearing in the first 24 issues will be found in the **First Special Internet & Copyright Compilation Issue**, 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: blipson@wgbglaw.com).*

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