

# LITIGATORS CORNER: The Federalist Papers Versus Anonymous Bloggers



BY JOSEPH N. HOSTENY,  
OF NIRO, SCAVONE,  
HALLER & NIRO

*Regular IP Today columnist Joseph N. Hosteny is an intellectual property litigation attorney*

*with the Chicago law firm of Niro, Scavone, Haller & Niro. A Registered Professional Engineer and former Assistant US Attorney, his articles have also appeared in Corporate Counsel Magazine, The Docket (American Corporate Counsel Association), American Medical News, Inventors' Digest, Litigation Magazine and Assembly Engineering Magazine. Mr. Hosteny can be reached at (312) 236-0733, or by e-mail at [jhosteny@hosteny.com](mailto:jhosteny@hosteny.com), or by visiting his web site at <http://www.hosteny.com>.*

To quote talk show host Roe Conn of WLS Radio in Chicago, "The blogosphere is angryonymous." It sure is. Jon Stewart said at the Oscars – this is hearsay, because I believe Dick Shawn's description of the Oscars as a yawn and never watch – that Hollywood needs a hug. Maybe America does, too, at least if one reads too many anonymous blogs. I once recommended that a high-strung commentator try the decaf. Maybe we all should.

My March column ("The Cowardice of Anonymous Bloggers") dealt with the anonymous blog, TrollTracker, the death threat anonymously posted to that blog, and the abuses to rational public discourse that those practices encourage. My April column ("TrollTracker, Cisco and the Coalition for Fairness to Foxes in the Hen House"), pointed to the motivation of TrollTracker, who turned out to be a Cisco attorney, and the evidence of sponsorship by Cisco, whose views of the value of IP are so plastic, varying depending on the identity and size of the owner of the IP, rather than the value of the IP itself.

Now we have Cisco, a member of the Coalition for Patent Foxes, backing away. It disavows Rick Frenkel's blog after he reportedly described the Eastern District of

Texas as a banana republic.<sup>1</sup> Cisco, realizing it might not be a smart idea to disrespect federal judges the same way it routinely disses American citizen-inventors, said:

That said, we would like to underscore that the comments in the employee's personal blog represented his own opinions and several of his comments are not consistent with Cisco's views, . . . We continue to have high regard for the judiciary of the Eastern District of Texas and confidence in the integrity of its judges.

The assertion that Mr. Frenkel's views aren't consistent with Cisco's views is rubbish. He attacks small companies and inventors; so does Cisco. He uses disparaging terms to describe them; so does Cisco. He uses a type of *ad hominem* attack: to defeat your adversary's argument, belittle the adversary. If the adversary is a rat, nothing he says can be believed. So does Cisco.

Although the company tries to distance itself from Mr. Frenkel, to my mind, Cisco was clearly using Frenkel's blog to advance its own position. *Business Week* reported in its March 27, 2008 issue ("Busting a Rogue Blogger"), that Cisco's General Counsel Mark Chandler "cited the blog as a good independent source of information while in Washington lobbying for changes to patent law that would rein in trolls, unaware he was plugging the work of a Cisco employee."<sup>2</sup> I am very skeptical that Chandler was unaware that the blog originated from within Cisco, since Mr. Frenkel has said that his boss, who is not far removed from the general counsel, knew about the blog.

Even Cisco's official blog admits that Mr. Frenkel's blog wasn't produced in isolation; it was influenced by views of still other anonymous persons inside Cisco. On March 24<sup>th</sup>, in a posting titled "Lessons Learned," its official blog acknowledges the obvious, that other Cisco employees were involved:

We believe that a few Cisco employees used poor judgment when they suggested topics to Rick for his anonymous blog or pointed third parties to the blog without disclosing that the content was created by a Cisco employee.<sup>3</sup>

Ironically, as the blog legalpad pointed out on March 25<sup>th</sup>, this official posting was itself anonymous, signed only by "Cisco."<sup>4</sup>

So, it's apparent that the Frenkel blog was not a one-man show. The question that remains is: Who was feeding him information, and why? What were his contributors' motivations? Were these the same people who are responsible for lobbying Congress to pass the Patent MisReform Act? *The Recorder* reports that the Coalition spent \$500,000, just in 2007, in lobbying for its passage.

Of course, as I pointed out in my April column, Rick Frenkel's blog, once open to all, is now by invitation only. Imagine if your morning *Chicago Tribune* or *New York Times* was suddenly encrypted, or if past issues were taken out of the library, simply because some of its readers complained. The standards of this blog have a way to go to meet minimal standards of good journalism. The ability to rewrite history by taking down Internet pages smells of Orwell's 1984, and is to me one of the most troubling aspects of journalistic amateurs on the Internet.

Is it a good idea to blog anonymously? Some say it is, citing the Federalist Papers, which were written in support of the adoption of the Constitution, as an example of anonymous authorship. They say that Alexander Hamilton, John Jay, and James Madison were anonymous authors, which justifies anonymous blogging and commenting. This doesn't strike me as an adequate justification for the kind of wacky commentary we are seeing now on the Internet. On the very controversial blog, [juicycampus.com](http://juicycampus.com), it is deemed fair for an anonymous poster to publish the name of a college student and brand her as a slut.<sup>5</sup> If you want to see what some college students are talking about, visit the site, but be prepared to have your hair stand on end. According to the Associated Press, an anonymous poster on Craigslist said the owner of a farm had to abandon it, and that everything was free for taking. A lot of people thought – or claimed they thought – the ad was true, went to the farm, and took whatever wasn't nailed down. It turned out that the posters were two thieves.<sup>6</sup> There have even been reports that some Internet postings may have contributed to suicides.<sup>7</sup>

There are a lot of differences between the Federalist Papers and these modern anonymous postings, and there are a lot of differences between the 1780s and now.

First, when the Federalist Papers were written, there was no Internet. So, no one could post an asinine, vitriolic comment within three nanoseconds of the publication of a Federalist paper. I have seen the

effects of the development of more rapid means of communication. Any lawyer practicing for the last twenty years or so has, too. We used to correspond by letters sent by mail. You'd write a letter. You'd expect a response to it, maybe in a few days, or in a week or so. And, if a letter did contain insults, at least it could not be forwarded with one or two keystrokes to ten thousand persons on an email list.

Then facsimile machines became popular; everyone had to have one, because a fax machine was a sign that you were among the elite, with the latest gadget. Those machines changed the response time we had been used to with snail mail. You would receive or send a fax instead of a letter; rather than expecting a response in a few days, everyone began expecting responses the same day. Messenger services produced the same result.

Then email became popular. Instead of expecting a response in a few days, or even one day later, emailers expect a response within an hour. Now, blog comments are nearly instantaneous. The process lacks a pause that enables one to think first before writing.

The delay inherent in older forms of communication helped let the mind cool down a bit before responding. That was a good thing. The forced pause ensured your brain was engaged before your mouth or pen started moving. The Federalist Papers weren't subject to the instant, unthinking responses of modern email and blog commenting.

The tempo of the 1780s seems much different, too. The high velocity of modern events seems to inspire copy-cating. Anyone who is aware of who D. B. Cooper is knows that he inspired any number of airplane hijackings. One shooting on a college campus or at a high school is followed by another shooting at another school. The anonymous authorship of blogs leads directly to the anonymous posting of idiotic and sometimes vicious comments, followed by more comments of the same ilk, followed by yet still more. Intelligent comments require thought before a response can be written. Insults and slander do not; they just generate more of the same, like an echo.

Second, unlike so many of the posters these days, the authors of the Federalist Papers had actually gotten past third grade. They could spell, punctuate, construct a sentence, and didn't use emoticons. Alexander Hamilton was the first Secretary of the Treasury. John Jay was the first Chief Justice of the Supreme Court. James Madison was the fourth President of the

United States. Today's lesser commenters don't measure up to those standards.


The first Federalist paper shows its authors adhered to a standard that, unlike so many blog comments today, recognized that the other fellow was entitled to respect. Hamilton wrote:

I am well aware that it would be disingenuous to resolve indiscriminately the opposition of any set of men (merely because their situations might subject them to suspicion) into interested or ambitious views. Candor will oblige us to admit that even such men may be actuated by upright intentions; and it cannot be doubted that much of the opposition which has made its appearance, or may hereafter make its appearance, will spring from sources, blameless at least, if not respectable – the honest errors of minds led astray by preconceived jealousies and fears. So numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy. And a further reason for caution, in this respect, might be drawn from the reflection that we are not always sure that those who advocate the truth are influenced by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question. Were there not even these inducements to moderation, nothing could be more ill-judged than that intolerant spirit which has, at all times, characterized political parties. For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution.

There is a defense to be made for anonymity. See, for example, *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995), which held that Margaret McIntyre's anonymous leaflet about school funding was protected by the First Amendment. The court was careful to point

out that the unconstitutional Ohio statute did not limit itself to false or libelous statements. The dissent in *McIntyre* says that disclosure of the author prevents fraud and "promot[es] a civil and dignified level of campaign debate." 96 S.Ct. at 1536. After describing mudslinging, innuendo, and demeaning characterization, the dissent, written in 1995, when the public's use of the Internet was almost non-existent, forecast the future: "Imagine how much all of this would increase if it could be done anonymously." The dissent concludes, saying that holding the Ohio law unconstitutional on the "ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future." We have arrived at that coarsened future.

Blogs and blog postings are public debate. I think the answer lies in realizing that those who use the Internet should observe some reasonable standards. And, like the authors of the Federalist Papers, perhaps we should not assume that the adversary in every debate is evil, or that to call someone a "troll" is argument rather than disparagement. Clearly, it is disparagement. Branding inventors and patent owners who don't happen to be associated with giants like Cisco is contrary to the spirit in which the Federalist Papers were written.

Modern bloggers and commenters need some standards. They should check their facts, as well as their spelling and their grammar. They should be willing to stand behind what they say, by disclosing their identities. They should moderate their rhetoric, and abandon the personal attacks. They should think before they type gibberish on a keyboard. And finally, bloggers, leave your pages online, just as if they were in a newspaper. Don't hide them from history's evaluation. 

## ENDNOTES

1. See the article by Ron Zapata in *IPLaw360*, March 13, 2008, and the *Wall Street Journal's* Law Blog for March 14, 2008.
2. [http://www.businessweek.com/magazine/content/08\\_14/b4078075822107.htm?campaign\\_id=rss\\_tech](http://www.businessweek.com/magazine/content/08_14/b4078075822107.htm?campaign_id=rss_tech).
3. [http://blogs.cisco.com/news/2008/03/lessons\\_learnedcisco\\_updates\\_p\\_1.html](http://blogs.cisco.com/news/2008/03/lessons_learnedcisco_updates_p_1.html).
4. [http://legalpad.typepad.com/my\\_weblog/2008/03/cisco-blogs-to.html](http://legalpad.typepad.com/my_weblog/2008/03/cisco-blogs-to.html).
5. See "Has Online Gossip Gone Too Far?" in *People*, April 14, 2008.
6. See <http://www.komotv.com/news/17187351.html>.
7. See "Exclusive: Teen Talks About Her Role in Web Hoax That Led to Suicide," by Jonann Brady, on Good Morning America's website, dated April 1, 2008.