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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL J. BERNSTEIN, an individual,)	Case No. C 95-0582 MHP
)	
Plaintiff,)	
)	DECLARATION OF
)	CINDY A. COHN, ESQ., IN
v.)	OPPOSITION TO DEFENDANTS'
)	MOTION FOR SUMMARY
UNITED STATES DEPARTMENT OF)	JUDGMENT
STATE, et. al.,)	F.R.C.P. 56(f)
)	
Defendants.)	
)	

I, CINDY A. COHN, declare as follows:

1. I am attorney at law associated with the law firm of McGlashan & Sarraill, Professional Corporation, am duly admitted to practice law in the State of California and the Northern District of California, and am one of Plaintiff's attorneys of record in the current case. I have personal knowledge of the facts set forth herein, unless otherwise indicated, and if called as a witness could and would so testify. I have handled this case since its inception.

2. Discovery has been on hold in this matter since its inception pursuant to Court Order.

3. Plaintiff believes that his Motion for Partial Summary Judgment

can be granted without discovery. This Motion is based upon the lack of procedural protections required by *Freedman v. Maryland* and its progeny, overbreadth and vagueness.

4. Plaintiff also believes that discovery is not required for this Court to determine that the Defendants have failed in their burden to prove that to the extent that the ITAR Scheme licenses protected expression, it meets the test of "direct, immediate and irreparable damage" required under *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., with whom White, J. joins, concurring) ("Pentagon Papers") and the strict scrutiny required for subsequent punishment of speech. Plaintiff further contends that the evidence submitted by Defendants so far demonstrates that they cannot meet these heavy burdens.

5. Should this Court determine, however, that these tests could be met by Defendants here or that other tests apply, Plaintiff should be allowed to conduct discovery in order to more fully respond to the factual assertions relied upon by Defendants in their Motion for Summary Judgment. I believe that discovery into these assertions will reveal genuine issues of material fact which preclude summary judgment for Defendants. This Declaration will note each such assertion and then explain the discovery necessary to address each.

6. Plaintiff recognizes that in order to respond to the factual assertions made by Defendants, he may have to seek discovery of information which may adversely impact the confidentiality of third parties, their trade secrets, or Defendants' national security concerns. Plaintiff is willing to discuss appropriate protective orders.

Defendants' Factual Assertions and Necessary Discovery to Respond.

7. Defendants assert that, despite the fact that 121.8(f) defines "software" as "including but not limited to system functional design, logic flows, algorithms . . ." Defendants do not, in practice, extend ITAR Scheme licensing requirements over anything but computer source code. Defendants specifically and repeatedly state that they do not license algorithms. Defendants' Brief at 31:8-25.

8. The facts of Plaintiff's own interaction with Defendants belie this assertion. In order to respond to it further, however, Plaintiff will need to review Defendants' actions in response to others who have sought to publish algorithms and other items defined as "software" which are not source code. This discovery will include propounding document requests to discover such requests, as well as all documents evidencing Defendants' decision making process and the disposition of each request. Since the NRC considered this issue, Plaintiffs will also seek all information given to or utilized by them in the course of their study of this question.

9. Plaintiff will also need to depose those who now implement and in the past have implemented the ITAR Scheme, as discussed further in Paragraph 33 of this Declaration.

10. Plaintiff believes that review of Defendants' files and the depositions of Defendants' personnel will reveal others whose speech has been restricted or chilled by the ITAR Scheme. Plaintiff will also use the subpoena power of discovery to obtain documents from and depose such persons, to further investigate the truth of Defendants' claims here.

11. Defendants claim that the exemptions to the ITAR Scheme definition of technical data have resulted in a situation in which academic and scientific publication is not burdened by the ITAR Scheme. Plaintiff has presented five declarations, from Mr. Miller, Professor Junger, Professor Bishop, Dr. Blaze, and himself, each of which

demonstrates that the ITAR has in fact burdened academic publication. He has further presented Declarations from Mr. Schneier, Mr. Demberger, Mr. Zimmermann, and Mr. Johnson demonstrating that the ITAR Scheme has burdened the development of the science of cryptography. In order to present further evidence to refute Defendants' claims, Plaintiff will need to review Defendants' records of all documents concerning such requests to Defendants and depose those persons who have sought to publish their ideas about cryptography for academic or scientific purposes about their interaction with Defendants under the ITAR Scheme.

12. Plaintiff will also need to utilize the subpoena authority of discovery to find further information from additional persons or entities who have sought to publish their ideas about cryptography for academic or scientific purposes. Some persons and entities, including the Massachusetts Institute of Technology, have indicated that they have such information, but, due to their ongoing interactions with Defendants, are unwilling to present it to this court unless they are subpoenaed.

13. Defendants have declared that the information sought to be exported under the ITAR Scheme is "typically classified by the government, or legally controlled pursuant to a defense contract, or privileged and proprietary commercial information," in support of their argument that the ITAR Scheme is applied consistent with the Edler case. Defendants' Brief at 11:13-16.

14. Plaintiff will need to propound written discovery and take the depositions of those who process such requests under the ITAR Scheme to learn whether this assertion of what information is "typically" sought to be exported is true. The answer to this question will assist in the evaluation of whether Defendants have met their burden to prove that Defendants do comply with the requirements of Edler and that as applied the ITAR Scheme is narrowly tailored.

15. Defendants have declared that "Most requestors seeking to export technical data come to the State Department for a license because the information at issue is proprietary or classified, and because they seek to export it specifically in connection with the provision of a defense service or to assist a foreign entity in obtaining or maintaining a defense article. Defendants' Brief at 11:16-20; 33:17-19.

16. Plaintiff will need to propound written discovery and take the depositions of those Government officials who process such requests under the ITAR Scheme to learn whether this assertion of why "most requestors" seek ITAR licenses. The answer to this question will assist in the evaluation of whether Defendants have met their burden to prove that the ITAR Scheme is narrowly tailored as applied.

17. Defendants have declared that the uncontrolled world-wide availability of cryptographic software "exposes to harm the government's national security and foreign policy interests in gathering intelligence abroad". Defendants' Motion at 18:2-4; 24:3-12.

18. Plaintiff will need to propound both written and oral discovery both to Government officials who can describe this "exposure to harm," and officials both inside and outside government who have stated that this assertion is either not true, or not nearly as important as the government here proposes, a fact which goes to the strength of the government interest here, and to whether "direct, immediate and irreparable damage" will result from the failure to continue this licensing scheme.

19. For example, Plaintiff is also informed and believes that Defendant National Security Agency has stated in written response to questions by the Senate Subcommittee on Technology and the Law at hearings

held on or about May 3, 1994 that "Encryption software distribution via Internet, bulletin board, or modem does not undermine the effectiveness of encryption export controls." Discovery will ascertain whether NSA in fact made such statement to Congress and will uncover the factual premises underlying this statement. The evidence discovered will support the conclusion that Defendants' extension of the ITAR Scheme to prevent the publishing of cryptographic software on the Internet, such as Plaintiff and Mr. Demberger seek to do here, is not supported by a strong government interest and further to demonstrate that the regulations are not properly tailored to fit the goals of the statute.

20. As another example, Plaintiff will seek the various Congressional and Presidential studies of the ITAR which have been undertaken, which Plaintiff believes have concluded the same thing.

21. In addition, Plaintiff will use the subpoena power of discovery to gain written documentation and oral testimony from non-parties that the ITAR Scheme has a significant impact on the privacy and security of purely domestic communication to further demonstrate the lack of proper tailoring. As in the case of academia, Plaintiff has been informed that several non-parties, who are unwilling to give declarations on this issue, will give such evidence if subpoenaed .

22. Defendants assert that "controls on the export of cryptographic software do not preclude individuals from otherwise publishing or discussing scientific ideas related to cryptography and cryptographic algorithms. As noted above, a broad academic discourse exists concerning cryptologic theories." Defendants Brief at 24:13-15. This assertion is supported by Mr. Crowell's Declaration and several exhibits.

23. Plaintiff has already presented some evidence to refute this assertion as noted in paragraph 11. Plaintiff will use the subpoena power of discovery, in the same ways as noted in paragraphs 10-12 above, to strengthen this point through written documentation and oral testimony.

24. Defendants' assert that "the regulation of the plaintiff's source code would not have 'a substantial deleterious effect,' on the ability of persons to disseminate information about cryptography, and would 'leave open ample alternative channels of communication' (citations omitted). Defendants' Brief at 24:19-22.

25. Plaintiff has already presented some evidence as noted in paragraph 11 that the ITAR Scheme does have a substantial deleterious effect on the growth of the science of cryptography and that the censorship of source code as a mode of explaining and testing certain ideas is important to the science. Plaintiff will use the subpoena power of discovery locate further admissible evidence in support of these points through written documentation and oral testimony in the same ways as noted in paragraphs 10-12 above.

26. For example, Defendants have indicated in the Karn litigation that, in response to a recent CJ Request, they are "reevaluating" their informal policy of not regulating books containing source code. Plaintiff would seek all information on this CJ and the apparent "reevaluation". Plaintiff is informed and believes that the individual who submitted this CJ, Philip Zimmerman, will consent to the Defendants' release of information related to it.

27. Defendants' assert that "encryption products that do not function to maintain the 'secrecy and confidentiality of data' are not encompassed by Category XIII(b)". Defendants' Brief at 24:24-25.

28. Plaintiff has already presented some evidence, namely the

Declaration of Brian Behlendorf, that the Defendants have applied the ITAR Scheme to software which does not maintain the "secrecy and confidentiality of data". Plaintiff is aware of other such instances, but the persons involved are unwilling to speak unless they are subject to subpoena due to the ongoing nature of their interactions with Defendants. Plaintiff will use the subpoena power of discovery to locate other admissible evidence to strengthen this point through written documentation and oral testimony, both from Government officials who implement the ITAR Scheme and from third parties who are affected by it.

29. Defendants assert that "many academics in Dr. Bernstein's field freely publish scientific information on cryptographic theories and algorithms and attend symposia. Defendants' Brief at 33:15-18.

30. As noted above in paragraph 11, 23 and 25, Plaintiff has already presented some evidence that the ITAR Scheme does have a substantial deleterious effect on the growth of the science of cryptography and that the censorship of source code as a mode of explaining and testing certain ideas is important to the science. Plaintiff will use the subpoena power of discovery to locate additional admissible evidence to strengthen this point through written documentation and oral testimony in the same ways as noted in paragraphs 10-12 above.

31. Defendants have asserted that "it is noteworthy that technical data for which export licenses are sought normally has not been placed into the public domain by the exporter." Defendants' Brief at 11:12-13. It is supported by the Declaration of Lowell, but no other evidence.

32. This assertion is a bit confusing and perhaps irrelevant, since the issue in this case is not technical data which "has been placed" into the public domain, but technical data which the author wishes to place into the public domain. To the extent that this assertion is relied upon by Defendants in support of their arguments here, however, both written discovery and depositions will be required in order to investigate whether it is true.

33. Anticipated Discovery.

a. Depositions.

i. Plaintiff anticipates deposing the following defendants within 120 days, or as soon thereafter as is reasonably possible, or as ordered by the Court. Plaintiff further anticipates that their testimony at deposition will be substantially different in content from each other so as to allow Plaintiff to ascertain a full and complete picture of these individual Defendants' involvement in implementing and administering the scheme of regulation.

(1) Mark Koro, National Security Agency. Mr. Koro's exact duty title is unknown. It is anticipated that Mr. Koro will provide evidence of Defendants' implementation and administration of ITAR.

(2) Greg Stark, National Security Agency. Mr. Stark's exact duty title is unknown. It is anticipated that Mr. Stark will provide additional testimony similar to that of Mr. Koro. However, since the exact nature of Mr. Stark's and Mr. Koro's positions in the National Security Agency, and their working relationships, if any, are unknown, Plaintiff anticipates discovery of that information either by deposition, production of documents, interrogatory, or disclosure by Defendants.

(3) Gary Oncale, Major, USAF, Bureau of Politico-

Military Affairs, Office of Defense Trade Controls, Department of State. It is anticipated that Major Oncale will provide evidence of Defendants' implementation and administration of ITAR.

(4) Michael Newlin, Acting Director, Defense Trade, Department of State. It is anticipated that Mr. Newlin will provide evidence of defendant's implementation and administration of ITAR.

(5) Charles Ray, Bureau of Politico-Military Affairs, Office of Defense Trade Controls, Department of State. It is anticipated that Mr. Ray will provide evidence of defendant's implementation and administration of ITAR.

(6) William B. Robinson, Director, Bureau of Politico-Military Affairs, Office of Defense Trade Controls, Department of State. It is anticipated that Mr. Robinson will provide evidence of defendant's implementation and administration of ITAR.

ii. Plaintiff further anticipates deposing "DOE" defendants ascertained during the above mentioned depositions, or through other discovery, as soon thereafter as is reasonably possible, or as ordered by the Court.

iii. Plaintiff further anticipates deposing, both orally and through the business records subpoena power, known third-party witnesses, including, but not limited to:

(1) Former and current employees of the Department of State and the NSA in order to determine the intended and applied scope of the ITAR regulations, including:

(a) William J. Lowell, whose Declaration supports Defendants' Motion for Summary Judgment and who authored letters to Plaintiff, Mr. Miller and others.

(b) William Crowell, whose Declaration supports Defendants' Motion for Summary Judgment.

(c) Martha Harris, who authored letters to Mr. Karn.

(d) Mary Sweeney, who authored letters to Mr. Demberger.

(e) John Sonderman, who corresponded to Mr. Miller.

(f) All those involved in the investigation and attempted indictment of Philip Zimmerman.

(g) All employees directly involved in the incidents described in the Declarations involving Mr. Miller, Mr. Junger, Mr. Johnson, Mr. Behlendorf, Mr. Karn and Mr. Demberger.

(2) Persons in addition to Plaintiff and the current Declarants who have been prevented from communicating

about cryptography as a result of the regulations, including those prevented from speaking about it at academic conferences and on on-line discussion groups;

(3) Persons who have been chilled in their communications about cryptography out of fear of the regulations, including those who wish to speak about it in academic classrooms and at academic conferences;

(4) Persons who wish to communicate about cryptography but who have found that the regulations are drafted such that a person of ordinary intelligence cannot determine what is restricted and what is not;

(5) Persons who can testify as to the effectiveness of the regulations in meeting Defendants' stated goals. For instance, persons will testify as to whether the regulations prevent foreign governments or citizens from using or obtaining strong cryptography;

(6) Persons who can testify about the ongoing public debate about cryptography;

(7) Persons who can testify as to the political value to them of Plaintiff's speech in the ongoing public debate about cryptography;

(8) Persons who can testify about the effect of the regulations on the availability of U.S. companies to compete in the world-wide market of cryptographic products.

iv. Depositions of Unknown Witnesses

Plaintiff further anticipates deposing as yet unknown witnesses ascertained during the above mentioned depositions, or through other discovery, on the issues mentioned above and others raised during the course of discovery, as soon thereafter as is reasonably possible, or as ordered by the Court.

v. Demands for Production.

Plaintiff anticipates serving Demands for Production of Documents on Defendant as soon as the Court authorizes the parties to proceed with discovery. Plaintiff anticipates the documents requested will show, among others

(1) The internal regulations, procedures and directives used by Defendants to implement and administer the ITAR Scheme;

(2) The actual implementation of the ITAR Scheme in practice;

(3) Defendants testimony at Congressional hearings about the ITAR, including testimony directly contrary to the positions which Defendants have taken in this case;

(4) Documents which provide factual support, if any exists, for Defendants assertions that their regulation of the communication of information

about cryptography is necessary to further their stated goals.

vi. Interrogatories.

Plaintiff anticipates serving Interrogatories on Defendants as soon as the Court authorizes the parties to proceed with discovery. Plaintiff anticipates the interrogatories will allow Plaintiff to discover, among others, how Defendants use their internal regulations, procedures and directives to implement and administer the ITAR;

vii. Expert Witnesses.

Plaintiff reserves the right to designate expert witnesses who will testify about the issues described above.

34. I believe that the information outlined above will raise genuine issues of material fact and therefore, if Defendants' Motion for Summary Judgment should be denied.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Mateo, California on _____, 1996.

CINDY A. COHN, ESQ.
Attorney for Plaintiff