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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL J. BERNSTEIN)
) C 95-00582 MHP
Plaintiff,)
) DECLARATION OF
v.) JAMES T. DEMBERGER
))
UNITED STATES DEPARTMENT OF)
STATE et al.,))
Defendants.)
)
)

I, JAMES T. DEMBERGER declare as follows:

1. I am a resident of Seminole, Florida. I have personal knowledge of the facts set forth herein, unless otherwise indicated, and if called as a witness could and would so testify.
2. On or about September 10, 1994, I posted a prototype computer program ("VOTPCRYP") for encryption and decryption along with documentation for VOTPCRYP to the Usenet "sci.crypt" newsgroup. I wrote this program myself and stated in the posting that I was putting this material in the public domain. My purpose in posting this material was to contribute to the development of cryptography and I have no commercial interest whatsoever.
3. In response to my posting, Mary F. Sweeney, Acting Chief of the Compliance and Enforcement Branch of the State Department's Bureau of Politico-Military Affairs, Office of Defense Trade Controls, advised me by letter dated Sept. 22, 1994, that my program was subject to licensing under the International Traffic in Arms Regulations ("ITAR"). A copy of this letter is attached as Exhibit A to this Declaration and incorporated by reference.
4. The letter stated, among other things, that VOTPCRYP was a defense article on the U.S. Munitions List ("USML"), that VOTPCRYP was not covered by any exemption for information in the public domain, and that my posting of VOTPCRYP to sci.crypt was an export for which a license from the State Department ("State") was needed. Exh. A.
5. I viewed the letter as a threat, because it stated that my posting was "a violation" of the ITAR and informed me that I could submit "mitigating information" to help State determine "whether any further action in this case is warranted." Exh. A.

6. I responded by letter dated Oct. 3, 1994, expressing my belief that VOTPCRYP was in the public domain and therefore exempt from ITAR. I pointed out that I had in my posting placed VOTPCRYP and its documentation into the public domain and that the principles underlying VOTPCRYP, i.e. XOR encryption and the use of one-time pads, have long been in the public domain. I did not keep a paper copy of this or any other letter I sent to State, but I retained computer copies of the letters. A verbatim reprinted copy of the Oct. 3, 1994 letter is attached as Exhibit B to this Declaration and incorporated by reference.
 7. After waiting a month I sent another letter to State dated Nov. 1, 1994. A verbatim reprinted copy of the Nov. 1, 1994 letter is attached as Exhibit C to this Declaration and incorporated by reference.
 8. State responded to my Oct. 3 letter by letter dated Nov. 7, 1994 from Mr. William B. Robinson, Director, Office of Defense Trade Controls. Mr. Robinson stated that the "public domain" exemption of the ITAR only applies to technical data and that cryptographic software such as VOTPCRYP is not technical data. A copy of this letter is attached as Exhibit D to this Declaration and incorporated by reference.
 9. I responded to Mr. Robinson's letter by letter dated Nov. 17, 1994, in which I informed him that VOTPCRYP was in the public domain. I further stated that I am not in the business of manufacturing or exporting defense articles. A verbatim reprinted copy of the Nov. 17, 1994 letter is attached as Exhibit E to this Declaration and incorporated by reference. After waiting a month, I mailed him a follow-up letter dated Dec. 22, 1994. A verbatim reprinted copy of the Dec. 22, 1994 letter is attached as Exhibit F to this Declaration and incorporated by reference.
 10. Ms. Sweeney responded to my November letters by letter dated Dec. 22, 1994. She stated that VOTPCRYP is excluded from the public domain exemption and that posting VOTPCRYP to internationally distributed Usenet newsgroups was an export. Although I stated that I was not in the business of manufacturing or exporting defense articles, she stated that "you created a defense article and exported it on September 10, 1994. You are not exempt from the registration requirement of the ITAR simply because you did not charge money for your product." A copy of Ms. Sweeney's Dec. 22, 1994 letter is attached as Exhibit G to this Declaration and incorporated by reference.
 11. I responded to her letter by letter dated Jan. 2, 1995, stating that I had placed VOTPCRYP in the public domain by posting it to Compuserve libraries and fora accessible to foreign persons in August 1994. A verbatim reprinted copy of the Jan. 2, 1995 letter is attached as Exhibit H to this Declaration and incorporated by reference.
 12. Ms. Sweeney responded to my Jan. 2, 1995 letter by letter dated Feb. 3, 1995. She warned that "[a]ny further violations of the ITAR . . . will be referred . . . for appropriate criminal and civil action." A copy of the Feb. 3, 1995 letter is attached as Exhibit I to this Declaration and incorporated by reference.
 13. I responded by letter dated Feb. 22, 1995. A verbatim reprinted copy of the Feb. 22, 1995 letter is attached as Exhibit J to this Declaration and incorporated by reference.
- I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed at Seminole, Florida, on this ___ day of July, 1996.

By _____ James T. Demberger