Decl. of William A. Reinsch, Sept. 10, 1997 in Bernstein v. Commerce

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL J. BERNSTEIN

    Plaintiff - Appellee

v.

UNITED STATES DEPARTMENT OF
COMMERCE, et al.

    Defendants-Appellants.

No. _____

(D.C. No. C-95-0582 MHP)

DECLARATION OF WILLIAM A. REINSCH
UNITED STATES DEPARTMENT OF COMMERCE
IN SUPPORT OF EMERGENCY MOTION FOR A
STAY OF INJUNCTION PENDING APPEAL

I, William A. Reinsch, do hereby state and declare as follows.

1.   I am the Under Secretary for Export Administration of the Department of

Commerce. I have held this position since May 3, 1994. I was appointed to this position by

President Clinton with the advice and consent of the Senate. As Under Secretary for Export

Administration, I determine the policy, direct the programs, and am responsible for all activities of

the Commerce Department's Bureau of Export Administration. I submit this declaration in

support of the government's motion for a stay of the district court's injunction pending appeal in

this case.

2.   The Department of Commerce administers the Export Administration Regulations

("EAR"), 15 C.F.R. Part 730 et seq., which establish licensing and other requirements for the

export of multiple commodities, technology, software, and related activities, from the United

States for national security and foreign policy reasons. At issue in this case is the exportation of certain "cryptographic" or "encryption" software — that is, software that can be used on a computer to maintain the secrecy of information being transmitted over computer systems. The Commerce Department seeks a stay of the district court's injunction because, as presently constituted, it would permit the plaintiff-appellee to export cryptographic software — including newly updated or as yet undeveloped versions of such software — by any means, to any person, entity, group, corporation, or government, for any purpose, pending resolution on appeal of whether the Commerce Department may, consistent with the Constitution, require that a license be sought prior to the export of such software.

3. When this case commenced, most export licensing controls over cryptographic software were administered by the Department of State pursuant to the Arms Export Control Act, 22 U.S.C. § 2778 et seq., and the International Traffic in Arms Regulations, 22 C.F.R. Part 120 et seq.. Such cryptographic devices and products were listed on the "United States Munitions List," see 22 C.F.R. Part 121, Category XIII(b)(1). On November 15, 1996, President Clinton issued an Executive Order and memorandum directing that export licensing jurisdiction over most cryptographic products, including software, be transferred to the Department of Commerce. See Executive Order 13026, 61 Fed. Reg. 58767 (Nov. 19, 1996). The President has specifically found that encryption products (including software), when used outside the United States, "can jeopardize our foreign policy and national security interests," and that the "exportation of encryption products accordingly must be controlled to further U.S. foreign policy objectives, and promote our national security, including the protection of the safety of U.S. citizens abroad." Presidential Memorandum, 32 Weekly Comp. Pres. Doc. 2397 (Nov. 15, 1996). Interim

regulations carrying out the President's policy were published by the Department of Commerce on December 30, 1996 and made effective on that same date. See 61 Fed. Reg. 68572 et seq. (December 30, 1996). Export licensing requirements for most encryption products, including encryption software, are now administered under the EAR.[1]/

    4.   The EAR contains the "Commerce Control List" ("CCL"), see 15 C.F.R. Part 774, which is a list of categories of items whose export is regulated for national security and foreign policy reasons. The CCL uses a classification system known as Export Control Classification Numbers ("ECCNs"). Encryption hardware products are covered by amended ECCN 5A002, while encryption software is covered by amended ECCN 5D002. See 15 C.F.R. Part 774, ECCN 5A002 and 5D002. Because encryption items covered by ECCN 5A002 and 5D002 "may be used by persons abroad to harm national security, foreign policy and law enforcement interests," they generally may not be exported without a license. See 15 C.F.R. § 742.15. When a license is required under the EAR, it "will be reviewed on a case-by-case basis by BXA, in conjunction with other agencies, to determine whether the export or reexport is consistent with U.S. national security and foreign policy interests." See 15 C.F.R. § 742.15(b).

    5.   The software originally at issue in this case, called "Snuffle 5.0", was determined by the State Department to be subject to export licensing requirements under the USML. Upon the transfer of export licensing jurisdiction to the Commerce Department, that software is now subject to the licensing requirements for encryption software covered by ECCN 5D002 under

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[1]/   The State Department issued a corresponding rule amending the USML to exclude the encryption products at issue. 61 Fed. Reg. 68633 (Dec. 30, 1996). The State Department retains jurisdiction under the AECA and the ITAR over cryptographic items that are specifically designed for military applications. See 61 Fed. Reg. 68633 (Dec. 30, 1996).

Section 742.15 of the EAR.

6.   The district court's order issuing a limited stay pending appeal left in place an injunction against the government from enforcing the EAR's export licensing controls with respect to the appellee, Daniel J. Bernstein, and his Snuffle 5.0 software, and updated versions of this software.   This injunction creates a serious risk of irreparable harm to the government's interests if not stayed pending appeal.

7.   As noted, the President has determined that the export of encryption products, including software, can jeopardize the foreign policy and national security interests of the United States.   Cryptographic products, including software, can be used to conceal the transmission of information which might have critical national security and foreign policy significance.   As explained further in the Declaration of William P. Crowell, Deputy Director of the National Security Agency, the United States seeks to control the export of certain cryptographic products, including software, in order to protect the United States' ability to gather foreign intelligence on military, national security, and foreign policy matters.   Crowell Declaration ¶¶ 3, 4.   The EAR does not ban the exportation of encryption products, including software, but, rather, establishes a licensing process so that the government can determine where the product is going, for what purpose, and whether the particular export poses a national security or foreign policy concern. This process has now been enjoined with respect to plaintiff's Snuffle 5.0 software and new, updated versions of that software.   Thus, at this point, Dr. Bernstein is free to export, by any means, to any place or any person in the world, for any purpose, including commercial marketing, cryptographic software programs that fall into a category of items that the President has determined should be subject to licensing controls in order to further the national security and

foreign policy interests of the United States.

8. Whether a commodity is available abroad may, in some instances, be a factor for the Secretary to consider in licensing the export of that item. The Commerce Department is aware that, at some point, a version of Snuffle was exported abroad by unknown persons through the Internet, in apparent violation of federal export control laws, and is available at foreign Internet sites. Notwithstanding this element of foreign availability, it remains necessary that the district court's injunction be stayed. As noted, the district court's injunction would permit Dr. Bernstein to now export his software by any means, without any apparent limitation as to quantity or purpose, including commercial marketing. In addition, the district court's injunction not only applies to Snuffle 5.0, which plaintiff originally submitted to the State Department to determine if it was subject to export licensing, but also to new, enhanced versions of this software which have never been exported (or even developed yet) and which the government has not assessed. This would allow Dr. Bernstein to export more practical and useful updated cryptographic software programs that perform the same function as Snuffle 5.0. See Crowell Declaration ¶ 8. The injunction would preclude the government from undertaking any licensing review as to such software programs, and thereby irreparably harms the government's ability to address whatever national security or foreign policy implications there might be as to such exports.

9. In addition, the real or apparent foreign availability of encryption software does not negate the need for, or purpose of, export licensing controls. In general, the Commerce Department does consider whether an item is available abroad for purposes of determining export licensing requirements, see 15 C.F.R. Part 768, (although even if an item is available abroad, the Secretary has authority to control that item for national security and foreign policy reasons, see,

e.g., 15 C.F.R. § 768.7(i)). With respect to encryption products, including software, the President specifically determined that the export of encryption products formerly regulated under the USML "could harm national security and foreign policy interests even where comparable products are or appear to be available from sources outside the United States." E.O. 13026, § 1(a). The President further found that "facts and questions concerning the foreign availability of such encryption products cannot be made subject to public disclosure or judicial review without revealing or implicating classified information that could harm United States national security and foreign policy interests." Id.; see Crowell Declaration ¶ 10. The President therefore directed that the provisions of the EAR relating to foreign availability shall not apply to encryption items transferred from the USML. Id. The EAR carry out that directive. See 15 C.F.R. § 768.1(b). Thus, the policy basis for the export controls at issue remain in place even if foreign availability appears to exist.
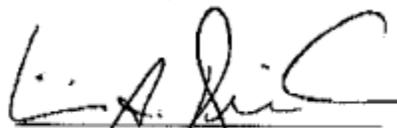
10.   Finally, the Commerce Department does not seek a stay pending appeal in order to regulate academic publication or exchange of ideas concerning cryptography. Our present concern is with the transmission outside the United States by any means of Plaintiff's encryption software programs subject to licensing controls pending appeal. With respect to academic activities in general, the EAR contains a number of exceptions to licensing controls for information that is already published or will be published, educational information released by instruction in catalog courses of academic institutions, and information resulting from fundamental university research. See 15 C.F.R. §§ 734.3(b)(3), 734.7, 734.8, 734.9. Primarily through these exceptions, the academic activities that Dr. Bernstein has stated he wishes to undertake, such as the publication of his research on cryptography, public discussion thereof (including overseas),

teaching students (including foreign students) in the United States are not regulated — nor has the Commerce Department at any time sought to regulate these activities of Dr. Bernstein. Rather, this stay is sought in order to prevent the unlimited spread throughout the world of the cryptographic software programs that plaintiff has and will develop in the future, without any assessment of the potential harm attendant with such an export for which the licensing process exists.

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

DATE: _Sept 8, 1997_

WILLIAM A. REINSCH

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