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

DANIEL J. BERNSTEIN,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF COMMERCE, et al.,

Defendants.

C 95-00582 MHP

**DECLARATION OF
DANIEL J. BERNSTEIN
IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Date: October 7, 2002

Time: 2:00 p.m.

Place: Courtroom 15, 18th Floor

I, DANIEL J. BERNSTEIN, hereby declare:

1. I am the Plaintiff in the above-entitled action. I currently reside in Chicago, Illinois. Except as expressly stated below, I have personal knowledge of the facts stated herein. If called upon to testify, I would competently testify to these facts.

Enforcement of EAR

2. In a press release dated February 21, 2002, the defendants announced the imposition of a \$95000 fine for a series of unlicensed "exports" of encryption software in 1998 and 1999. I saw this announcement on the defendants' web page <http://www.bxa.doc.gov/press/2002/PenaltyImposedExpEncSoft.html>. Exhibit A is a true and correct printout of that web page as downloaded on 29 July 2002.

1 3. The defendants made the following statement in their announcement: “This case
2 demonstrates that the U.S. Government can and will enforce its export controls on encryption
3 products.”

4 4. The defendants have also published some statistics regarding their enforcement of
5 EAR last year. I saw these statistics on the defendants’ web page
6 [http://www.bxa.doc.gov/press/2002/ForeignPolicyReport02/
7 Chap10_Encryption.pdf](http://www.bxa.doc.gov/press/2002/ForeignPolicyReport02/Chap10_Encryption.pdf). Exhibit B is a true and correct printout of that web page as
8 downloaded on 29 July 2002.

9 5. The defendants’ statistics include the following statement (page 95): “Under
10 current encryption policy, most encryption products require a one-time technical review and
11 classification prior to export. . . . Of the 1,405 encryption products reviewed, nearly 80 percent
12 were classified as ‘retail’ encryption items, making them broadly eligible for export without a
13 license.” The defendants did not say how many of these “products” were “software.”

14 6. The defendants’ statistics also indicate (page 94) that the defendants received
15 “341 license applications for encryption items,” and denied five of those applications.

16 7. The defendants’ statistics also indicate (page 95) that the defendants received
17 “241 notifications of encryption items eligible for export pursuant to license exception TSU or
18 ENC.”

19 **Recent Discussions with the Defendants**

20 8. On 1 March 2002, through my attorneys, I sent the defendants a message
21 concerning my communications with my colleagues at conferences this year. I explained that
22 EAR interfered with these activities; I asked whether the government was willing to tolerate
23 these activities; and I proposed that we enter into a stipulation rather than my moving for a
24 preliminary injunction. Exhibit C is a true and correct printout of that message.

25 9. Under the proposed stipulation, the sole obligations of the defendants were as
26 follows: “The Secretary [of Commerce] will not impose, or seek or encourage the imposition
27 of, civil penalties or criminal sanctions for the 2002 Conference Activities. If the Export
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1 Administration Regulations . . . impose any licensing requirements, notification requirements,
2 or other requirements upon the 2002 Conference Activities, the Secretary hereby waives those
3 requirements as applied to the 2002 Conference Activities.”

4 10. The defendants responded on 4 March 2002. In their response, they stated that
5 they could not “exempt [me] from the EAR,” and they refused to enter into the proposed
6 stipulation. Exhibit D is a true and correct printout of the defendants’ response.

7 11. On 16 May 2002, through my attorneys, I informed the defendants that I
8 understood their refusal as a specific threat of punishment under EAR for my activities. I also
9 requested that the defendants enter into stipulations covering the other activities described in
10 my previous declaration. Exhibit E is a true and correct copy of my letter.

11 12. As of 1 August 2002, I have not received a response from the defendants.

12 13. In March 2002, after learning about this Court’s busy schedule, I decided not to
13 move for a preliminary injunction. I am continuing to refrain from unlawful activity, as
14 described in my previous declaration.

15 I declare under penalty of perjury under the laws of the United States that the foregoing
16 is true and correct and that this declaration was executed on this 1st day of August, 2002.

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19 DANIEL J. BERNSTEIN
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