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Encryption and the First Amendment [*]

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1. Though cryptography has ancient roots, the emergence of First Amendment challenges to government control of encryption is a very recent phenomenon. Yet the several cases now in the courts, and others likely to follow, promise to make this one of the liveliest arenas for free expression. Though it is far too early to venture confident predictions, it would be surprising if the Supreme Court does not pass upon encryption issues sometime in the next few years.
2. The constitutional issues emerge with a clarity and simplicity that contrasts sharply with the inherent complexity of the technology. The basic issue is a profoundly important one both for free speech and for electronic communication: whether the United States Government may require export licenses of persons who disseminate encryption programs or publish, either electronically or in print, materials discussing encryption where non-U.S. citizens may access those materials.
3. Not surprisingly, federal courts differ in the resolution of this issue. A district judge in San Francisco has twice held encryption software to be expression fully protected by the First Amendment.[1] Her decision is currently under review by the Court of Appeals for the Ninth Circuit.[2] Meanwhile, a judge in Washington, D.C. took a markedly different view of a commercial publisher who sought, but was denied, a license for foreign distribution of encryption programs.[3] He found the export controls virtually immune from constitutional challenge, in deference to the foreign affairs powers of the President.[4] With respect to encryption programs themselves, he recognized the presence of an expressive element, but appraised the regulatory scheme under a much lower level of scrutiny than did the San Francisco judge.[5]
4. A third case pending in federal court in Cleveland promises to be the most interesting and difficult of the encryption cases.[6] The plaintiff, a law professor who teaches computer law has felt compelled to bar foreign students and visiting international scholars from his classes, lest the mere discussion of encryption in their presence be deemed an unlicensed "export" of regulated technology.[7]
5. While the facts of the three cases differ substantially, they share common themes. The customary level of judicial deference to executive controls over the export of sensitive material

complicates[8] —and in the view of one judge forecloses[9] —full review of the First Amendment claims. Yet even the judge who felt most severely constrained by such deference recognized an inescapably expressive element in encryption software, and even more clearly in the posting or publishing of papers and articles that describe such programs.[10]

6. Such cogent First Amendment claims cannot long be postponed or avoided. Courts will need to continue to address the novel issues raised in the three early cases challenging encryption export licensing—and in so doing must confront the basic question: whether cryptographic software is "speech" within the scope of the First Amendment.
7. That process should be greatly aided by the Supreme Court's recent invalidation of Congress' attempt to forbid "indecency" on the Internet.[11] Much of what the high Court said in conferring full protection upon electronic communication in that form should guide analysis of encryption and other forms of digital expression. As the Supreme Court recognized so forcefully with respect to the Internet, the novelty of the medium, and the lack of its familiarity to the Framers of our Bill of Rights, offer no excuse for denying First Amendment protection to communicative channels that disseminate ideas and information.[12]
8. Thus the hope for affirmation of the San Francisco federal judge's bold ruling is realistic, if far from certain. Many other factors will come to bear on the pending litigation; central to the process, one hopes, is a deep awareness of how well the First Amendment has transcended changes in technology during its more than two centuries.

Footnotes

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[1] Berstein v. United States Dep't of State, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) [hereinafter Berstein I]; Berstein v. United States Dep't of State, No. C-95-0582 MHP, 1997 WL 530866, at *16, *22 (N.D. Cal. 1997) [hereinafter Berstein II].

[2] Bernstein II.

[3] Karn v. United States Dep't of State, 925 F. Supp. 1 (D.D.C. 1996).

[4] *Id.* at 11.

[5] *Id.* at 10.

[6] Michelle Fuetch, *Professor Fights U.S. on Encryption; CWRU Computer Law Teacher Needs License*, Plain Dealer (Cleveland), June 8, 1996, at 1B.

[7] *Id.*

[8] Berstein II, 1997 WL 530866, at *10.

[9] Karn, 925 F. Supp. at 11.

[10] *Id*. at 9-10.

[11] Reno v. A.C.L.U., 117 S. Ct. 2329 (1997).

[12] *Id*. at 2344.