



UNITED STATES DEPARTMENT OF COMMERCE
Bureau of Industry and Security
Washington, D.C. 20230

Mr. Eric C. Grimm, Esq.
CyberBrief, PLC
320 South Main Street, Second Floor
P.O. Box 7341
Ann Arbor, Michigan 48107-7341

Dear Mr. Grimm,

Thank you for your letter dated September 13, 2002 in which you request that the Bureau of Industry and Security (BIS) determine whether a license is required for your clients to export encryption source code (and the corresponding object code) from server computers, some of which are located in the United States.

In your letter, you state that your clients and other members of the organizations “Hacktivism” and the “Cult of the Dead Cow” are seeking to distribute the “Six/Four” software program (both the source code in its entirety and the corresponding object code) worldwide as “free” and “open source” software, under what you referred to as a “Hacktivism License”.

You further state that your clients plan to make the “Six/Four” encryption software program freely available on the Internet under a “Hacktivism License” for any end-use (except those end-uses that violate the human rights of others) by any end-user, except those known to be located in, or nationals of, Cuba, Iran, Iraq, Libya, North Korea, Sudan or Syria. However, you describe a few examples of restrictions on the end-uses of “Six/Four” which may be imposed by a “Hacktivism License”. Such restrictions include: (i) a prohibition on making changes that include a weakening of the strength of the encryption protocols or the insertion of “backdoors” or other malicious code into the software, and (ii) any distribution of the “Six/Four” software program (or a derivative) must consist of the entire source code of the software (or derivative).

You indicate in your letter that this software (and all future versions) will be distributed via server computers, some located inside the United States, and that some of these servers are operated by your clients, who are not U.S. nationals. As the “Six/Four” package of software



tools implements the 256-bit AES encryption algorithm to secure data communications over the Internet, such software is correctly classified under Export Control Classification Number (ECCN) 5D002. You request that BIS determine whether the EAR require any license for your clients, under the circumstances you describe.

As described in section 734.2(b)(9)(i) of the EAR, the export of encryption source code and object code software includes the actual shipment, transfer, or transmission of the software out of the United States as well as transfers of such software in the United States to an embassy or affiliate of a foreign country. As further stated in section 734.2(b)(9)(ii), such export of encryption software includes downloading, or causing the downloading of, such software to Internet locations outside the United States. Therefore, the proposed distributions of “Six/Four” software from servers located inside the United States are “exports” that are subject to the EAR.

Based on the information you have provided, the “Six/Four” encryption source code that you intend to freely distribute under a “Hacktivism License” and post to a site on the Internet would be considered publicly available under section 734.3(b)(3) as described in §740.13(e) of the EAR. BIS would not consider the restrictions you described under the “Hacktivism License” on the end-uses of the “Six/Four” software program to be restrictions of a kind that affect the free access to the program. As such, the “Six/Four” software is eligible for export and reexport under the terms and conditions of the Technology and Software Unrestricted (TSU) license exception. License exception TSU authorizes the export and reexport (including postings to the Internet) of encryption source code (and the corresponding object code) that would be considered publicly available, provided that notification to BIS (with a copy to the ENC Encryption Request Coordinator) is provided by the time of export. *See* 15 C.F.R. § 740.13(e).

Accordingly, once such notification has been given and eligibility under the TSU license exception established, the “Six/Four” software (source code and corresponding object code) is released from “EI” controls. *See* 15 C.F.R. § 772.1 of the EAR for the definition of “License Exception”. Please be advised that you may not knowingly export or reexport source code or products developed with the source code to Cuba, Iran, Iraq, Libya, North Korea, Sudan or Syria, or other parties to which exports are precluded including those (i) defined in the EAR (e.g. denied parties) or (ii) defined by another U.S. Government agency (e.g. the Treasury Department’s Office of Foreign Assets Control).

As further described in license exception TSU, the posting of ECCN 5D002 encryption software to the Internet where it may be downloaded by anyone (such as under the described “Hacktivism License”) does not establish “knowledge” of a prohibited export or reexport, or

otherwise trigger “red flags” and “know your customer” requirements described in Supplement No. 3 to Part 732 of the EAR. *See* 15 C.F.R. § 740.13(e)(6). In addition, bug fixes, patches, upgrades or releases, including name changes, of the “Six/Four” software program may be exported and reexported under the applicable provisions of the EAR without additional notification. However, please note that each time new (or changed) encryption software is created and posted to the server in the United States, separate notification to BIS (as described above) would be required.¹

If you have any questions or concerns, please do not hesitate to contact Timothy Clinton of my staff on 202-482-1368.

Sincerely,



Norman E. LaCroix
Acting Director
Information Technology Controls Division

¹ Notification is required each time a new encryption algorithm in source code is made publicly available by posting it to a site on the Internet. A new encryption algorithm is, with respect to a version previously notified, any algorithm that has been modified so that identical input results in different output.

Sender _____ H
U.S. DEPARTMENT OF COMMERCE
Bureau of Export Administration
Washington, D.C. 20230

OFFICIAL BUSINESS
Penalty for Private Use, \$300

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