
BIS OKs Anonymous Worldwide Downloads of Mass Market Encryption Software

by Thomas M. deButts

On September 11, 2009, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) issued an advisory opinion permitting unlimited anonymous worldwide export via download of "mass market" encryption software subject to certain conditions.

Background

Software with encryption capabilities or software that calls on or enables encryption functionality in other software is controlled for export from the United States under the Export Administration Regulations (EAR). Some of these software products are eligible for "mass market" treatment whereby the software can be released from strict encryption export controls, depending on the specifications of the software. Upon designation as encryption mass market software, the software is assigned the Export Control Classification Number (ECCN) 5D992, and may be exported anywhere in the world except to Cuba, North Korea, Syria, Iran and Sudan.

Many software products in this category are made available by software developers for free and anonymous download via the Internet. Many distributors require downloaders to provide identifying information such as name, address and country. Automated screening may also be used to ensure that the software is not downloaded to an IP address in a prohibited country. Up until now, there has been uncertainty about the duty distributors have to prevent downloads via the Internet of mass market encryption software to prohibited countries. The question is important because the person making the software available on the Internet is generally considered to be the exporter of the software and is responsible for compliance with the EAR.

Advisory Opinion Clarifies Exporter Responsibilities

The recent advisory opinion issued by BIS to an undisclosed software developer has clarified the BIS position on the duty to prevent downloads of mass market encryption software to prohibited countries. The opinion provides the following guidance:

- Publishing “mass market” encryption software to the Internet where it may be downloaded by anyone neither establishes “knowledge” of a prohibited export or reexport nor triggers any “red flags” necessitating further inquiry.
- Posting “mass market” encryption software on the Internet for free or anonymous download that results in the software being downloaded by an anonymous person in Cuba, North Korea, Syria, Iran or Sudan would not be a violation of the EAR.

“Anonymous” Clarified

The opinion also provided an important clarification of what constitutes an “anonymous” person downloading software via the Internet. Specifically, if the person posting the software requires registration or collects information like name, address, e-mail address, etc., prior to permitting the download, then the download is not anonymous and the person posting the software would have knowledge of an export to a prohibited country, if such information revealed a prohibited destination.

Perhaps even more importantly, the opinion provides the following guidance concerning the IP address that is always left as a footprint when any download occurs:

A violation would not occur if the IP address of the person downloading the software is collected by the software provider at the time of the download and stored as a “footprint” in the machine code of the software provider’s data base, but is not tracked or used for any purpose by the software provider.

This “don’t ask, don’t tell” policy permits software developers to post their mass market encryption software for unlimited worldwide download via the Internet as long as they do not ask the downloader for identifying information and do not decipher the IP addresses buried in the servers that could reveal the countries to which the software was downloaded.

Treasury Sanctions

The opinion notes that it is confined to the interpretation of the EAR and does not address the sanctions regulations implemented by the Department of the Treasury, Office of Foreign Assets Control (OFAC), which administers its own distinct restrictions on trade with Cuba, Iran, Sudan and other countries. Thus, there still remains uncertainty concerning the OFAC position on this issue.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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