

**Judge Casey**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*Copy received  
USAO-SDNY/dsj  
9/27/04*

-----X  
THE ASSOCIATION OF AMERICAN  
UNIVERSITY PRESSES, INC.;  
THE PROFESSIONAL/SCHOLARLY  
PUBLISHING DIVISION OF THE  
ASSOCIATION OF AMERICAN  
PUBLISHERS, INC.;  
PEN AMERICAN CENTER, INC.; and  
ARCADE PUBLISHING, INC.

Civ. No. \_\_\_\_\_

**04 CV 7604**

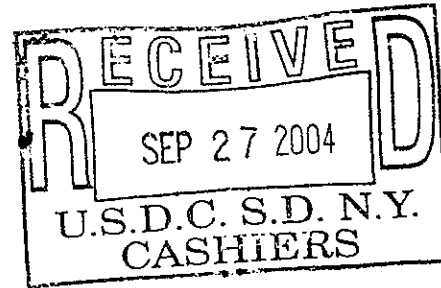
Plaintiffs,

**COMPLAINT**

- against -

THE OFFICE OF FOREIGN ASSETS  
CONTROL OF THE DEPARTMENT OF THE  
TREASURY; JOHN W. SNOW, SECRETARY  
OF THE TREASURY, in his official capacity;  
and R. RICHARD NEWCOMB, DIRECTOR,  
OFFICE OF FOREIGN ASSETS CONTROL,  
in his official capacity,

Defendants.  
-----X



Plaintiffs, the Association of American University Presses, Inc. ("AAUP"), the Professional/Scholarly Publishing Division of the Association of American Publishers, Inc. ("PSP"), PEN American Center, Inc. ("PEN"), and Arcade Publishing, Inc. ("Arcade"), submit this complaint for declaratory and injunctive relief against the Office of Foreign Assets Control of the United States Department of the Treasury ("OFAC"), the Secretary of the Treasury, John W. Snow, and R. Richard Newcomb, the Director of OFAC, and allege the following:

**INTRODUCTION**

1. Plaintiffs bring this action to remove restrictions the defendants have imposed on the legislatively and constitutionally protected free exchange of information and ideas. The

defendants' regulations and rulings prohibit the publication of works by authors in certain countries that are subject to United States trade sanctions or prohibit the activities that would make publishing them in the United States possible. Congress has twice declared that U.S. trade embargoes may not be allowed to restrict the free flow of information and ideas that is vital to our understanding of the world. Yet the defendants have promulgated and maintained restrictions on publishing works from sanctioned countries, in defiance of the Berman Amendment and the Free Trade in Ideas Amendment, which explicitly deprive the Executive Branch of authority to "regulate or prohibit, directly or indirectly," transactions for "information and informational materials," including publications of all kinds.

2. OFAC has done exactly what Congress has forbidden, making ordinary publishing activities illegal if they involve works by authors in countries such as Cuba, Iran and Sudan. Congress sought to guarantee that people living under the governments of those countries could still reach the American public and that Americans would have full access to ideas and information from them. In flouting Congress's will, OFAC has also violated the First Amendment rights of publishers, authors, editors and translators to express themselves by bringing works by authors in those countries to the United States, and abridged the First Amendment rights of all Americans to learn from authors throughout the world.

3. The Berman Amendment and the Free Trade in Ideas Amendment exempt information and publications from U.S. economic sanctions programs, but OFAC has eviscerated the exemption and declared that Americans must apply to OFAC for permission if they want to engage in three categories of activities that publishing requires.

4. First, OFAC has invented a distinction between works that have already been completed and works that are not yet fully created. OFAC does not honor the Berman

Amendment and Free Trade in Ideas Amendment for works that have not been completed before anyone subject to the jurisdiction of the United States becomes involved. Transactions involving new books or articles and revised versions of publications are absolutely banned. Americans may not enter into contracts or collaborate with authors in the countries under embargo to create new works or revise works for Americans to read, or pay them advances.

5. Second, OFAC has declared that Americans may not provide substantive or artistic alterations or enhancements to works by authors in embargoed countries, whether the works are new or already exist. As a result, Americans may not substantively edit those authors' works for publication or add materials to them, such as notes, introductions, and illustrations to enhance them, as publishers, editors, and translators routinely do.

6. Third, OFAC insists that publishers, editors, and agents may not market or promote works by authors who live in the restricted countries. For all practical purposes, that means American publishers simply cannot publish their books.

7. Because of OFAC's restrictions, Americans who want information from Cuba, Iran and Sudan are limited to reading what has already been written in those countries. Because authors there work under government restrictions, OFAC has, in effect, extended the force of foreign censorship to the United States.

8. The United States has historically welcomed the works of authors whose voices may be silenced in their own countries. The Berman Amendment and Free Trade in Ideas Amendment were enacted to guarantee that trade sanctions would not interrupt the free flow of information and ideas, specifically information and ideas from countries such as Cuba, Iran, and Sudan.

9. Congress therefore expressly prohibited the restrictions OFAC has imposed. The Constitution, too, prohibits the restrictions. They impose a burden on First Amendment rights that a free society cannot bear, subjecting the members of AAUP, PSP and PEN, and Arcade, to the threat of civil and criminal penalties for their publishing activities, and depriving Americans of access to valuable information and ideas. The restrictions are, further, so vague and contradictory that they are unconstitutional for that reason, as well. And, finally, they establish an unconstitutional licensing scheme that imposes a prior restraint on speech and press.

### **JURISDICTION AND VENUE**

10. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1361, 28 U.S.C. § 1651 and 28 U.S.C. § 2201.

11. Venue is proper pursuant to 28 U.S.C. § 1391(e).

### **PARTIES**

#### **Plaintiffs**

12. The Association of American University Presses, Inc. (“AAUP”) is the trade organization for non-profit scholarly publishers. Its 124 member publishers are affiliated with research universities, scholarly societies, foundations, museums and non-degree-granting research institutions and publish the vast majority of scholarly books in this country and a wide range of academic journals. AAUP is a New York not-for-profit corporation with its headquarters in New York, New York.

13. The Professional/Scholarly Publishing Division of the Association of American Publishers, Inc. (“PSP”) is a formally constituted division of the not-for-profit national trade association of book and journal publishers, which is incorporated in New York and headquartered in New York City. Members of PSP publish, in print and electronic form, the vast majority of materials produced and used by scholars and professionals in science, medicine,

technology, business and law. Their publications and their publishing processes, including the peer review of research results and scholarship, form an integral part of worldwide research.

14. PEN American Center, Inc. (“PEN”) is an association of authors, editors and translators, with approximately 2,700 members, which strives for the unimpeded flow of ideas and information throughout the world. In addition to representing the interests of its members, PEN funds and operates a program to promote the translation and publication in the United States of works by authors in other countries, including countries subject to trade sanctions. PEN is a New York not-for-profit corporation with its headquarters in New York, New York.

15. Arcade Publishing, Inc. (“Arcade”) is an independent book publisher that publishes fiction and nonfiction by authors from around the world. Arcade is a New York corporation with its headquarters in New York, New York.

### **Defendants**

16. The Office of Foreign Assets Control is the office within the U.S. Department of the Treasury that is responsible for administering and enforcing United States trade sanctions.

17. John W. Snow is the Secretary of the U.S. Department of the Treasury and is named as a defendant in his official capacity.

18. R. Richard Newcomb is the Director of the Office of Foreign Assets Control and is named as defendant in his official capacity.

### **FACTS**

#### **U.S. Economic Sanctions**

19. U.S. economic sanctions are governed principally by two federal statutes, the Trading With the Enemy Act (“TWEA”), 50 U.S.C. App. §§ 1-40, and the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701-06. TWEA, which was initially enacted as a wartime measure in 1917, was later amended to extend to peacetime

national emergencies without a declaration of war. In 1977, Congress enacted IEEPA to provide the Executive Branch with separate and limited authority to impose sanctions in peacetime. U.S. sanctions against North Korea and Cuba, which were originally imposed in 1950 and 1963, respectively, continue under the authority of TWEA, while IEEPA authorizes sanctions imposed in subsequent years against Iran, Sudan and other countries.

20. OFAC promulgates and enforces U.S. economic sanctions pursuant to TWEA and IEEPA on behalf of the President and Secretary of the Treasury. Separate regulations set out the terms of the embargoes for each country. The regulations for Cuba, Iran, and Sudan all prohibit most forms of trade to and from the United States. Foreign Assets Control Regulations, 31 C.F.R. § 500 (2004); Cuban Assets Control Regulations, 31 C.F.R. § 515 (2004); Sudanese Sanctions Regulations, 31 C.F.R. § 538 (2004); Iranian Transactions Regulations, 31 C.F.R. § 560 (2004). The regulations challenged here are codified at 31 C.F.R. §§ 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) (the “OFAC Information Regulations”).

21. The penalties for violations of OFAC’s regulations include prison terms of up to ten years and fines totaling up to \$250,000 for individuals, and \$1,000,000 for corporations. OFAC may, in addition, impose civil penalties of up to \$65,000 under TWEA and up to \$11,000 under IEEPA through administrative proceedings. Multiple violations may be found within a single transaction. Reporting, Procedures, and Penalties Regulations, 31 C.F.R. § 501.701 (2004); 50 U.S.C. App. § 16 (2004); 50 U.S.C. § 1705 (2004); 18 U.S.C. § 3571 (2004).

#### **The Berman Amendment**

22. In 1988, in response to several seizures of shipments of magazines and books from embargoed countries at the U.S. border, Congress added an exemption to IEEPA and

TWEA to ensure that “informational materials” would not be excluded from the United States.

The “Berman Amendment” provided that:

[t]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation ... or the exportation ..., whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials.

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), 50 U.S.C. App. § 5(b)(4)(1988).

23. Congress ensured that the exemption for informational materials could not be exploited to interfere with controls on the export of sensitive technology or security information, by excluding materials “otherwise controlled for export under section 5 of the Export Administration Act of 1979,” which permits the President to prohibit the export of goods or technology to protect national security, “or with respect to which acts are prohibited by chapter 37 of title 18, United States Code,” which enumerates crimes involving espionage and the disclosure of classified information. *Id.*; 50 U.S.C. App. § 2404; 18 U.S.C. §§ 79-799.

24. The legislative history of the Berman Amendment confirms the importance to Congress of ensuring that trade sanctions not interfere with the international exchange of ideas and information. The conference report declares that the Amendment “clarifies that the Trading with the Enemy Act and the International Emergency Economic Powers Act do not authorize regulations on the export or import of informational material not otherwise controlled under the Export Administration Act.” H.R. Conf. Rep. No. 576, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1872. The relevant House Foreign Affairs Committee’s report emphasized that ideas and information should flow freely into the United States and from

the United States to the rest of the world, in light of the fundamental First Amendment interests at stake. *See* H.R. Rep. No. 4, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., pt. 3, at 113 (1987).

### **OFAC's Response to the Berman Amendment**

25. OFAC amended its regulations purportedly to comply with the Berman Amendment in 1989. The amended regulations expanded the general licensing provisions to authorize all transactions relating to “informational materials,” 54 Fed. Reg. 5229, 5231-34 (1989); 31 C.F.R. §§ 500.206, 500.550, 515.206, 515.545 (1990, 2004), but narrowly defined “informational materials” to include only “information recorded in tangible form,” excluding “intangible items, such as telecommunications transmissions.” 54 Fed. Reg. 5229, 5231, 5233; 31 C.F.R. §§ 500.332, 515.332 (1990). The exemption for transactions relating to “informational materials” also contained the following unexplained carve-out:

This section does not authorize transactions related to informational materials not fully created and in existence at the date of the transaction, or to the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services by a person subject to the jurisdiction of the United States. Such prohibited transactions include, without limitation, payment of advances for informational materials not yet created and completed, provision of services to market, produce or co-produce, create or assist in the creation of informational materials, and payment of royalties to a designated national with respect to income received for enhancements or alterations made by persons subject to the jurisdiction of the United States to informational materials imported from a designated national.

54 Fed. Reg. 5229, 5231, 5233; 31 C.F.R. §§ 500.206(c) (1990); 515.206(a)(2) (1990). The new regulations went into effect on February 2, 1989.

26. Within a year, OFAC's restriction of the scope of “informational materials” exempted from regulation by the Berman Amendment faced two legal challenges. In the first case, the court ruled that artworks qualified as “informational materials” exempt from regulation



pursuant to the Berman Amendment. In the second, *Capital Cities/ABC v. Brady*, 740 F.Supp. 1007 (S.D.N.Y. 1990), the court accepted OFAC's argument that the exemption did not apply to information not yet fully in being or otherwise in intangible form, such as broadcast communications.

### **Congress's Response to OFAC: The Free Trade in Ideas Amendment**

27. Distressed by OFAC's unauthorized narrowing of the Berman Amendment and the outcome in the *Capital Cities* case, Congressman Berman proposed new legislation in 1992, then known as the Free Trade in Ideas Act, to clarify Congress's original intent to allow the import and export of all materials protected by the First Amendment. A summary of the bill reiterated that the legislation was "necessary to clarify the intent of Congress in adopting the Berman amendment," because the Executive Branch had interpreted it "narrowly, to exclude many informational and artistic materials." The new law "makes clear that *all First Amendment protected materials and activities*, including paintings, telecommunications, and travel necessary for trade in information, are within the ambit of the statute's protection." 138 Cong. Rec. E1856-04, E1857 (emphasis added).

28. The Free Trade in Ideas Amendment added the words "information and" to the phrase "informational materials" in TWEA and IEEPA to make it clear that the exemption applies to information even if it has not yet been given tangible form as a "fully created" work at the time of the transaction. Congress also added four new examples of informational materials that would be covered by the exemption and expressly stated that the exemption applies regardless of format or medium of expression. The statutory language now reads:

The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, *regardless of format or medium of transmission*, of any information or informational

materials, *including but not limited to*, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.

P.L. 103-236, Sec. 525(b), (c); *codified in* 50 U.S.C. § 1702(b)(3); 50 U.S.C. App. § 5(b)(4).

(The words in italics were added by the Free Trade in Ideas Amendment to the original text of the Berman Amendment.)

29. The conference committee's report on the Free Trade in Ideas Amendment specified that the Berman Amendment had been intended, "by including the words 'directly or indirectly,' to have a broad scope," and to cover all information protected by the First Amendment. It explained that the new law was designed to correct the Treasury Department's "restrictive interpretations, for example limits on the type of information that is protected or on the medium or methods of transmitting the information." H.R. Conf. Rep. No. 482, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., 1994 U.S.C.C.A.N. 398, 483. It further clarified that Congress intended "informational materials" to include both tangible and intangible informational materials, "without regard to the type of information, its format, or means of transmission, and electronically transmitted information, *transactions for which must normally be entered into in advance of the information's creation. Id.* (emphasis added).

#### **The Present OFAC Information Regulations**

30. In spite of this clarification of the statutory language and Congress's explicit articulation of the legislation's purpose, OFAC has continued to misinterpret and misapply the sanctions statutes, in defiance of Congress's manifest intent.

31. OFAC revised its regulations in response to the Free Trade in Ideas Amendment. The term "information" was added, and the definition of informational materials was revised to encompass "compact disks, CD ROMs, artworks and news wire feeds." 60 Fed. Reg. 8933, 8934 (1995).

32. However, OFAC made no changes to the provisions of the regulations that forbid Americans from entering into transactions related to information “not fully created and in existence at the date of the transactions” – such as publishing agreements for new or to-be-revised books or articles. 31 C.F.R. §§ 500.206(c), 515.206(a)(2) (2004).

33. Nor did OFAC retract the prohibitions on “substantive or artistic alteration or enhancement of informational materials” and “the provision of marketing and consulting services” in connection with either existing or not-yet-fully-created works. *Id.*

34. OFAC’s regulations give the agency discretion to authorize otherwise prohibited transactions by way of licenses. *See Reporting, Procedures and Penalties Regulations*, 31 C.F.R. § 501.801 (2004). They provide for both general licenses, which permit entire classes or categories of transactions, and specific licenses, which require case-by-case determinations and approval by OFAC.

35. OFAC’s license determinations are not subject to any stated criteria. OFAC has stated only that “many” of them are “guided by U.S. foreign policy and national security concerns.” OFAC website, Frequently Asked Questions, *available at* <http://www.ustreas.gov/offices/enforcement/ofac/faq/#license>.

36. OFAC’s regulations permit it to amend or rescind existing licenses at any time or to exclude any person or transaction from the benefit of any general or specific license. 31 C.F.R. §§ 501.803, 500.503, 515.503, 535.503, 538.502, 560.502 (2004).

37. There is no limit to how long OFAC may take to respond to a license application. One letter ruling on publishing and the OFAC Information Regulations was issued almost a year and a half after the inquiry was made.

38. Nor is there any administrative process for appealing the denial of a license. Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004).

39. The importation of works from and exportation of services to North Korea similarly requires prior approval from OFAC, and OFAC's regulations leave open the criteria applied to such applications. 31 C.F.R. § 500.586(b) (2) (2004).

40. Anyone subject to U.S. jurisdiction who wishes to engage in the transactions or activities barred by the regulations, which are all inherent parts of the publishing process, must choose between applying for a license or approval from OFAC, which means facing delay and acceding to an unconstitutional prior restraint, and violating the regulations, which means facing civil penalties and criminal sanctions.

#### **Enforcement of the OFAC Information Regulations**

41. OFAC's enforcement division vigorously investigates violations of its regulations and the statutes it administers. According to congressional testimony of OFAC Director R. Richard Newcomb given on June 16, 2004, since 1993, OFAC has imposed penalties in more than 8,000 matters, generating fines of nearly \$30 million.

42. Among the few publicized enforcement actions involving First Amendment activity was the action taken by OFAC against the musician Ry Cooder. On information and belief, in 1999, Cooder was fined \$25,000 for collaborating with Cuban musicians to record the Grammy-winning album *The Buena Vista Social Club*. When Cooder sought to return to Cuba to record a second album, OFAC first refused to grant him a license, then reversed its position and stated that Cooder could return to Cuba only if he agreed to forgo any profits from the album. Cooder rejected that offer and instead lobbied senior members of the Clinton Administration for an unconditional license. President Clinton, during his last days in office, prevailed on OFAC to grant the license.

43. Plaintiffs do not know how often OFAC has levied sanctions for First Amendment-protected activities because OFAC has only recently begun to make reports of its enforcement actions available to the public. They are not aware of efforts by OFAC, after passage of the Berman or Free Trade In Ideas Amendments, to enforce its continued regulation of “information and informational materials” against publishers of books or journal articles, prior to September 2003.

44. Beginning late last year, however, OFAC issued a series of interpretive rulings that created increasing concern for publishers and authors.

45. In September 2003, responding to inquiries from U.S. entities interested in publishing books by Iranian authors in the United States and working with Iranian publishers to publish U.S. works there, OFAC ruled that several routine publishing activities would *not* be covered by the exemption and would therefore be barred. In two letters, OFAC stated:

- U.S. persons may not engage Iranian authors to create new works;
- U.S. persons are not authorized to assist Iranian authors by editing and otherwise preparing their manuscripts for publication, including the reordering of paragraphs or sentences, correction of syntax and grammar, and replacement of inappropriate words, since such activities “would result in a substantively altered or enhanced product”; and
- U.S. persons may not create illustrations for Iranian-authored works because that would constitute “a prohibited exportation of services.”

46. OFAC also explicitly ruled that the publication of books in the U.S. on behalf of persons in Iran or the publication of books in Iran on behalf of U.S. persons is prohibited. As OFAC wrote, “Inherent in the publication of a book are marketing, distribution, artistic, advertising and other services not exempt from [OFAC’s regulations]. Thus, you may not

publish books in the United States on behalf of a person in Iran, nor may a person in Iran publish books on your behalf.”

47. Also in September 2003, OFAC issued an interpretive ruling to the Institute of Electrical and Electronics Engineers (“IEEE”), which publishes scientific and technical journals, that certain ordinary activities undertaken by IEEE in the publication of works by Iranian authors fell outside the “information and informational materials exemption” and therefore were barred. These activities included “the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words by U.S. persons,” because they “may result in a substantively altered or enhanced product, and [are] therefore prohibited under [OFAC’s regulations] unless specifically licensed.”

48. OFAC indicated that a U.S. publisher could accept “camera-ready cop[y]” from Iran and distribute it here. In addition, OFAC stated that the marketing of a periodical with articles by many authors would be permissible, although marketing a particular work by an author in a country under embargo would not, because “the provision of marketing or business consulting services is generally not permitted as incidental to the importation or exportation of informational materials.”

49. OFAC ruled that IEEE’s facilitation of a peer review process, including the selection of reviewers to collaborate with Iranian authors and transmitting the reviewers’ comments to the authors, would also violate the regulations because it would substantively enhance the articles.

50. In October 2003, IEEE submitted supplemental information to OFAC and called upon the agency to recognize that the Berman Amendment exempted all aspects of its publication process from trade sanctions, including editing and peer review. Congressman

Berman sent a letter to OFAC's director stating that its recent interpretations were "patently absurd" and "clearly inconsistent with both the letter and spirit of the law."

51. On April 2, 2004, OFAC ruled that IEEE could, without a license, engage in the limited peer review process it had described, but only so long as the process begins with completed manuscripts – not new or commissioned material – and provides only "general guidance and suggestions" from reviewers and editors that does not result in the "substantive[] re-writ[ing] or revis[ing of] the manuscript" or "a collaborative interaction ... resulting in co-authorship or the equivalent thereof."

52. This time, OFAC stated that routine copy editing, such as changing font sizes, correcting linguistic errors and repositioning illustrations, would be exempt because such acts would not amount to substantive alteration or enhancement of the work.

53. In July 2004, OFAC issued an interpretive ruling stating that it would be permissible for a U.S. person to fund the translation of already-published literary works by Iranian writers, evidently on the theory that reproducing, dubbing or translating existing works would not substantively alter or enhance them, which OFAC reiterated would not be allowed.

54. On July 19, 2004, in response to a query from the American Society of Newspaper Editors, OFAC issued another contradictory interpretation of the exemption for "information and informational materials." OFAC ruled that a U.S. newspaper could translate a completed article or op-ed commentary by a writer in a sanctioned country into English; edit such a work for space reasons by deleting superfluous text; edit it to correct grammar, syntax or spelling errors; and substantively edit it to make it more cohesive, efficient, argumentative or effective, in the same manner that it would for one of its own writers. OFAC did not explain the departure from its previous rulings or how to square its ruling with the regulations, which bar

substantive alteration. OFAC merely stated that “offering substantive edits to the work’s content ... would not constitute substantive or artistic alteration or enhancement of the article or commentary.” OFAC did not explain why “substantive edit[ing]” would not constitute “substantive alteration or enhancement” or why newspapers should be treated differently from books and journals.

55. Faced with such inconsistency in the interpretation of “substantive...alteration or enhancement,” publishers are left to wonder which rulings to follow and which transactions remain prohibited by that phrase in the regulations.

56. There is no uncertainty, however, about other prohibitions in the OFAC Information Regulations. OFAC has consistently maintained that American publishers may not enter into agreements to publish new works or substantially revised works by authors in the targeted nations. Those subject to U.S. jurisdiction may not pay them advances; may not co-author works with them; and may not engage in marketing activities for new or existing works written by them. Nor may anybody subject to OFAC’s rules “substantively or artistically alter or enhance” such works, although OFAC’s inconsistent rulings have left the meaning of that phrase dangerously unclear.

#### **The Effects of the OFAC Information Regulations**

57. The OFAC Information Regulations impede the free flow of ideas and information, in every medium, created in whole or in part by individuals in Iran, Cuba and Sudan. Because all the activities prohibited by the regulations are integral to the publishing process, the regulations effectively make it illegal for American publishers to publish any books and, in many cases, journal articles, by authors in the restricted countries.

58. In book publishing and scholarly journals, publishers have to engage in “transactions relating to information or informational materials not yet fully created” – which the



regulations prohibit – to select and shape the works they publish in keeping with their editorial vision and publishing program.

59. It is standard practice for publishers and literary agents to enter into agreements with authors for new works or works to be revised, before the works are fully created.

Publishers and their editors generally must collaborate with authors before a book or article is completed to help develop the ideas and plan the topics, structure and approach for their works.

60. Authors must often be contractually engaged by publishers before they complete a work. Many could not devote the hundreds, if not thousands, of hours required over several years to create a finished work without a prior assurance of publication.

61. Publishers also routinely pay advances on royalties for new works or even for significant revisions of works first published abroad. Compensation is a significant inducement for authors, as for all professionals, and individuals often cannot afford to spend the time necessary to write without compensation.

62. The prohibition against the substantive alteration or enhancement of a work also conflicts with the way American publishers of books and journals do their work. Substantive editing and, in many instances, expert peer review, form an integral part of the publication process for almost all authors, a function that is critical to bringing any work into conformity with a publisher's goals and standards, and to ensure that it communicates effectively and will make a worthwhile contribution to knowledge. To be meaningful, the right to publish requires the right to edit.

63. OFAC has stated that publishers may “advise the ... author of the nature and extent of th[e] problems,” but publishers also regularly “substantively rewrite or revise the

manuscript for the authors to remedy those problems,” which OFAC has generally forbidden. Barriers of language and culture for many authors makes such editing all the more important.

64. Even when language poses no problems, the role of publishing in the research process makes substantive editing crucial, especially for primary research publications. Such manuscripts are subjected to rigorous, substantive peer review so that results may be published and relied upon by other researchers, academics, and professionals.

65. Publishers also substantively alter and enhance works by translating them – a process that is far from mechanical – or by adding photographs, artworks, explanatory notes and introductions. For reference works, as well as photo essays and many other publications, such enhancements are often essential. They can produce new works that offer readers more insight and information than the original text alone.

66. OFAC has maintained that any input that rises to the level of co-authorship is forbidden. The prohibition of enhancement therefore also bars authors from working jointly on publications with other specialists in their fields. In scientific journals, in particular, collaboration and joint authorship are the rule more than the exception. The ban thus prohibits collaborations that could advance knowledge in many fields. It is especially frustrating for American researchers because it forbids them to work with co-authors in countries to which Americans do not have free access to conduct research.

67. The prohibition against marketing has the effect of rendering it impossible to publish a book authored in whole or in part by an individual in one of the restricted countries, whether it is a new work or an already completed one. Book publishers cannot feasibly publish books without marketing them. They must, at a minimum, describe their upcoming publications in marketing catalogs and employ a sales force to sell their lists. Publishers also have to be able

to solicit reviews and articles in the press and place advertisements. University and professional publishers also regularly promote their works at academic conferences and promote individual works through electronic databases.

68. According to OFAC, a journal publisher may promote a journal as a whole without violating the marketing prohibition, but a book publisher cannot realistically publish a book without marketing the individual title. As OFAC has recognized “[i]nherent in the publication of a book are marketing, distribution, artistic, advertising and other services not exempt from the prohibitions ....” OFAC thus correctly concluded that, without such services, one cannot publish a book.

69. The OFAC Regulations preclude publication of books and articles in medicine, chemistry, other sciences and the arts, as well as works of literature, history and social science whose observations can contribute to our understanding of the people and governments in the restricted nations. They preclude publication of eyewitness accounts and analyses of the operations of the very regimes the sanctions are intended to oppose, which could inform our conduct of foreign affairs. Often, such books and articles cannot be published in the authors’ native countries.

70. In some restricted countries – for example, Sudan – authors do not have access to the resources to permit them to publish books, so that publication in the United States represents one of the only realistic chances for Americans to have access to the authors’ work.

71. In all the restricted countries, dissidents fear repercussions for expressing their views. Because of OFAC’s restrictions, a dissident who is not free to publish at home cannot publish here, either.

### **Particular Projects That Have Been Affected**

72. Because of the OFAC Information Regulations and OFAC's recent enforcement and interpretations, several publishers, including members of AAUP and PSP, have suspended or cancelled significant publishing projects in history, literature, science and the arts, including a project sponsored by PEN. Others are concerned about the possible legal consequences of continuing with ongoing projects, including PEN and Arcade, which are collaborating on an anthology of works by authors in Iran. Many simply wish to be able to publish works by authors in the affected countries and would do so but for OFAC's restrictions.

73. Authors, editors, translators, and agents, including many who are members of PEN, have had projects stopped because of OFAC's regulations and rulings and have decided not to pursue other projects because of OFAC's restrictions. They do not want to face penalties or prosecution, but they do not believe they should have to apply for permission to publish their works.

74. Particular publications that have been cancelled, suspended or endangered by the regulations include the following examples. Some have been planned since as early as 2001.

75. The University of Alabama Press, a member of plaintiff AAUP, suspended the publication of two books in early 2004 when it learned about the OFAC Information Regulations and OFAC's recent interpretations of them. Both books, *Dialogues in Cuban Archaeology* and *A Colossus on the Sand: The Slave Revolt of 1825 in Guamacaro and the Atlantic World*, would feature recent scholarship based on materials not hitherto available to scholars in the United States – materials found in Cuban archaeological sites and the Cuban National Archives – and both would entail the close collaboration of Cuban and American scholars and editors, as well as the active marketing of the books as important contributions to their fields.

76. *Mathematical Geology*, the journal of the International Association for Mathematical Geology and a member of plaintiff PSP, has cancelled the publication of a paper by geologists at Shiraz University in Iran in March 2004. The paper, which aimed to advance the work of scientists concerned with earthquake prediction, had been subjected to rigorous peer review and substantively edited by the journal's staff in preparation for publication.

77. The Smithsonian Institution Press, a member of AAUP, planned to publish an English/Spanish edition of a book on the architecture of Havana by the Cuban novelist and cultural writer Alejo Carpentier and would have combined the text with photographs by American and Cuban photographers, an essay by a Cuban cultural critic, and a preface by an American architect. The project was dropped because OFAC prohibits substantively and artistically altering a work from Cuba, as well as publishing "not-yet-created" works by Cubans (such as the introduction and photos) and promoting the book.

78. Cornell University Press, another member of AAUP, wishes to reprint its *Field Guide to the Birds of Cuba*, a successful international collaboration that combined text by Cuban ornithologists with illustrations by an American artist and innovative designs devised by Cornell, and became an important resource for understanding bird species found in Cuba and the fragile ecosystems they inhabit, which are not easily accessible to American scientists, as well as the migration patterns of birds along the eastern coast of the Americas. To ensure its accuracy, the *Field Guide* would have to be substantively edited before being reprinted, and it would then have to be actively promoted.

79. As part of a translation program that PEN funds and operates, PEN has provided support for the translation and promotion of a selection of short stories written during the past decade by young writers in Cuba, some of whose works have not circulated freely because of

political constraints. The book would add an introduction by two American comparative literature scholars to help American readers more fully appreciate the translated works; the translators and editors would substantively and artistically alter the original works; and PEN and the publisher would market the book. The publisher, Northwestern University Press, has put the project on “hold” pending the resolution of legal concerns about OFAC’s rulings on editing, translating and marketing works from Cuba.

80. As part of a project to promote the translation of works from Iran to promote international understanding, PEN is also sponsoring the publication of *The PEN Anthology of Contemporary Iranian Literature*, which plaintiff Arcade wishes to publish, adding biographical and explanatory notes and an introductory essay that will provide historical and literary context to help American readers more fully appreciate the translated works, many of which reflect the turmoil and repression in Iran since the revolution. Both PEN and Arcade would plan to promote the book.

81. The *Journal of Democracy*, published by Johns Hopkins University Press, sought approval from the Department of the Treasury to publish excerpts of letters between Vaclav Havel, the playwright, democracy activist and former president of the Czech Republic, and Oswaldo Payá, one of Cuba’s foremost dissidents and advocates of democracy. The *Journal* is fortunate to be a project of an organization that has a license to support pro-democracy activities in Cuba and was advised that the dialogue could be published, but the editors would like to publish works by authors in other countries, including Iran and Sudan, and they do not believe they should need permission to bring those works to readers in the U.S. and around the world.

82. The journal *Technology and Culture*, also published by Johns Hopkins, has received a manuscript about technology and theology from a professor at the University of

Tehran in Iran that would require considerable substantive editing to be published. The journal wishes to make a decision based on the merits of the article, not the nationality of its author.

83. Temple University Press decided not pursue a promising project, an *Encyclopedia of Cuban Music*, which would have been the definitive work in its field. The *Encyclopedia*, by a Cuban scholar, would have required significant revisions to be published for an American audience.

84. Many other works that would interest and inform American readers cannot be published without a license, according to OFAC. The works we are missing could include the writings of political prisoners in Cuba and Iran; articles by Cuban scientists on research in infectious diseases; works by people in Sudan about the environmental disasters, famine, and religious and civil strife they have suffered; articles by earth scientists about their research in sanctioned countries; and works that could illuminate pressing issues that face us in international affairs.

85. American authors, editors and publishers, including plaintiffs and members of plaintiffs in this action, are eager to bring works of all kinds by authors in the embargoed countries to the public in the United States.

#### **Irreparable Injury**

86. The continued threat posed by the OFAC Information Regulations and OFAC's recent interpretive rulings causes irreparable harm to publishers, editors, authors and translators, whose work is inhibited, and to the public, whose access to information is impaired. But for those regulations and rulings, works would be created, improved and published that would contribute to ongoing research in many fields and inform the public on matters of current and historical importance.

87. Citizens and government officials make public policy decision every day. Scientific progress depends on the timely publication of research being performed worldwide. The clock cannot be turned back to recover the opportunities that are being lost to build on the unconstrained circulation of information and ideas.

88. The facts establish the likelihood of plaintiffs' success on the merits of the claims herein.

**FIRST CAUSE OF ACTION**  
**THE OFAC INFORMATION REGULATIONS VIOLATE TWEA AND IEEPA AS AMENDED BY THE BERMAN AND FREE TRADE IN IDEAS AMENDMENTS**

89. Plaintiffs repeat, replead, and reallege each of the allegations contained in paragraphs 1 through 88 above, as if fully set forth herein.

90. TWEA and IEEPA, as amended by the Berman and Free Trade in Ideas Amendments, prohibit OFAC from regulating or prohibiting the import and export of any and all First Amendment protected materials, directly or indirectly.

91. The OFAC Information Regulations openly defy that unconditional ban by regulating and prohibiting, directly and indirectly, the import and export of information and informational materials, violating not only the plain language of the statutes but the clearly expressed intent of Congress as evidenced in the statutes' legislative history.

92. Sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2) of Title 31 of the Code of Federal Regulations, and OFAC's recent interpretive rulings, violate TWEA and IEEPA, as they have been amended by the Berman Amendment and the Free Trade in Ideas Amendment, exceed OFAC's statutory authority, and are arbitrary and capricious.



**SECOND CAUSE OF ACTION**  
**THE OFAC INFORMATION REGULATIONS ARE UNCONSTITUTIONAL**

93. Plaintiffs repeat, replead, and reallege each of the allegations contained in paragraphs 1 through 88 of the above, as if fully set forth herein.

94. The OFAC Information Regulations are unconstitutional on their face and as applied, under the First and Fifth Amendments to the United States Constitution.

95. The prohibitions impose an unconstitutional burden on core First Amendment rights, including the rights to speak and publish and the American public's right to receive information.

96. The OFAC Information Regulations are unconstitutionally vague because they fail to provide the kind of notice that would enable ordinary people to understand what conduct is prohibited and they authorize arbitrary and discriminatory enforcement, in violation of the First and Fifth Amendments to the United States Constitution, infirmities that are highlighted by OFAC's contradictory interpretive rulings.

97. The application of the licensing scheme contained in the OFAC regulations, 31 C.F.R. § 501.801, to information and informational materials, imposes an impermissible prior restraint on First Amendment protected speech.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiffs request that the Court:

1. Set the case down for determination of plaintiffs' motion for a preliminary and permanent injunction.

2. Declare that sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) of the OFAC Information Regulations in Title 31 of the Code of Federal Regulations violate TWEA and IEEPA.

3. Declare that sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) of the OFAC Information Regulations in Title 31 of the Code of Federal Regulations abridge the freedoms secured by the First Amendment to the United States Constitution.

4. Declare that sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) of the OFAC Information Regulations in Title 31 of the Code of Federal Regulations violate the First and Fifth Amendments of the Constitution because they are unconstitutionally vague.

5. Declare that 31 C.F.R. § 501.801, to the extent that it applies to information and informational materials exempted from regulation by the Berman Amendment and the Free Trade in Ideas Amendment, imposes an unconstitutional prior restraint on speech and press.

6. Preliminarily and permanently enjoin OFAC from enforcing sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) of Title 31 of the Code of Federal Regulation and any other sections that regulate information or informational materials exempted from regulation by the Berman Amendment and the Free Trade in Ideas Amendment, including without limitation 31 C.F.R. § 501.801, to the extent it may be applied to information or informational materials protected by the Berman Amendment and the Free Trade in Ideas Amendment.

7. Grant plaintiffs their attorneys' fees and related costs in this action.

8. Grant such additional relief as the Court deems just and proper.

Dated: New York, New York  
September 24, 2004

DAVIS WRIGHT TREMAINE LLP

By: Edward J. Davis  
Edward J. Davis (ED 1266)  
Linda Steinman (LS 5906)  
Victor A. Kovner (VK 2248)  
Kai Falkenberg (KF 9463)

Attorneys for Plaintiffs

Marjorie Heins  
Brennan Center for Justice at NYU School  
of Law  
161 Avenue of the Americas, 12<sup>th</sup> Floor  
New York, NY 10013  
(212) 992-8847

- and -

Leon Friedman  
148 East 78<sup>th</sup> Street  
New York, NY 11021  
(212) 737-0400

Co-counsel for PEN American Center  
and Arcade Publishing