

V. This Order is effective immediately and shall remain in effect until April 24, 2004.

VI. A copy of this Order shall be delivered to Ames. This Order shall be published in the **Federal Register**.

Dated: March 23, 1999.

Eileen M. Albanese,

Director, Office of Exporter Services.

[FR Doc. 99-7881 Filed 3-30-99; 8:45 am]

BILLING CODE 3570-DT-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Order Denying Permission To Apply for or Use Export Licenses; Action Affecting Export Privileges; Harold J. Nicholson, Also Known as "Nevil R. Strachey" and as "Batman"

In the Matter of: Harold J. Nicholson, also known as "Nevil R. Strachey" and as "Batman" currently incarcerated at: Sheridan Federal Correction Institute, Inmate Number 49535-083, 27072 Ballston Road, Sheridan, Oregon 97378, and with an address at: 1699 North Terry Sp 161, Eugene, Oregon 97492.

On June 5, 1997, Harold J. Nicholson, also known as "Nevil R. Strachey" and as "Batman" (Nicholson), was convicted in the United States District Court for the Eastern District of Virginia on one count of violating Sections 794(a) and (c) of the Espionage Act (18 U.S.C.A. §§ 792-799 (1976 & Supp. 1998)). Nicholson was convicted of unlawfully and knowingly combining, conspiring, confederating and agreeing with other persons, both known and unknown, including officers of the intelligence services of the Russian Federation, to knowingly and unlawfully communicate, deliver, and transmit, and attempt to communicate, deliver, and transmit, to representatives of a foreign government, specifically the Russian Federation, directly or indirectly, documents, photographic negatives and information relating to the national defense of the United States, with the intent and reason to believe that the same would be used to the injury of the United States and to the advantage of the Russian Federation.

Section 11(h) of the Export Administration of 1979, as amended (currently codified at 50 U.S.C.A. app. §§ 2401-2420 (1991 & Supp. 1998)) the Act),¹ provides that, at the discretion of

the Secretary of Commerce,² no person convicted of violating Sections 793, 794, or 798 of the Espionage Act, or certain other provisions of the United States Code, shall be eligible to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 C.F.R. Part 730-774 (1998)) (the Regulations), for a period of up to 10 years from the date of the conviction. In addition, any license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked.

Pursuant to Sections 766.25 and 750.8(a) of the Regulations, upon notification that a person has been convicted of violating Sections 793, 794, or 798 of the Espionage Act, the Director, Office of Exporter Services, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person permission to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act and the Regulations, and shall also determine whether to revoke any license previously issued to such a person.

Having received notice of Nicholson's conviction for violating Sections 794(a) and (c) of the Espionage Act, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Nicholson permission to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act and the Regulations, for a period of 10 years from the date of his conviction. The 10-year period ends on June 7, 2007. I have also decided to revoke all licenses pursuant to the Act in which Nicholson had an interest at the time of his conviction.

Accordingly, it is hereby
Ordered

I. Until June 7, 2007, Harold J. Nicholson, also known as "Nevil R. Strachey" and as "Batman," currently incarcerated at: Sheridan Federal Correction Institute, Inmate Number 49535-083, 27072 Ballston Road, Sheridan, Oregon 97378, and with an address at: 1699 North Terry Sp 161, Eugene, Oregon 97492, may not, directly or indirectly, participate in any way, in

any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Apply for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

II. No person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the denied person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the denied person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the denied person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the denied person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the denied person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the denied person, or service any item, of whatever origin, that is owned, possessed or controlled by the denied person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation,

¹ The Act expired on August 20, 1994. Executive Order 12924 (3 C.F.R., 1994 Comp. 917 (1995)), extended by Presidential Notices of August 15, 1995 (3 C.F.R., 1995 Comp. 501 (1996)), August 14, 1996 (3 C.F.R., 1996 Comp. 298 (1997)), August 13, 1997 (3 C.F.R., 1997 Comp. 306 (1998)), and August 13, 1998 (63 FR 44121, August 17, 1998), continued the Export Administration Regulations in effect under

the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701-1706 (1991 & Supp. 1998)).

² Pursuant to appropriate delegations of authority that are reflected in the Regulations, the Director, Office of Exporter Services, in consultation with the Director, Office of Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act.

maintenance, repair, modification or testing.

III. After notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to Nicholson by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until June 7, 2007.

VI. A copy of this Order shall be delivered to Nicholson. This Order shall be published in the **Federal Register**.

Dated: March 23, 1999.

Eileen M. Albanese,

Director, Office of Exporter Services.

[FR Doc. 99-7880 Filed 3-30-99; 8:45 am]

BILLING CODE 3510-DT-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 032399B]

Taking and Importing of Marine Mammals; International Dolphin Conservation Program

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability.

SUMMARY: NMFS announces the availability of initial research results from the International Dolphin Conservation Program survey of dolphins in the eastern tropical Pacific Ocean (ETP).

ADDRESSES: A copy of the research results may be found on the internet at <http://swfsc.ucsd.edu/IDCPA/IDCPAfront.html>. Copies may also be obtained from the Marine Mammal Division, Southwest Fisheries Science Center, 8604 La Jolla Shores Drive, P.O. Box 271, La Jolla, California 92038-0271 (fax 619-546-7003).

SUPPLEMENTARY INFORMATION: NMFS has conducted scientific research required by the Marine Mammal Protection Act, as amended by the International Dolphin Conservation Program Act ((IDCPA) 16 U.S.C 1414(a)). Under the IDCPA, NMFS is required to study the

effects of intentional encirclement on dolphins incidentally taken in the tuna purse seine fishery in the ETP, and to conduct population abundance surveys and stress studies. The IDCPA requires the Secretary of Commerce to make an initial finding regarding whether intentional encirclement is having a significant adverse impact on any depleted dolphin stock in the ETP (16 U.S.C. 1385(g)). NMFS' report on the study has been delayed by 30 days while completing an additional independent peer review requested by Congress. NMFS expects to publish a notification of the Secretary's initial finding in early May.

Dated: March 24, 1999.

Linda A. Chaves,

Acting Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 99-7887 Filed 3-30-99; 8:45 am]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. 990212048-9048-01]

Guidelines for Reexamination of Cases in View of *In re Portola Packaging, Inc.*, 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997)

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice

SUMMARY: The Patent and Trademark Office (PTO) is publishing the final version of guidelines to be used by Office personnel in their review of requests for reexaminations and ongoing reexaminations for compliance with the decision in *In re Portola Packaging, Inc.*, 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997). Because these guidelines govern internal practices, they are exempt from notice and comment under 5 U.S.C. 553(b)(A).

DATES: The guidelines are effective March 31, 1999.

FOR FURTHER INFORMATION CONTACT: John M. Whealan by telephone at (703) 305-9035; by facsimile at (703) 305-9373; by mail addressed to Box 8, Commissioner of Patents and Trademarks, Washington, D.C. 20231; or by electronic mail at "john.whealan@uspto.gov".

SUPPLEMENTARY INFORMATION:

I. Discussion of Public Comments

Comments were received by the PTO from eight individuals and one bar association in response to the Request for Comments on Interim Guidelines for Reexamination of Cases in View of *In re Portola Packaging, Inc.*, 110 F.3d 786,

42 USPQ2d 1295 (Fed. Cir. 1997), published June 15, 1998 (63 FR 32646). In general, six of the eight individual comments were critical of the guidelines; one individual comment was partially supportive of the guidelines and one suggested a legislative change; the comments from the bar association were in complete support of the guidelines. All of the comments have been carefully considered.

A. Below is a listing of comments along with a corresponding Office response explaining why each has not been adopted:

(1) Comment: Most of the critical comments suggest the Office is misinterpreting the "holding" of *Portola Packaging*. These comments believe *Portola Packaging* held that (i) the Office may not initiate a reexamination proceeding based solely on prior art previously cited during prosecution of the application which matured into the patent, regardless of whether that art was discussed, and (ii) no rejection can be made during a subsequent reexamination based solely on prior art cited during prosecution of the application which matured into the patent, even if that prior art was not previously discussed. Response: The Office views these positions as dicta and not the "holding" of *Portola Packaging*.

The Federal Circuit recently explained the difference between the holding of a case and dicta. See *In re McGrew*, 120 F.3d 1236, 1238-39, 43 USPQ2d 1632, 1635 (Fed. Cir. 1997). The Court explained that dicta consists of the statements in an opinion "upon a point or points not necessary to the decision of the case." *Id.* at 1238, 43 USPQ2d at 1635. The Court further explained that since "dictum is not authoritative," it need not be followed. *Id.*

The Office considers the portions of the *Portola Packaging* opinion relied on by the critical commenters as dicta and not the holding of the case. In *Portola Packaging*, the prior art relied upon in the reexamination (that was found by the Court to be improperly used) was not only cited, but it was also discussed and applied to reject claims during prosecution of the application which matured into the patent. Thus, *Portola Packaging* holds that a rejection in a reexamination proceeding may not be based solely on prior art that was previously applied to reject claims during prosecution of the application which matured into the patent. *Portola Packaging* does not, however, hold (as suggested by the commenters) that prior art in the record of the application that