NELSON MULLINS

FinTech Code as Protected Speech

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Is Code Speech?

- FinTech companies and allies have offered several arguments that the First Amendment protects the crypto industry from government regulation.

- There are three general arguments:

  - **"Code is speech" arguments.** Several court decisions note that it is possible, in some situations, to use computer code as a protected medium for First Amendment expression. Most arguments for crypto as speech are based on the "code is speech" case law. Under this reading, government efforts to regulate the content of software are as contrary to the First Amendment as efforts to regulate the content of a work of literature.

  - **Cryptocurrency as communications infrastructure.** These arguments claim that cryptocurrencies deserve First Amendment protection because they allow for new forms of communication. The oldest version of this argument relied on the fact that people sometimes write creative or artistic messages in the blockchain ledger. The more recent version of the argument alludes to the possibilities of Web3, a new Internet architecture that will depend at a technical level on a robust market for crypto tokens.

  - **Privacy arguments.** These arguments claim that cryptocurrency is a significant source of funding for organizations engaged in expressive advocacy. According to these arguments, many donors are willing to donate only under conditions of strict anonymity—and for this reason, parties to cryptocurrency transactions have a general First Amendment right to conceal their personal identities from the government and the public more broadly.

- This presentation will focus on the first issue.

The First Amendment

- The First Amendment to the U.S. Constitution states:

  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- It covers not only spoken and written words but also expressive conduct, symbolic speech, and other forms of expression.

- However, certain categories of speech receive limited or no First Amendment protection, including: Incitement to imminent lawless action, Fighting words, True threats, Obscenity, Defamation, Child pornography and Commercial speech (receives intermediate protection)

- The government may impose reasonable time, place, and manner restrictions on speech, provided they are content-neutral, narrowly tailored to serve a significant government interest, and leave open alternative channels for communication.

Article I, Section 8, Clause 8

- The Copyright and Patent Clause or the Intellectual Property Clause, covers copyrights and patents.
- This clause grants Congress the power: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
  - Copyright Act of 1976, is codified in Title 17 of the United State Code (17 U.S.C. §§ 101-1401).
  - The Patent Act is codified in Title 35 of the United States Code (35 U.S.C. §§ 1-390).

Conflict?

- Free Speech says that Congress cannot regulate what I say.
- But….
- The Copyright Act would prohibit me from publicly reading aloud (i.e., performing) a book.
    - How do we square this dilemma?

The Copyright Act Does Not Violate the First Amendment

- The Supreme Court has held that copyright law and free speech are compatible because of two key built-in accommodations:
  - **The idea/expression dichotomy**: Copyright protects only the specific expression of ideas, not the underlying ideas themselves. Anyone remains free to express the same ideas in their own original way.
  - **Fair use doctrine**: Codified in 17 U.S.C. § 107, this doctrine allows limited use of copyrighted material without permission for purposes such as criticism, commentary, news reporting, teaching, scholarship, or research.
- Eldred v. Ashcroft, 537 U.S. 186 (2003), held that Copyright Act is constitutional because it has built-in First Amendment safeguards through these two doctrines.
- The Court emphasized that the Framers viewed copyright protection as compatible with free speech principles, as evidenced by their adoption of both the Copyright Clause and the First Amendment close in time.
- The Copyright Act advances First Amendment goals by providing economic incentives for the creation and dissemination of speech and creative works.
- Without copyright protection, many creators would lack the financial motivation to produce new works, potentially resulting in less speech and creative expression overall.

Copyright

- What does a copyright protect?

- Original Works of Authorship Fixed in a Tangible Medium of Expression

  - Any original and creative writing
  - Pictures, drawings, videos
  - Sculptures, carvings, models
  - Sound recordings, sheet music
  - Architectural plans
  - Computer software

Idea v. Expression

- The idea/expression dichotomy is a fundamental principle in copyright law that distinguishes between ideas (which are not protected) and the expression of those ideas (which are protected).

- This doctrine was established in *Baker v. Selden*, 101 U.S. 99 (1879), and is now codified in 17 U.S.C. § 102(b).

- Ideas Are Not Protected = Patents
  - Abstract concepts
  - Facts
  - Procedures
  - Methods of operation
  - Scientific principles

- Mathematical formulas
  - Expression Is Protected = Copyrights
  - The particular way an idea is presented
  - Specific arrangement of words, code instructions, images, or sounds
  - Creative choices in communicating the idea
  - Original selection and arrangement of facts and other works

Certain Computer Code is Copyrightable

- Computer code is protected under copyright law as a "literary work" under 17 U.S.C. § 102(a)(1).

- However, the following elements of Code are NOT copyrightable:

  - Standard programming elements (if/then statements, common functions)
  - Methods of operation
  - Algorithms and formulas
  - Programming languages themselves
  - Functionality of the program
  - Elements dictated by external factors or efficiency requirements
  - Elements taken from the public domain

- The protection extends to both literal elements (actual code) and non-literal elements (structure, sequence, and organization), provided they contain sufficient originality and creativity. *Computer Associates International v. Altai, Inc.,* 982 F.2d 693 (2d Cir. 1992).

Is Crypto Code Speech?

- Claims that crypto is speech rest heavily on cases at the district and circuit level going back to the late 1990s. Kyle Langvardt, *Crypto's First Amendment Hustle*, Yale Journal of Law & Technology (2023) ("*Langvardt*").

- The foundational opinion in this line, *Bernstein v. United States Department of Justice*, 176 F.3d 1132 (9th Cir. 1999), reasoned that computer programming languages, like natural languages, can be used to express ideas about mathematical concepts, software design, and more. *Id.*

- As crypto promoters tell it, this means any law that regulates the use or sale of human-readable computer code should be analyzed in the same way for First Amendment purposes as a law regulating the use or sale of a work of literature. *Id.*

- Most regulations of this code, meanwhile, would be presumptively unconstitutional because of their interference with the open-source "message." *Id.*

- One attorney has argued, for example, that it was unconstitutional for New York to adopt a two-year state-wide moratorium on "cryptocurrency mining operations that use proof-of-work authentication methods to validate blockchain transactions." *Id.*

- Bitcoin uses the "proof of work" method to secure its transaction record; some other crypto chains, including Ethereum, use different methods including a method called "proof of stake." *Id.*

Is Crypto Code Speech?

- The moratorium on "proof of work" methods but not "proof of stake" methods may be viewed as drawing a "content-based line" when it "imposes a significant economic burden on proof-of-work miners—*a burden not imposed on other data-center operators or crypto-protocol validators*—solely due to the content of the data they process and publish (e.g., solutions to proof-of-work algorithms and transactions generated pursuant to the rules of the respective proof-of-work protocol)." Aaron Daniel, *New York's Proof-of-Work Ban Violates Bitcoin Miners' Right to Free Speech*, BITCOIN MAG. (Aug. 4, 2022),

- Traditionally, laws that draw "content-based lines"—a special tax on books with disfavored subject matter, for example—tend to have strong, obvious censorial overtones. *Langvardt*.

- At a minimum, such laws threaten to distort public discussion by placing special burdens on certain ideas or voices. *Id.*

- That is why courts typically subject content-discriminatory laws to "strict scrutiny" under the First Amendment—a high bar that even most legitimate legislation could not pass. *Id.*

- The government must show that it intends to advance a "compelling" (as opposed to merely "substantial" or "legitimate") governmental interest. *Id.*

Is Crypto Code Speech?

- The government must also show that its law advances the goal "directly" and that no content-neutral alternative would advance the goal as well. *Id.*
- But courts have never extended this kind of protection to computer code. *Id.*
- What the "code is speech" case law actually does is reject an especially aggressive argument, advanced by the government in the 1990s, that computer code is "merely functional" and therefore never protected under the First Amendment from any kind of regulation. *Id. (citing Bernstein v. U.S. Department of Justice,* 176 F.3d 1132, 1142 (9th Cir. 1999), *reh'g granted, opinion withdrawn,* 192 F.3d 1308 (9th Cir. 1999).
- There are instances when speakers use code to speak—a computer science professor, for example, who shares code with students as part of an instructional exercise. *Id.*
- Laws that regulate code may burden these expressive uses. *Id.*
- When the government regulates computer code, the impact on expression is almost always unintended, incidental, and minor. *Id.*

Is Crypto Code Speech?

- Courts entertaining "code is speech" claims have therefore settled on an approach that focuses on the government's purpose. *Id.*
- If the government meant to target the expressive uses of the code, then the regulation is content based and courts will apply strict scrutiny. *Id. (citing Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 450 (2d Cir. 2001)).
- But if the regulation targets only the "functional" aspects of the code, then courts will apply a more deferential intermediate scrutiny test that weighs the government's purpose, the adequacy of alternative messaging channels, and whether the law burdens substantially more speech than necessary to achieve its purpose. *Id. (citing Junger v. Daley,* 209 F.3d 481, 485 (6th Cir. 2000)).
- To date, *Bernstein* is the only case in which a court has applied strict rather than intermediate scrutiny to a regulation of computer code—and the only such challenge out of many that has ever led to the invalidation of a governmental policy. *Id.*
- Since 2000, *every single judicial opinion* to engage with the "code is speech" doctrine beyond the pleadings—nine of them, in several jurisdictions—has ruled for the government. *Id.*

The Time Code Was Speech *

- In the 1990s, the State Department interpreted its International Traffic in Arms Regulations ("ITAR") to mean that any person who wished to communicate encryption software or source code internationally needed prior approval from State Department officials. Bernstein, 176 F.3d at 1137-38.
- The goal was to keep useful knowledge out of the hands of U.S. adversaries who might use it for dangerous purposes.
- This administrative interpretation of ITAR is the only act of government ever to have been challenged successfully as an unconstitutional restriction on the publication of source code.
- The ITAR restriction raised genuine First Amendment concerns for two reasons.
- It would have curtailed scholarly activity that was unambiguously expressive.
- Computer-scientists would have needed prior authorization to do things such as give a lecture abroad on cryptography or post an example of an encryption algorithm on a university website where foreigners might see it. *Junger v. Daley,* 209 F.3d 481 (6th Cir. 2000).
- The government *intended* these burdensome effects on scientific expression: the whole purpose behind the regulation was to prevent the dissemination of useful knowledge into foreign hands. *Bernstein,* 176 F.3d at 1145.

** Langvardt.*

The Time Code Was Speech - *Karn*[*]

- In *Karn v. U.S. Department of State*, 925 F. Supp. 1 (D.D.C. 1996), the first in a series of three code-is-speech challenges to the State Department's cryptography policy, the plaintiff sought to export a copy of Bruce Schneier's book *Applied Cryptography* with an enclosed diskette containing some of the source code discussed in the book.
- The State Department refused Karn's request for clearance to export the materials, and Karn appealed to the U.S. District Court for the District of Columbia.
- The court rejected the plaintiff's First Amendment claim as "meritless."
- The court rejected Karn's contention that "the Karn diskette is 'pure speech,' the regulation of which should require strict scrutiny review" as an argument that "places form over substance."
- If the First Amendment applied at all, the appropriate standard was intermediate scrutiny because the policy was "clearly content-neutral."

** Langvardt*

The Time Code Was Speech - *Karn*[*]

- The court observed that the Department of State was "regulating because of the belief that the combination of encryption source code on machine readable media will make it easier for foreign intelligence sources to encode their communications" rather than "because of the expressive content of the comments and or source code."

- The *Karn* decision is less-remembered, and certainly less glorified, than *Bernstein*, the decision that famously laid down the "code is speech" principle and struck down the ITAR regulation.

- But the post-*Bernstein* case law actually looks a lot more like *Karn* than *Bernstein*.

- Just as in *Karn,* courts consistently treat regulation of software as content-neutral regulations subject only to intermediate scrutiny, rejecting techno-libertarian First Amendment claims that "plac[e] form over substance."

** Langvardt*

The Time Code Was Speech - *Bernstein*[*]

- In *Bernstein* the challenger was a graduate student who wished to go abroad and present a paper on a new encryption algorithm he had designed, accompanied by the source code.
- The Ninth Circuit ultimately invalidated the State Department's restrictions on cryptography software as a standardless prior restraint that was "intentionally retarding the progress of the flourishing science of cryptography."
- The court noted, "*We do not hold that all software is expressive* … Much of it surely is not."
- The court suggested that this was an exceptional case precisely because "the government's efforts [were] *aimed* at interdicting the flow of scientific ideas (whether expressed in source code or otherwise)."

** Langvardt*

The Time Code Was Speech*

- *Bernstein* was and remains the highwater mark for code and crypto as speech.
- The decision does not support the expansive First Amendment protection for software development proposed by the crypto community.
- *Bernstein explicitly* rejects the idea that laws regulating "encryption products" should receive close First Amendment scrutiny in cases where the "effect on expression" is "incidental."
- *Bernstein* is the only code-is-speech case in which a court has applied strict scrutiny.

* Langvardt

Junger

- *Junger v. Daley,* 209 F.3d 481 (6th Cir. 2000), the third ITAR case, involved a professor who wished to post cryptographic source code on his website for teaching purposes.
- The Sixth Circuit held that the First Amendment protected computer source code because it is an "expressive means for the exchange of information and ideas about computer programming."
- The circuit court rejected the trial court's determination that source code was at most expressive conduct.
- But the Sixth Circuit also held that intermediate rather than strict scrutiny was the appropriate standard to apply.
- The case was mooted after the government withdrew its crypto-export controls in light of *Bernstein*, and the lower court never had the opportunity to apply *Junger* intermediate scrutiny on remand.

More Recent Cases

- Since the initial trio of ITAR cases, many litigants have successfully *pled* that the government interfered impermissibly with their First Amendment right in computer code.
- But every court to consider such an argument at the merits stage, whether district or circuit, has rejected it.
- These decisions all acknowledge that the use of source code *may* be entitled to First Amendment protection in certain cases where the regulation interferes with speakers' attempts to use code for expressive purposes.
- But when the interference with expression is merely incidental—as it has been in every case except *Bernstein*— courts apply intermediate scrutiny.
- The government has not failed to clear the bar in one of these cases.
- Courts applying the "code is speech" principle have repeatedly upheld schemes that impose heavy, even excessive regulatory penalties on software developers.
- Several circuit courts have upheld criminal and civil prohibitions against the publication and distribution of digital rights management decryption software. *See, e.g., Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 434 (2d Cir. 2001).
- A U.S. District Court for the District of Arizona upheld, over "code is speech" objections, the indictment of an engineer who unlawfully exported nuclear reaction simulation software to Iran. *United States v. Alavi,* No. CR 07-429, 2008 WL 1989773, at *1 (D. Ariz. May 5, 2008).

More Recent Cases

- The Second Circuit upheld a requirement that software developers register with the CFTC as broker-dealers when they market stock advice algorithms to retail investors. *Commodity Futures Trading Comm'n v. Vartuli,* 228 F.3d 94 (2d Cir. 2000).

- A U.S. District Court for the Western District of Texas declined to issue a preliminary injunction against the government in a case where a gun maker sought and failed to receive pre-clearance from the State Department to "publish" 3D-printed handguns over the internet. *Def. Distributed v. U.S. Dep't of State,* 121 F. Supp. 3d 680 (W.D. Tex. 2015).

- A U.S. District Court for the District of Delaware held that 3D printed gunmakers had failed to establish a likelihood of success on the merits in their challenge to a Delaware law prohibiting the distribution of computer files needed to manufacture 3D-printed guns. *Rigby v. Jennings,* No. CV 21-1523, 2022 WL 4448220 (D. Del. Sept. 23, 2022).

- To beat this he crypto industry will have to find a set of facts on which they can plausibly allege—as in *Bernstein*—that a crypto regulation was designed to inhibit speech or research about crypto for informational purposes rather than to regulate the functional use of crypto as a product. * *Langvardt.*

- But the government has never shown any inclination to restrict the distribution of the source code behind crypto products, and it is hard to imagine a scenario in which authorities would see that as an effective regulatory strategy. *Id.*

More Recent Cases

- More realistically, the government might pursue policies that require crypto businesses to write certain functionality into their products for investor protection or law enforcement purposes. *Id.*

- For example, two founders of a crypto money laundering service were recently indicted for, among other things, failing to implement AML programs as part of their product. *Id.*

- But precisely because these kinds of policies are after the functionality rather than the expressive potential of the source code, they will trigger intermediate scrutiny, and based on the existing track record, the government will win. *Id.*

DeFi as Speech

- Advocates of the "code is speech" doctrine actually have raised concerns with two recent regulatory proposals. *Id.*

- The industry is concerned with SEC rulemaking that would treat "decentralized finance" applications—automated online crypto exchanges, essentially—as regulated securities exchanges. Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, Exchange Act Release No. 94062, 87 Fed. Reg. 15496-01 (Mar. 18, 2022)

- The industry is also concerned about the Treasury Department's recent sanctions on Tornado Cash, an automated "financial privacy" application that North Korea used to launder $600 million in stolen funds. Press Release, U.S. Department of the Treasury, U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash (Aug. 8, 2022).

- "Decentralized finance" ("DeFi") projects have many of the functional attributes and governance characteristics of ordinary financial services companies. *Langvardt.*

- But their promoters claim that DeFi projects are not firms or companies at all—only software—and that ordinary business and finance regulations therefore cannot attach to them. *Id.*

DeFi as Speech

- Advocates of the "code is speech" doctrine believe a DeFi enterprise offering financial services can claim a business is exempt from public oversight *generally* because it is software, and software is speech. *Id.*
- Grounding DeFi's supposedly special status in the Constitution rather than some temporary regulatory loophole may help attract investment by solidifying a perception that the regulatory arbitrage position is permanent. *Id.*
- The DeFi software applications themselves are sometimes called dApps. *Id.*
- dApps allow users to execute cryptocurrency transactions in an exchange-like environment, but on a peer-to-peer basis.
- This means that DeFi users can, for example, borrow money without involving a bank or some similar human-operated institution. *Id.*
- Instead, a borrower might call up a dApp for borrowing and lending, and take out a crypto loan by putting up some greater amount of crypto as collateral. *Id.*
- If the loan is not paid back under the terms set, then the dApp takes possession of the collateral. *Id.*
- The process is entirely automated. *Id.*

DeFi as Speech

- This automation is why DeFi companies claim to be "decentralized." *Id.*
- There is no "central" person or institution deciding, for example, whether the borrower is creditworthy. Instead, the software just makes the loan to any user who puts up the collateral. *Id.*
- The dApp itself does not run on a "central" server. *Id.*
- The software runs on a blockchain that is hosted, in principle, by many mutually anonymous machines around the world. *Id.*
- Unlike the automated software at an ATM or a bank website, a dApp does not have to phone home to a bank server that bad actors may, hypothetically, mess with. *Id.*
- DeFi's promoters therefore tout these blockchain-based automated systems as a way to "remove the risk of trusting financial intermediaries." *Id.*

DeFi as Speech

- Emphasizing these attributes, DeFi promoters try to cultivate an impression that DeFi platforms are "pure" code that exist more in the realm of ideas—and incidentally of expression—than of ordinary business. *Langvardt.*

- Peter Van Valkenburgh of Coin Center argues: "[DeFi d]evelopers publish electronic cash and decentralized exchange software because they fervently wish to teach others *how* these private and person-to-person interactions are technologically possible and *why* they are essential to preserving human dignity and individual autonomy." Peter Van Valkenburgh, *Electronic Cash, Decentralized Exchange, and Constitution*, COIN CENTER (Mar. 2019).

- He also argues that under this model, no one "owns" or "governs" a DeFi utility—the DeFi bank Uniswap, for example, where the top one percent of token holders control ninety-six percent of governance tokens — except the broad, mutually anonymous "community" of freethinking idealists who purchase Uniswap "governance tokens" on the open market and vote on how the Uniswap ecosystem should be managed. *Langvardt.*

- He claims if token-holder governance of a DeFi project qualifies as "decentralization," then shareholder governance of publicly held corporations should probably be considered "decentralized" as well. *Id.*

- That is where shareholder governance is "centralized," and lower levels of governance are entrusted to directors and officers who also act from a centralized position. *Id.*

Securities Exchanges

- Section 3(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") defines an "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."

- Exchange Act Rule 3b-16(a) interprets the definition to mean any organization, association, or group of persons that: (1) brings together the orders of multiple buyers and sellers and (2) uses established, nondiscretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.

- Absent an exemption, an exchange must register as a national securities exchange pursuant to section 6 and section 19(a) of the Exchange Act.

- If a digital asset platform brings together multiple buyers and sellers of digital assets that are deemed securities, the platform could be required to register as a securities exchange unless it falls within an exclusion from registration.

Alternative Trading Systems

- In 1998, the SEC adopted Regulation ATS, which allows an ATS to choose whether to register as a national securities exchange or to register as a broker-dealer and comply with additional requirements of Regulation ATS.

- An "alternative trading system" means any organization, association, person, group of persons, or system:

  - that constitutes, maintains, or provides a marketplace or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b-16 under the Exchange Act, and

  - that does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or discipline subscribers other than by exclusion from trading.

- A blockchain technology platform may be required by the SEC to register as an ATS if it maintains a marketplace or facilities for bringing together purchasers and sellers of digital assets that are deemed securities, and it does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such platform.

- An ATS must be operated by a broker-dealer registered with the SEC.

Broker-Dealers

- Section 15 of the Exchange Act requires registration with the SEC of all broker-dealers using interstate commerce or the facilities of any national securities exchange to effect transactions in securities (other than exempted securities and certain short-term debt instruments).
- Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others."
- The Exchange Act and the rules thereunder do not define these terms.
- The courts and the SEC have taken an expansive view of the scope of these terms.
- The SEC and the courts apply a "facts and circumstances" analysis in evaluating whether a person has acted as a broker, with no single element being dispositive.
- Depending on the circumstances, the operator of a blockchain technology platform may be deemed a broker-dealer if the operator of the platform is deemed to be engaged in the business of effecting transactions in securities for the account of others.

DeFi and Exchanges

- DeFi groups offer two reasons why this language does not cover them. *Langvardt.*
- They argue that because decentralized exchanges ("DEXes") are automated, "no actor facilitates or effectuates transactions between users." *Id.*
- So, in the language of the rule, there is no "organization, association, or group of persons" to "bring together the orders." *Id.*
- They concede that DEXes may use "established, non-discretionary methods" to settle transactions, they also note that there is no actor to "use" these methods as contemplated under the rule—just software. *Id.*
- Whether or not this characterization of the existing rule has much merit, the DeFi sector today is spooked that the definition of "exchange" will soon be widened in a way that would cover DEXes more clearly than the current one does. *Id.*
- The proposal to amend the definition of "exchange" that the SEC is considering does not mention crypto or decentralized finance explicitly, but it has fallen under heavy scrutiny as a "shadow ban" on DeFi itself. *Id.*

Tornado Cash

- Tornado Cash is a decentralized "mixer"—essentially, a dApp for disguising cryptocurrency transactions. In June and July of 2022, the government of North Korea used Tornado Cash to launder $600 million in crypto tokens that it had stolen from players of a blockchain-based online video game.
- The Treasury Department's Office of Foreign Assets Control ("OFAC") responded in August 2022 by sanctioning Tornado Cash and a list of Ethereum addresses controlled by the service.
- Since then, it has been unlawful for Americans to deposit or withdraw funds at these addresses except with special authorization from OFAC.
- This was not the first time OFAC had sanctioned a crypto "mixer"—it had sanctioned a mixer called Blender.io, for example, earlier in the year.
- But Tornado Cash was the first *decentralized* application of any kind to be sanctioned.
- This incursion into the DeFi-adjacent space has provoked an outcry from the industry and those who speak for it.

Tornado Cash

- Some FinTech attorneys were quick to claim publicly that the Tornado Cash sanction had violated some kind of first principle in the law. *Langvardt*
- Paul Grewal, Chief Legal Officer for Coinbase, told the New York Times that "[i]t's important that the law's distinction between people and code be respected. . . . If that disrespect is allowed to stand, there could be all sorts of other ways in which statutes are twisted and bent to apply to crypto in ways that they shouldn't be." *Id.*
- But the law does not in fact make any basic, thoroughgoing "distinction between people and code." *Id.*
- Two legal challenges to the Tornado Cash sanctions press this same code-is-speech line - the first suit, *Van Loon v. Department of Treasury*, was financed by the crypto exchange Coinbase. *Van Loon v. Dep't of Treasury,* No. 1:23-CV-312, 2023 WL 5313091 (W.D. Tex. Aug. 17, 2023).
- The U.S. District Court for the Western District of Texas rejected all of the plaintiffs' claims on cross motions for summary judgment.
- The second suit is in the Northern District of Florida, where the lobby group Coin Center is the lead plaintiff. *Coin Center v. Yellen*, No. 3:22-cv-20375, 2023 WL 2889736 (N.D. Fla. Apr. 10, 2023).

Tornado Cash

- Both suits lead with typical DeFi theories that Tornado Cash—mere autonomous software—is simply too decentralized to fall within Treasury's jurisdiction.
- Both suits argue the Treasury only has jurisdiction over "persons," and that Tornado Cash is not a "person" even under the Treasury Department's definition of "person" as "individual or entity."
- Both suits also argue that the Tornado Cash software cannot be sanctioned under the International Emergency Economic Powers Act ("IEEPA") because Tornado Cash is not "property" as contemplated by the statute.
- But the *Van Loon* plaintiffs also raise a code-is-speech theory that the Tornado Cash sanctions interfered with their "right to publish . . . source code."
- The Electronic Frontier Foundation ("EFF") submitted an amicus brief to the same effect, arguing that the sanctions "immediately and predictably chilled the speech of dozens of open source developers writing directly on the Tornado Cash project."
- Van Loon, EFF, and others insisted that the sanctions chilled speech even after Treasury clarified that publishing source code on an academic web page would not qualify for sanctions purposes as an illicit transaction in cryptocurrency.

Tornado Cash

- The court rejected these as “misleading” arguments that did not align with the facts.
- The Tornado Cash sanctions, like all sanctions under IEEPA, merely block *transactions with* the sanctioned entity.
- Americans, in other words, are no longer permitted to deposit cryptocurrency with or withdraw cryptocurrency from the Ethereum addresses controlled by the Tornado Cash platform.
- This restriction does not remotely imply that merely publishing or studying the code itself is against the law.
- It is hard to see how a lawyer who has any passing familiarity with the law of sanctions could have interpreted the Tornado Cash sanctions as some kind of prohibition on publishing computer code.
- For some members of the crypto community the Tornado Cash sanctions have become a focal point for handwringing about an impending “war on code” in which well-meaning coders might soon be subject to strict criminal liability merely for “publishing” or “distributing” useful software that criminals abuse in unpredictable ways.

Tornado Cash

- On November 26, 2024, the United States Court of Appeals for the Fifth Circuit issued a decision holding that OFAC exceeded its statutory authority by sanctioning immutable smart contracts created by Tornado Cash. *Van Loon v. Department of the Treasury,* No. 23-50669 (5th Cir. 2024).
- The decision has significant implications for the use of the IEEPA to regulate certain decentralized finance (DeFi) technologies.
- *Van Loon* focused on whether Tornado Cash's immutable smart contracts could be considered "property" under the IEEPA.
- Relying on the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* the Fifth Circuit held OFAC was no longer entitled to "heightened deference" in its interpretation of the terms relevant to the case, and that immutable smart contracts cannot be "property" under the IEEPA because they are not capable of being owned, controlled, or altered by any individual or entity.
- The court noted smart contracts are not "owned" by anyone, the court reasoned, in large part because possession and control typically inheres the right to exclude, and no one has the ability to exclude anyone else from using the smart contracts.
- The Fifth Circuit's ruling limits the government's ability to regulate decentralized technologies through existing sanctions laws.
- The decision which is subject to appeal, does not signal the end of the US government's jurisdiction or attempts to enforce US laws over cross-border digital asset transactions or the blockchain technology.

Contact Details

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Moderator Biography

RICHARD B. LEVIN

Richard is chair of the FinTech and Regulation Practice and was one of the first lawyers to focus on the regulation of blockchain and digital assets. He is considered a thought leader in the FinTech space. Richard brings his experience as a senior legal and compliance officer on Wall Street and in London to bear in advising clients on corporate, FinTech, securities, and regulatory issues. A problem-solver by nature, he has been advising FinTech clients on legal and regulatory issues since the start of electronic trading in the late 1990s. His practice focuses on helping financial services and technology clients identify and address regulatory issues as they build their businesses.

Richard's practice focuses on the representation of early stage and publicly traded companies in the FinTech space, including investment banks, broker-dealers, investment advisers, peer-to-peer lending platforms, digital currency trading platforms, alternative trading systems (ATSs), exchanges, and custodians. He represents these firms before the U.S. Securities and Exchange Commission (SEC), the U.S. Commodity Futures Trading Commission (CFTC), the Financial Industry Regulatory Authority (FINRA), the U.S. Department of the Treasury, Office of the Comptroller of the Currency (OCC), state regulators, and Congress. Richard has represented clients before regulators in Australia, Canada, France, Germany, Hong Kong, Ireland, Japan, Singapore, South Korea, and the United Kingdom. His current and past clients include leading national financial institutions, multinational financial services holding companies, leading firms in the FinTech space, and institutions engaging in global investment banking, investment management, securities, and other financial services with institutional clients.

Richard has been identified by Chambers and Partners as one of the leading lawyers in the Blockchain and Cryptocurrencies category since the inception of the category. He has been recognized by Chambers for his knowledge on regulatory matters, great relationships with regulators, for helping clients push the boundaries of the FinTech sector, and for his advice on matters such as broker-dealer licensing and alternative trading systems. Richard is routinely quoted by leading publications including Bloomberg, the New York Times, Reuters, and the Wall Street Journal and is a frequent speaker at conferences around the world on the regulation of FinTech, blockchain, and digital assets.

Speaker Biographies

Bobby Wenner

Bobby counsels financial services and technology firms on financial services regulatory and corporate matters. He focuses on the representation of financial technology companies working with blockchain, tokenization, digital assets, and cryptocurrencies, including broker-dealers, alternative trading systems (ATS), digital asset and currency trading platforms, digital asset issuers and custodians, securities exchanges, and derivatives trading platforms including swap execution facilities.

Bobby represents these clients before Congress, the Securities Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), the Commodity Futures Trading Commission (CFTC), and state financial services regulators. He also represents banks, money services businesses, and payment processors before the federal banking regulators, including the Office of the Comptroller of the Currency, the Financial Crimes Enforcement Network (FinCEN), and state banking regulators.

Before joining Nelson Mullins, Bobby served as the Chief Legal Officer of a FINRA-member broker-dealer and ATS designed for trading digital asset securities, as well as the Associate General Counsel of the holding company, and the company's digital asset trading and issuance ecosystem. In these roles, Bobby led various state and federal financial services licensure applications, interfaced with regulators, provided counsel on a wide range of securities, commodities, and derivatives product development efforts, and helped develop a regulatory compliant business model and launch strategy. Prior to his positions in-house, Bobby was an associate in the FinTech and Regulation practice of a national law firm.

Speaker Biographies

John C. McElwaine

John C. McElwaine is a partner in the Charleston, SC, and Washington, D.C. offices of Nelson Mullins Riley & Scarborough LLP, focusing his practice in the cutting-edge fields of intellectual property, internet, domain name, and technology litigation, as well as strategic counseling. John has been involved in numerous federal and state actions, as well as cases brought before the Trademark Trial and Appeal Board and arbitration proceedings under ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP). His extensive litigation experience underscores his ability to navigate complex intellectual property disputes effectively.

In his strategic counseling practice, John advises clients on a wide range of intellectual property matters, including the assignment, licensing, and development of applications and other technologies. He also focuses on implementing brand protection measures on the internet and within online social media networks, helping clients safeguard their intellectual property in the digital age. John is actively involved in several professional organizations. Within the International Trademark Association (INTA), he has served as the chairperson of the Internet Committee and previously held roles as vice chairperson and sub-committee chair of the New gTLD Registry Issues subcommittee. His involvement with ICANN includes membership in the Intellectual Property Constituency (IPC), where he served as its representative to the GNSO Council, ICANN's policy-making board, from 2020 to 2024. He is currently the president of the IPC.

In 2015, John was appointed by the World Intellectual Property Organization (WIPO) as a panelist arbitrator for UDRP proceedings. John's professional achievements have earned him numerous accolades. He has been recognized as a "Trademark Star" and "Transactions Star" by Managing Intellectual Property magazine in 2022 and 2023. The National Law Journal named him an Intellectual Property Trailblazer in 2020, highlighting his pioneering work in the field. Additionally, he has been acknowledged as a World Trademark Review Global Leader and a World Leading Trademark Professional by the WTR 1000 from 2019 to 2024.