

Key Issues in University Research: “Publicly Available” and “Public Domain” Statuses



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One of the most common exports in Academic environments is the export of Technical Data and Software. In the purposes of public interest, research and innovations, BIS and DDTC determined that technical data and software that can be classified as “publicly available” (EAR 734.3(b)(3)) or in the “public domain” (ITAR 120.11) are excluded from export controls. The EAR and the ITAR strictly define those statuses. Their definitions, as their names, are slightly different.

If the technical data or software cannot be categorized under the “publicly available” or “public domain” statuses, the normal classification process should be followed¹.

Be aware that these exemptions apply only to technical data and software, i.e., there is no “publicly available” or “public domain” status for hardware.

A. EAR: TECHNOLOGY AND SOFTWARE PUBLICLY AVAILABLE (TSPA)

According to the EAR 734.3(b) (3), “publicly available” technical data and software² are not subject to the EAR, so absolutely no restrictions apply to them. For instance, this allows everyone (including a person from E1 countries³) to download publicly available information from the Pitt website. However, there is exclusion to the “publicly available” status for software classified under 5D002⁴ of the Commerce Control List (CCL).

“Publicly available” includes information and software that are:

1. “Published” (EAR 734.7):

Information is “published” when it becomes generally accessible to the interested public, in any form, including: publication in periodicals, books, print, electronic [...] available for free or nominal cost; available in libraries open to public; published patent and applications; released at open conferences, seminar, trade show [...]. Software is “published” when it is available for general distribution either for free or at nominal cost.

¹ Step 1: Classify under the USML or CCL.

Step 2: Determine if a license is required or if the item is eligible for NLR.

Step 3: Check if a license exception can be used.

² For more details about the “publicly available” status, see EAR Supplement No. 1 to Part 734.

³ Category E1 countries include: Cuba, Iran, Syria, Sudan, North Korea.

⁴ Encryption items controls (EI) and mass market software with symmetric key length exceeding 64 bits.

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2. “Resulting from Fundamental Research” (EAR 734.8)

Universities often use this status. Pitt’s policy is to conduct only research that qualifies as fundamental research on campus. However, the Fundamental Research exemption cannot be used for every proposal received by the University. The fact that the research is conducted within the University by Faculty or students is just a presumption and not sufficient to qualify for the Fundamental Research exemption. Therefore, the Fundamental Research exemption **MUST** be used with caution.

According to EAR 734.8, is defined as Fundamental Research “*basic and applied research in science and engineering, where the **resulting information is ordinarily published and shared broadly** within the scientific community*”.

In brief, 2 criteria are essential:

- Basic and Applied Research
- The researchers must be **free to share** the result of the research, so **no restriction on publication is permitted**

Examples of unacceptable restrictions:

- University based research is not considered “fundamental research” if the university or its researchers accept (at the request, for example, of a sponsor) other restrictions on publication of scientific and technical information resulting from the project or activity. EAR 734.8(b)(5).
- Non-Disclosure agreements.

Examples of acceptable restrictions:

- Prepublication review by a sponsor of university research solely to insure that the publication would not: “inadvertently divulge proprietary information that the sponsor has furnished to the researchers” (EAR 734.8(b)(2)) or “compromise patent rights” (EAR 734.8(b)(3)).

Warnings:

- Tangible products of fundamental research (models, instrument, devices) are subject to export controls, and may require a license to ship outside the U.S.
- Only the data, information resulting from the basic and applied research are considered as Fundamental Research, so excluded from export controls. However, some items used for the Research can be export-controlled (EAR or ITAR) and remain controlled even when

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used in Fundamental Research. Sharing those items with non-U.S. persons is a deemed-export, requiring prior U.S. government authorization.

- Fundamental Research can be conducted only in the U.S. The exemption does not apply abroad, e.g. does not apply to a laboratory or field research site in another country outside of the U.S.

3. “Educational Information” (EAR 734.9)

Educational information is defined as information released through catalog classes or labs at institutions of higher learning.

4. “Patent applications” (EAR 734.10)

5. “Unrestricted government research” (EAR 734.11)

Research conducted in an open setting where the researchers are free to share the results without restriction among the scientific community.

If “*specific national security controls are agreed on to protect information resulting from the research*”, the publicly available status doesn’t apply. The research will be subject to the EAR.

B. ITAR: TECHNICAL DATA IN THE PUBLIC DOMAIN

According to the ITAR 120.10, technical data⁵ and software directly related to defense articles are subject to the ITAR requirements. However, it is specified a little bit further⁶, that this definition does not include technical data in the public domain.

Under ITAR 120.11, Public Domain is defined as “*information which is published and which is generally accessible or available to the public*”. Therefore, the ITAR Public Domain definition has some similarities with the EAR Publicly available definition in the sense that it targets information destined to the public and shared broadly. However, the ITAR is more restrictive than the EAR as it specifically designates what is covered by the Public Domain definition, and therefore not subject to the ITAR requirements.

Information published and accessible to the public:

⁵ Technical data is defined as information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification or defense articles.
Example: blueprints, drawings, photographs, plans, instructions, documentations...

⁶ ITAR 120.10 (5)

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1. Through sales at newsstand and bookstores
2. Through subscriptions
3. Through second class mailing privileges granted by the U.S. Government
4. At libraries open to the public or from which the public can obtain documents
5. Through patents
6. Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States
7. Through public release in any form [...]

8. Through Fundamental Research

Fundamental Research is defined as “*basic and applied research* in science and engineering [*at accredited institutions of higher learning in the U.S.*] where the resulting information is ordinarily published and shared broadly within the scientific community”.

3 criteria are essential:

- Basic and Applied Research
- **At accredited institution of higher learning in the U.S.**
- Results must be **published and share broadly, so no restrictions is permitted**

University research will not be considered fundamental research if:

- the research takes place outside the University
Example: Research conducted by a Pitt research team at a commercial lab would not be considered fundamental research if the technology is subject to the ITAR.
- the University or researchers accept any restrictions on publication. ITAR 120.11 (8) (i)
- the research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable. ITAR 120.11 (8) (ii)

To summarize, the “publicly available” and “public domain” statuses are favorable to research and innovation in the Academic environment. However, those statutes do not automatically apply to every project taking place on campus and, therefore, the specifics of each program need to be examined on a case-by-case basis to ensure correct classification.

DOCUMENT HISTORY AND VERSION CONTROLS		
Subject	PUBLICLY AVAILABLE AND PUBLIC DOMAIN STATUSES	
Last Amendment	March 2015	Version 2.0
Supersedes	May 2013 (original document)	Version 1.0