

§ 734.6

under the EAR, including a Denial Order issued pursuant to part 766 of the EAR.

[61 FR 12746, Mar. 25, 1996, as amended at 61 FR 68578, Dec. 30, 1996; 64 FR 27141, May 18, 1999; 64 FR 47105, Aug. 30, 1999; 74 FR 52883, Oct. 15, 2009]

§ 734.6 Assistance available from BIS for determining licensing and other requirements.

(a) If you are not sure whether a commodity, software, technology, or activity “subject to the EAR” is subject to licensing or other requirements under the EAR, you may ask BIS for an advisory opinion or a commodity classification determination. In order to determine whether an item is “subject to the ITAR,” you should review the ITAR’s United States Munitions List (see 22 CFR 120.3, 120.6 and 121.1). You may also submit a request to the Department of State, Directorate of Defense Trade Controls, for a formal jurisdictional determination regarding the commodity, software, technology, or activity at issue; or in ITAR terms, the defense article, technical data or defense service at issue (see 22 CFR 120.4).

(b) As the agency responsible for administering the EAR, BIS is the only agency that has the responsibility for determining whether an item or activity is subject to the EAR and, if so, what licensing or other requirements apply under the EAR. Such a determination only affects EAR requirements, and does not affect the applicability of any other regulatory programs.

(c) If you need help in determining BIS licensing or other requirements you may ask BIS for help by following the procedures described in § 748.3 of the EAR.

[61 FR 12746, Mar. 25, 1996, as amended at 78 FR 61900, Oct. 4, 2013]

§ 734.7 Published.

(a) Except as set forth in paragraph (b) of this section, unclassified “technology” or “software” is “published,” and is thus not “technology” or “software” subject to the EAR, when it has been made available to the public without restrictions upon its further dis-

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semination such as through any of the following:

(1) Subscriptions available without restriction to any individual who desires to obtain or purchase the published information;

(2) Libraries or other public collections that are open and available to the public, and from which the public can obtain tangible or intangible documents;

(3) Unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the interested public;

(4) Public dissemination (*i.e.*, unlimited distribution) in any form (*e.g.*, not necessarily in published form), including posting on the Internet on sites available to the public; or

(5) Submission of a written composition, manuscript, presentation, computer-readable dataset, formula, imagery, algorithms, or some other representation of knowledge with the intention that such information will be made publicly available if accepted for publication or presentation:

(i) To domestic or foreign co-authors, editors, or reviewers of journals, magazines, newspapers or trade publications;

(ii) To researchers conducting fundamental research; or

(iii) To organizers of open conferences or other open gatherings.

(b) Published encryption software classified under ECCN 5D002 remains subject to the EAR unless it is publicly available encryption object code software classified under ECCN 5D002 and the corresponding source code meets the criteria specified in § 742.15(b) of the EAR.

[81 FR 35602, June 3, 2016, as amended at 81 FR 64668, Sept. 20, 2016]

§ 734.8 “Technology” or “software” that arises during, or results from, fundamental research.

(a) *Fundamental research.* “Technology” or “software” that arises during, or results from, fundamental research and is intended to be published is not subject to the EAR.

NOTE 1 TO PARAGRAPH (a): This paragraph does not apply to “technology” or “software” subject to the EAR that is released to conduct fundamental research. (See

§ 734.7(a)(5)(ii) for information released to researchers that is “published.”)

NOTE 2 TO PARAGRAPH (a): There are instances in the conduct of research where a researcher, institution or company may decide to restrict or protect the release or publication of “technology” or “software” contained in research results. Once a decision is made to maintain such “technology” or “software” as restricted or proprietary, the “technology” or “software,” if within the scope of § 734.3(a), becomes subject to the EAR.

(b) *Prepublication review.* “Technology” or “software” that arises during, or results, from fundamental research is intended to be published to the extent that the researchers are free to publish the “technology” or “software” contained in the research without restriction. “Technology” or “software” that arises during or results from fundamental research subject to prepublication review is still intended to be published when:

(1) Prepublication review is conducted solely to ensure that publication would not compromise patent rights, so long as the review causes no more than a temporary delay in publication of the research results;

(2) Prepublication review is conducted by a sponsor of research solely to insure that the publication would not inadvertently divulge proprietary information that the sponsor has furnished to the researchers; or

(3) With respect to research conducted by scientists or engineers working for a Federal agency or a Federally Funded Research and Development Center (FFRDC), the review is conducted within any appropriate system devised by the agency or the FFRDC to control the release of information by such scientists and engineers.

NOTE 1 TO PARAGRAPH (b): Although “technology” or “software” arising during or resulting from fundamental research is not considered intended to be published if researchers accept restrictions on its publication, such “technology” or “software” will nonetheless qualify as “technology” or “software” arising during or resulting from fundamental research once all such restrictions have expired or have been removed.

NOTE 2 TO PARAGRAPH (b): Research that is voluntarily subjected to U.S. government prepublication review is considered “intended to be published” when the research is

released consistent with the prepublication review and any resulting controls.

NOTE 3 TO PARAGRAPH (b): “Technology” or “software” resulting from U.S. government funded research that is subject to government-imposed access and dissemination or other specific national security controls qualifies as “technology” or “software” resulting from fundamental research, provided that all government-imposed national security controls have been satisfied and the researchers are free to publish the “technology” or “software” contained in the research without restriction. Examples of specific national security controls include requirements for prepublication review by the Government, with right to withhold permission for publication; restrictions on prepublication dissemination of information to non-U.S. citizens or other categories of persons; or restrictions on participation of non-U.S. citizens or other categories of persons in the research. A general reference to one or more export control laws or regulations or a general reminder that the Government retains the right to classify is not a specific national security control.

(c) *Fundamental research definition.* *Fundamental research* means research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons.

[81 FR 35603, June 3, 2016]

§ 734.9 [Reserved]

§ 734.10 Patents.

“Technology” is not subject to the EAR if it is contained in any of the following:

(a) A patent or an open (published) patent application available from or at any patent office;

(b) A published patent or patent application prepared wholly from foreign-origin “technology” where the application is being sent to the foreign inventor to be executed and returned to the United States for subsequent filing in the U.S. Patent and Trademark Office;

(c) A patent application, or an amendment, modification, supplement or division of an application, and authorized for filing in a foreign country in accordance with the regulations of the Patent and Trademark Office, 37 CFR part 5; or