

Heeding Export Controls

A Message from Bill Parker, Vice Chancellor for Research

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Of growing national concern, export controls have become especially significant since the 9/11 attacks. Export controls regulate technologies and ideas that are taken to other countries by American travelers or that are imparted to foreign nationals working here in the U.S. These controls are intended to protect the U.S. economy and trade and to advance foreign policy goals, but also to keep technologies and ideas that could be used to harm the U.S. and its citizens from falling into the hands of terrorists and other hostile parties. Export controls are particularly important to academic researchers because our work depends so much on an open exchange of ideas with people from other countries. And because many ordinary aspects of academic work potentially fall under the purview of export controls, it can be difficult to recognize when these regulations must be followed.

Individual sets of regulations from the Departments of Commerce (DOC), State, and the Treasury control exports of information, technologies, and items to foreign countries. The two of greatest concern for academic researchers are Commerce's Export Administration Regulations (EAR) and the State Department's International Traffic in Arms Regulations (ITAR). EAR is concerned with dual-use items, such as computers or pathogens, that are designed for commercial use but have the potential for military application. ITAR covers munitions, broadly defined. Also of potential concern are regulations from the Treasury Department's Office of Foreign Assets Control (OFAC), particularly in light of the recent conflict between OFAC and certain professional organizations over providing editing services to individuals in countries under embargo, an issue that was resolved last year.

According to a November 2004 report from the Council On Governmental Relations (COGR), what constitutes an "export" under EAR regulations includes 1) visual inspection of U.S.-origin equipment and facilities by foreign nationals; 2) oral exchanges of information in the U.S. or abroad; and 3) the application to situations abroad of knowledge or technical experience acquired in the U.S. EAR and ITAR regulate both exports of items and information to other countries and so-called "deemed exports," in which information is transferred to foreign nationals within the U.S.

For academics, export controls can pose a challenge to conducting research. To enable universities to freely engage in public domain research and to allow foreign members of their communities to participate in basic research without requiring a license, the federal government has identified "fundamental research" exempt from regulation. The Fundamental Research Exemption (FRE) applies to all research that could be publicly disseminated: research that is not classified. The policy for the past 25 years or so has been that there should be a "bright line" that distinguishes classified from unclassified information, so that all unclassified information is open to the public, without being muddled by ambiguous terms such as "sensitive." Of particular importance, if the institution or researcher has accepted restrictions on publication of the results, other than ordinary prepublication review, the research may no longer be considered fundamental and may require a license.

Research can become subject to regulation in a variety of ways. For example, export controls are at issue in dealings with nationals from the six embargoed countries (Cuba, North Korea, Libya, Iran, Iraq, Sudan), and can be particularly intricate in collaborative research projects between researchers in the U.S. and nationals from embargoed countries. In addition, export controls can come into play even if foreign nationals are from friendly nations when the research isn't classified as fundamental. For example, if a U.S. university is collaborating with an industry partner that imposes publication restrictions in order to protect its intellectual property, and the university's team includes foreign researchers, the project may no longer be classified as fundamental research because the results can't be publicly disseminated. In addition, a program officer at an agency might impose a contractual clause that restricts publication or access by foreign participants. In such cases, it is important to consult with a campus contracts and grants officer.

Export controls also may come into play when researchers travel abroad. Although public domain information may be taken abroad, controlled items may not be. The Commerce Department includes an extensive list of controlled items; these include computers, chemicals, and biological materials, as well as many non-obvious items. For example, in physically transporting advanced technologies to a foreign country, a U.S. researcher may not allow a foreign national to gain control of it, even if the technology itself is not classified. A researcher may take the latest HP laptop to a foreign country, but may not surrender it temporarily to a foreign national, for instance, while going on a hike. Cell phones with Global Positioning Systems qualify under the same terms.

Deemed exports also can pose unsuspected pitfalls. For example, if a foreign national graduate student who is studying at UCI dismantles and reassembles an instrument that is subject to export controls, the knowledge that s/he gains may be considered a deemed export. Alternatively, if a seminar discusses a technology that is subject to export controls and the audience includes a foreign student or visitor, the seminar could require an export license. Export controls thus begin not just at national borders, but at the boundary of the mind.

Although export controls have not yet affected UCI, the current climate of concern demands that we become aware of their potential to regulate our work, and respond with care. Currently the DOC is evaluating the meaning of fundamental research and considering redefining it. The Association of American Universities is in discussion with DOC and hoping for a resolution. In the meantime, we at UCI need to become more aware of the territory covered by export controls. For more information, visit the COGR website, at <http://www.cogr.edu/>, and scroll down to the link on export controls. If you have questions about how a project you are working on will be affected by export controls, please contact either Marci Copeland (824-0445, email m.copeland@uci.edu) or Bruce Morgan (824-5677, e-mail bruce.morgan@uci.edu) in the Office of Research Administration.