

# Client Alert: Government Data Rights: Defense Contractors May Use Custom Markings to Signal Rights against Third Parties

## Publications

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In the final days of 2020, the US Court of Appeals for the Federal Circuit decided a case providing defense contractors a tool to enhance protection of their technical data (such as specifications and drawings) and computer software when delivering them to the government by including markings asserting rights against third parties not acting under the government's authority.

Sophisticated government contractors regularly look for strategies to protect the "secret sauce" of their technologies from disclosure to and use by competitors. The standard "data rights" clauses included in most government contracts provide various options for doing so, but those clauses also provide that the government will receive "unlimited rights" to certain types of technical data and computer software. However, even when the government receives unlimited rights (a very broad license), the contractor generally retains ownership of the underlying intellectual property rights and potentially the ability to enforce those rights against third parties who are not acting under color of the government's license.

The issue before the Federal Circuit in *Boeing Co. v. Secretary of the Air Force* stemmed from Boeing's use on technical data delivered to the government of a restrictive legend not authorized by the Defense FAR Supplement (DFARS) to restrict third party use of technical data in which the government had unlimited rights. *Boeing Co. v. Secretary of the Air Force*, No. 2019-2147 (Fed. Cir. Dec. 21, 2020). The court held that use of such a legend is consistent with the standard DFARS data rights clause, so long as the legend does not restrict the rights of the government.

As background, DFARS 227.7103 and DFARS 227.7203 establish five types of government licenses for noncommercial technical data and computer software: (1) unlimited rights; (2) government purpose rights; (3) limited rights (for technical data); (4) restricted rights (for computer software); and (5) specifically negotiated license rights. The parallel clauses at DFARS 252.227-7013 and DFARS 252.227-7014 are generally incorporated into defense contracts to address the contractor's and the government's respective rights in noncommercial technical data and computer software.

Paragraph (f) of these clauses contains specific instructions for contractors to mark qualifying technical data and computer software to provide the government less than unlimited rights. Those instructions include specific markings corresponding to each of the license types other than unlimited rights. Other provisions address removal and correction of nonconforming markings.

When Boeing was required to deliver technical data to the government with unlimited rights, it had a longstanding practice of marking that data with what it called a “Non-U.S. Government Notice” claiming the data as proprietary and advising that non-governmental entities may use and disclose the data only as authorized by Boeing or the government. Eventually, a contracting officer rejected technical data marked with that legend, finding it nonconforming because it is not one of the legends specifically authorized by DFARS 252.227-7013.

Boeing’s argument on appeal to the Armed Services Board of Contract Appeals, and later to the Federal Circuit, was based on the specific language of DFARS 252.227-7013(f), which states that the authorized legends are to be used when a contractor wishes to assert “restrictions on the Government’s rights to use, modify, reproduce, release, perform, display, or disclose technical data” (emphasis added). Specifically, Boeing argued that because its legend did not restrict the Government’s rights, but rather the rights of third parties, DFARS 252.227-7013(f) did not provide a basis for the government to object to its marking.

While the Board upheld the contracting officer’s decision, the Federal Circuit agreed with Boeing, finding that “the plain language of Subsection 7013(f) demonstrates that it applies only in situations when a contractor seeks to assert restrictions on the government’s rights.” The court noted that this conclusion had “the added benefit” of allowing Boeing “to notify the public of its ownership” of the relevant technical data. Although the Court agreed with Boeing’s legal argument concerning the interpretation of DFARS 252.227-7013(f), it declined to opine on whether the specific text of Boeing’s legend actually did restrict the Government’s rights. That question, the Court decided, was a question of fact that must be determined by the Board on remand.

While the court’s decision concerned interpretation of the technical data provisions in DFARS 252.227-7013(f), it would seem to apply with equal force to the parallel provisions for computer software in DFARS 252.227-7014(f).

In view of the decision, it makes sense for defense contractors to consider using a restrictive legend to notify third parties of their claims to ownership when delivering technical data or computer software to the government with unlimited rights. While such a legend may not create any substantive rights against third parties, it would at least serve as a reminder to competitors that certain uses of the data may implicate enforceable intellectual property rights and have an in terrorem effect.

Jenner & Block lawyers stand ready to assist contractors in protecting their intellectual property rights while complying with this complex regulatory regime.

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