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UNDERSTANDING THE IMPLICATIONS OF SELLING RIGHTS IN SOFTWARE TO THE DEFENSE DEPARTMENT: A JOURNEY THROUGH THE REGULATORY MAZE*

PAMELA SAMUELSON**

INTRODUCTION

The Department of Defense ("DoD") has in recent years been sponsoring the development of a large number of very sophisticated software systems.¹ Many companies are interested in exploring the possibility of participating in one or more DoD-sponsored software development projects. Small firms, in particular, may be drawn to DoD as a source of funding for large scale projects, perhaps hoping that the software developed for the military will also, with some modifications, have a significant commercial market.² The company may think it worthwhile to take DoD funding to meet initial development costs and then rely on commercial sales for further profit.

One of the perceived drawbacks to making such a deal with the Defense Department, however, is the "data rights" policy the Department has adopted to allocate and administer what rights the government and its contractors will have as to software acquired by the government.³

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* This article is a revised version of a Technical Memorandum of the same title originally prepared for the Software Engineering Institute ("SEI") of Carnegie Mellon University ("CMU") in connection with the author's work as the principal investigator of the Software Licensing Project at the SEI. The SEI is a federally funded research and development center established with funds from the U.S. Department of Defense ("DoD"). The views contained in this article are the author's and should not be attributed to the SEI, CMU, or DoD. For a more comprehensive overview of the DoD's software licensing policy and problems associated with it, see Samuelson, The Need for Reform of the Software Licensing Policy of the Department of Defense, 27 JURIMETRICS J. 9 (1986).

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² Ada compilers, for example, are a class of software programs having both military and commercial applications. See, e.g., Sammet, Why Ada Is Not Just Another Programming Language, 29 COMMUNICATIONS ACM 722 (1986).

³ When the government acquires hardware systems, it frequently also acquires "data" (for example, engineering designs) about the systems for maintenance or reprocurement purposes. There is a set of government procurement regulations that gov-
The DoD data rights policy is often described as "confiscatory" by the computer software industry, although just how and to what extent it is "confiscatory" is not well understood. Given the length and complexity of the standard data rights clause that DoD inserts in virtually all of its software acquisition contracts, it is not surprising that many involved in software development do not know the full implications of the clause. This article sets forth as simply and clearly as possible what rights contractors are likely to have, and not have, when selling rights in software to the Defense Department. The study also assesses the potential risks of negotiating non-standard contract terms with special contractual language. Not all such special language may be enforceable for reasons set forth at some length below.

I. LIMITS ON FLEXIBILITY AS TO SOFTWARE CONTRACT TERMS

This article begins with pointing out how little flexibility DoD's own contracting personnel seem to have under the current procurement regime. The regulations state that the standard data rights clause is to be incorporated into every software acquisition contract into which the Defense Department enters, unless a formal "deviation" is granted over such things as the level of rights the government and the contractor will have in such acquired data. See Federal Acquisition Regulations ("FAR"), 48 C.F.R. §§ 1.000-1.707 (1985). Part 27 of the FAR sets forth the general government policy as to patents, copyrights, and data acquisitions. See 48 C.F.R. §§ 27.101-27.104 (1985). Part 27.4 sets forth the copyright and data policy. See 48 C.F.R. § 27.401 (1985). Because the FAR provisions do not provide very specific guidance about all possible acquisition situations, several federal agencies, including the Department of Defense, have supplemented the FAR provisions with their own procurement regulations. See, e.g., 48 C.F.R. §§ 201.101-201.707 (1985) (Defense Department Supplement). The special agency supplements are numerically ordered in conformity with the FAR numbering system. For example, the FAR data rights policy provisions may be found at 48 C.F.R. § 27.401 (1985) and the DoD supplementary regulations at 48 C.F.R. §§ 227.400-227.405 (1985). Implementing clauses are found in Part 52 of the FAR, and at 48 C.F.R. §§ 252.101-252.270-7064 (1985) of the Defense Department Supplement [hereinafter DFARS]. The FAR data rights policy provision is very brief and general. Because DoD acquires considerable volumes of data, it has found it necessary to extensively supplement the FAR data rights provision, including regulations relating to software. Compare 48 C.F.R. § 27.401 (1985) with 48 C.F.R. §§ 227.400-227.7013 (1985).

Concerning DoD's technical data rights policy, see generally R. Nash & L. Rawicz, PATENTS AND TECHNICAL DATA (1983) [hereinafter Nash & Rawicz].


5. See 48 C.F.R. § 252.227-7013 (1985) (standard clause for acquiring rights in software and technical data), which is reprinted in its entirety in the Appendix to this article.

The mandatory nature of the standard data rights clause is an important limit on the ability of contract officers to reach agreements that contravene the clear commands of the standard clause.8

This is not to say that the clause is completely inflexible. One can, for example, negotiate a special set of terms to control the government's use of privately developed software so long as the government still has the four minimum rights prescribed in the standard clause.9 But an agreement purporting to take away from the government one of the four standard minimum rights would be of questionable validity absent authorization for a deviation.10 Similarly, a specially negotiated arrangement that would give the government less than "unlimited rights"11 in software funded in whole or in part12 with federal money would also be problematical. If the standard data rights clause is included in a government contract or subcontract, the mandatory clause seems likely to prevail over any contradicting specially negotiated provisions should a dispute over the rights between the parties arise.13 For instance, a special clause forbidding the government from enhancing the software, a clause that might appear in a standard commercial con-

7. See 48 C.F.R. § 227.404-2(a) (1985) (describing the procedure for obtaining a deviation from use of the mandatory data rights clause). The regulations do not establish standards by which deviations will be granted. It is in the discretion of the Defense Acquisition Regulations Council.

8. The procurement regulations limit the authority of a government contract officer to vary certain terms of the contract. With respect to software acquisitions, for example, the regulations state that "the Gov't shall have restricted rights in [privately developed] computer software. . . ." 48 C.F.R. § 252.227-7013(b)(3)(i) (emphasis added). "Restricted rights" is defined to include "as a minimum" four specified rights. See infra notes 25-29 and accompanying text. See also 48 C.F.R. § 252.227-7013(a) (definition of "restricted rights").

9. The contract officer can, for example, negotiate for the government to have additional rights in software over and above the four minimum rights. See 48 C.F.R. § 227.404-2(b)(3) (1985). But see infra note 72 and accompanying text regarding the limitation on such flexibility as to commercial software.

10. See supra notes 6-7 and accompanying text.

11. The standard data rights clause states that the government shall have unlimited rights in all software that is originated or developed as a necessary part of performing a government contract. See 48 C.F.R. § 252.227-7013(b)(1). For a discussion of the DoD's unlimited rights policy, see infra notes 34-67 and accompanying text.

12. For a discussion of the importance of the funding source as a basis for allocation of rights in software as between the government and the contractor who is supplying the software., see infra notes 34-44 and accompanying text.

13. Even if the contract officer omits the standard data rights clause from a particular software acquisition contract, it would probably be read into the contract as it is a mandatory clause. See, e.g., G.L. Christian & Assocs. v. United States, 312 F.2d 418, 423-26 (Ct. Cl. 1963) (reading a mandatory "termination at the convenience of the government" clause into a government contract).
tract, would contravene the standard minimum modification right and would likely not be enforceable.

The policy reasons that support enforcement of the standard data rights clause over a specially negotiated clause are straightforward. The Defense Department buys a tremendous volume of software and other items. In turn, it needs a way of predicting with some certainty what minimum rights it will have in this property.\textsuperscript{14} The standard data rights clause is the vehicle for obtaining such assurances. Agency regulations require its use; it is itself a regulation\textsuperscript{15} with the force and effect of law.\textsuperscript{16}

The standard clause sets forth the basic transactional rules the government has decided are necessary to protect its interests. Because there is a way within the regulations to alter the standard data rights policy, namely the formal deviation,\textsuperscript{17} specially negotiated terms that contradict the standard clause might well be found ineffective when the deviation process was not used to obtain the right to an exception. This policy argument would seem to apply equally to subcontracting as well as to prime contracting situations.\textsuperscript{18}

Nevertheless, there may be some instances in which a software company and DoD contracting personnel have entered into special arrangements in which the standard data rights clause may be incorporated by reference while separate clauses contradicting part of this standard clause may also appear.\textsuperscript{19} The government contract officer and the industry representative may have reached between themselves an under-

\begin{itemize}
\item \textsuperscript{14} For example, in order for the government's logistics command personnel to be able to perform maintenance and support work on software systems developed by private contractors, they will need to know what minimum rights the government will have in order to transfer software from one computer to another and from one site to another, and to modify the software.
\item \textsuperscript{15} See 48 C.F.R. §§ 227.404-1 (1985) and 252.227-7013.
\item \textsuperscript{16} See, e.g., Caha v. United States, 152 U.S. 211, 220 (1894); Carter v. Cleveland, 643 F.2d 1, 8 (D.C. Cir. 1980).
\item \textsuperscript{17} See supra note 7 and accompanying text. The DFARS also requires prime contractors to "flow down" the same data rights clauses to subcontractors as are in the prime contract. See 48 C.F.R. § 252.227-7013(g)(1).
\item \textsuperscript{18} For a discussion of the ability of the government to bind subcontractors to terms in the prime contract, see P. Samuelson, Toward a Reform of the Defense Department Software Acquisition Policy, Technical Report CMU/SEI-86-TR-1, at 95-98 [hereinafter SEI REPORT].
\item \textsuperscript{19} One of the standard minimum rights the government claims in privately developed software is the right to modify software. See 48 C.F.R. § 252.227-7013(a) (definition of "restricted rights"). In the commercial arena, software firms often do not give customers the right to modify the acquired software. An example of an unauthorized special arrangement between DoD and a contractor that would contravene the standard data rights clause would be one in which a contract officer negotiated away the government's right to modify software.
\end{itemize}
standing that the specially negotiated language will govern. In many, and perhaps most, instances, the deal may go smoothly and no disputes about rights will arise. In the event of a dispute, however, the Defense Department might well take the position that the standard data rights clause prevails over the specially negotiated terms for the policy reasons discussed above. It may also argue that the contract officer, or the prime contractors in the subcontract situation, had no authority to make special arrangements without obtaining approval for a deviation. The inequity of subjecting a firm to terms vastly different from those to which it agreed would probably yield to the larger policy underlying the procurement regulations. This is one risk for firms that sell rights in software to the government.

II. DIFFERENT TREATMENT FOR SOFTWARE AND ITS ASSOCIATED DOCUMENTATION

There are many features of the DoD standard data rights clause that differ from standard commercial practices. One important example is the different treatment accorded machine-readable code and software documentation. DoD defines “software” in such a way as to encompass only machine-readable code; software documentation is considered “technical data.”

If both the machine-readable code and documentation have been developed, at least in part, at public expense, the separate classification of machine-readable code and documentation will matter very little because the government will claim the same “unlimited rights” in both. If they have instead been developed wholly at private expense, however, the machine-readable code will generally be subject to a tighter set of restrictions than its documentation because of the separate classification of software documentation as technical data.

Privately developed machine-readable software is acquired by DoD with at least the four standard minimum “restricted rights” on the part of the government. These are the right to use it in the computer for

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21. See 48 C.F.R. § 252.227-7013(a) (definition of “computer software”).
22. See id. (definition of “technical data”).
23. See id. (definition of “unlimited rights”). See also infra notes 33-67 and accompanying text.
24. The exception for commercial software documentation, which may be acquired with “restricted” instead of “limited” rights, is discussed infra notes 70-71 and accompanying text.
25. See 48 C.F.R. § 252.227-7013(a) (definition of “restricted rights”). Deeper in the
which it was obtained, the right to use it in a backup computer if the intended use computer is inoperable, the right to make a backup copy of it, and the right to modify it. Privately developed software documentation will typically be acquired with "limited rights," which means that the government will have the right to use, copy, and disclose it throughout the government, and in emergency repair situations, to have these same acts performed by outsiders.

It should be readily apparent that DoD's discrepant treatment of privately developed machine-readable code and its documentation is at odds with commercial practice, which tends either to treat software and documentation the same or to treat documentation more restrictively than executable code. This is a feature of DoD's policy that warrants careful consideration by software firms supplying software and documentation to the government.

standard data rights clause, there is actually a second and somewhat different set of restricted rights, which is applicable to commercial software whose owner elects to have treated as commercial software. See 48 C.F.R. § 252.227-7013(b)(3)(ii). See also infra notes 68-72 and accompanying text.

26. See 48 C.F.R. § 252.227-7013(a) (definition of "restricted rights"). The definition makes clear that if the computer is transferred to another government installation, the software may be transferred with it. The commercial software restricted rights provisions allow the government to use the software at the facility (not just for the computer) for which it was acquired. See 48 C.F.R. § 252.227-7013(b)(3)(ii)(D).

27. There is no substantive difference between the general set of "restricted rights" and "commercial software restricted rights" as to this issue.

28. See 48 C.F.R. § 252.227-7013(a) (definition of "restricted rights"). It is not clear whether the government can make more than one copy of the software for back-up purposes.

29. The modification right and the proviso concerning the effect of modifications on the status of the software are worded somewhat differently in the clause definition and commercial software provisions. Compare 48 C.F.R. § 252.227-7013(a) (definition of "restricted rights") with 48 C.F.R. § 252.227-7013(b)(3)(ii)(D).

30. See 48 C.F.R. § 252.227-7013(a) (definition of "limited rights"). See also infra notes 70-71 and accompanying text.

31. See infra notes 78-79 and accompanying text for the exception to this general rule as to manuals or instructional material needed for installation, maintenance, or training.

32. See P. SAMUELSON, COMMENTS ON THE PROPOSED DEFENSE AND FEDERAL ACQUISITION REGULATIONS, CMU/SEI-86-TM2 (1986) (arguing that this discrepant treatment for code and documentation creates needless disincentives for the software industry to do business with the DoD). The President's Blue Ribbon Commission on Defense Management in its final report recommends a change in the DoD's software policy to make it more responsive to industry needs. See PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE (1986) [hereinafter PACKARD COMMISSION REPORT]. See also PACKARD COMMISSION REPORT at Appendix I.
III. PUBLIC V. PRIVATE FUNDING OF SOFTWARE
AS IT AFFECTS RIGHTS

Undoubtedly the most important distinction in the DoD standard
data rights clause is that between “publicly funded software” and “pri-
vately developed software.” The government will claim “unlimited
rights” in any software and documentation “developed” with public
funding; it will treat as “proprietary” any software developed at pri-
vate expense.

The DoD takes an “all or nothing” approach in these situations.
That is, no matter how much of a private firm’s own money has gone
into the development of a piece of software, and regardless of how valu-
able that software or its prototype may be, if even one dollar of DoD
money has gone into the software’s development fund, the government
will claim unlimited rights in that software and documentation.

33. It is interesting that the standard data rights clauses does not speak of “publicly
funded software” but only of software either resulting from performance of a govern-
ment contract or required to be generated under a government contract; yet it is clear that it is
the source of funding that is the primary issue. See NASH & RAWICZ, supra note 3, at
439-46 for a discussion of the circumstances under which technical data and software are
protectable.

34. “Unlimited rights” is defined in the standard data rights clause as the “rights to
use, duplicate, or disclose technical data [or computer software], in whole or in part, in
any manner and for any purpose whatsoever, and to have or permit others to do so” 48
C.F.R. § 252.227-7013(a).

35. See NASH & RAWICZ, supra note 3, at 443-46. See also 48 C.F.R. § 252.227-
7013(b)(1) (setting forth nine categories of items in which the government claims unlim-
ited rights).

36. That is, the government will accept restrictions on its ability to use, duplicate, or
disclose the software or documentation, either within the government (as to software) or
as to persons outside the government (as to software documentation) if the software and
documentation has been developed at private expense. See NASH & RAWICZ, supra note 3,
at 439-46.

37. See In re Bell Helicopter Textron, ASCBA No. 21192 (1985) (interpreting the
term “developed at private expense” as to technical data), summarized at 31 PAT.
TRADEMARK & COPYRIGHT J. (BNA), Dec. 12, 1985, at 132. In the fall of 1985, the
DoD issued a set of proposed revisions to the DFARS that included a very patent-orien-
ted definition of the term “developed at private expense” as to both technical data and
software. This definition would have required software to have been completely devel-
oped before any government contract was entered into and tested to demonstrate that it
performed the intended function in order to qualify for limited or restricted rights treat-
This definition as applied to software would have meant that virtually no software would
qualify for restricted rights treatment because by its very nature software is an evolution-
ary product and is not “completely developed” at any point in time. The software indus-
try was outraged at this proposed definition. See, e.g., Government Contractors Oppose
Proposed Technical Data Rules, 30 PAT. TRADEMARK & COPYRIGHT J. (BNA), Oct. 10,
1985, at 607. The DoD decided not to go ahead with these proposed rules, but instead
money has paid only for slight modifications to the code that were necessary to make the software suitable for government purposes.\textsuperscript{38}

Industry has been trying for many years to alter this policy and, indeed, recent legislation seems to call for the establishment of some form of middle ground alternative for mixed funding situations.\textsuperscript{39} The newly proposed Federal Acquisition Regulations ("FAR")\textsuperscript{40} would, for example, permit the government and a contractor to make arrangements for the government to get less than unlimited rights when both supply funds for the development of software.\textsuperscript{41} The new FAR would also permit firms to retain "privately developed" status for software that has been slightly modified by a contractor to make it suitable for government use.\textsuperscript{42} This is not, however, the Defense Department's policy, as reflected in the current DoD FAR Supplement\textsuperscript{43} and the proposed amendments to it.\textsuperscript{44}

\[\text{adopted a set of interim rules that retain the basic substance of the prior policy. See Dep't of Defense Federal Acquisition Regulation, 50 Fed. Reg. 43,158 (1985).}\]

On January 16, 1987, DoD issued a set of proposed changes to the data rights regulations including a new definition of the term "developed." Proposed § 227.471 would define this term as follows:

"Developed," as used in this subpart, means that the item, component or process exists and works as intended. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component or process has been analyzed and/or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of testing is required in addition to analysis depends on the nature of the item, component, or process and the state of the art. To be considered "developed" the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market.

\[\text{Dep't of Defense Federal Acquisition Regulation, 52 Fed. Reg. 2084 (1987). This definition would be incorporated by reference in the revised standard data rights clause. Id. at 2091.}\]

\[\text{38. The proposed FAR data rights regulations would permit contractors to retain private development status for software as to which only slight modifications were made for the government. See Proposed Subpart 27.4 of FAR, (48 C.F.R. § 252.227-14) (1985), reprinted in 30 PAT. TRADEMARK & COPYRIGHT J. (BNA), Aug. 22, 1985, at 413-29 (providing text of draft regulations) [hereinafter Proposed Subpart 27.4].}\]


\[\text{40. See 50 Fed. Reg. 32,870 (1985) (announcing the availability of the proposed regulations). See generally Proposed Subpart 27.4, supra note 38.}\]

\[\text{41. See Proposed Subpart 27.4, supra note 38, at 419 (proposed 48 C.F.R. § 27.408).}\]

\[\text{42. See id. at 421 (proposed 48 C.F.R. § 52.227-14(c)(2)).}\]

\[\text{43. See supra note 37 and accompanying text.}\]

\[\text{44. See 50 Fed. Reg. 36,887, 36,889 (1985).}\]
IV. Unlimited Rights Vis-a-Vis Ownership?

As indicated above, the standard data rights clause provides that if DoD provides funding for any part of the developmental costs for software, it will claim "unlimited rights" in the software and its associated documentation. There seems to be some confusion within DoD, as well as in the industry, concerning the meaning of unlimited rights vis-a-vis an ownership interest. Apparently, many think that unlimited rights is equivalent to an ownership interest.

A close examination of the standard data rights clause indicates that this assumption is not accurate. The definition of unlimited rights under the DoD clause makes no mention of any ownership interest. "Unlimited rights" is defined in the standard data rights clause to mean only the rights to use, duplicate, and disclose software and its documentation in any manner and for any purpose and to have or permit others to do the same. While this is surely a very broad license, it appears that it is not an ownership interest. In intellectual property, ownership rights are defined in terms of the right to exclude others from doing one or more things with the property; the definition of unlimited rights confers no right to exclude on the part of the government. Furthermore, a close reading of the DoD procurement policy regulations reveals that when DoD wants an ownership interest in software, it should use the "special works" clause instead of the standard data rights clause.

V. The Effect of Use of a Special Works Clause

The DoD special works clause purports to give to the government an ownership right and a direct copyright interest in software or other work prepared under a government contract in which this clause is used. The clause claims this direct copyright interest by maintaining that the work prepared by the contractor under the clause is a "work made for hire" under the copyright law. Unfortunately, the DoD spe-

45. See supra note 37 and accompanying text.
47. See, e.g., Regents of the University of Colorado v. K.D.I. Precision Prod., Inc., 488 F.2d 261, 264 (10th Cir. 1973) (discussing the difference between "unlimited" and "exclusive" rights). The patent and copyright statutes define the scope of the property rights of owners of these intellectual property interests in terms of their power to exclude other people from doing certain things. See 35 U.S.C. § 154 (1982); 17 U.S.C. § 106 (1982).
50. The relevant section, 48 C.F.R. § 252.227-7020(b), provides: "All works first produced in the performance of this contract shall be the sole property of the Government,
cial works clause, insofar as it purports to give the government a direct copyright interest in software, may be ineffective for this purpose because it conflicts with the copyright law in two respects: first, software is not a category of specially commissioned work that qualifies for the "work made for hire" rules; and second, the copyright law specifically prohibits the government from directly owning copyrights. The effect of putting the DoD special works clause in a software development contract would seem to be to put the software and associated documentation in the public domain.

VI. HOW BROAD IS THE UNLIMITED RIGHTS LICENSE?

How broad the government's unlimited rights in software are might seem a tritely simple question, but it is not. Some procurement personnel tend to interpret the term as if it was tautologically defined, i.e., that "unlimited rights" means "unlimited" rights. The DoD's own definition of the term, however, is limited to the three basic rights to use, duplicate, and disclose the software. The most glaring omission from the definition is a reference to rights to prepare derivative works. Derivative works are defined broadly by the copyright law to include those based on "one or more preexisting works." There is little case law to provide guidance as to the scope of this concept vis-a-vis software, but it would seem to include all modifications, enhancements, translations into other programming languages, and additional programs developed using parts of the original code, i.e., the reusability of software.

which shall be considered the 'person for whom the work was prepared' for the purpose of authorship in any copyrightable work under Section 201(b) of Title 17, United States Code, and the Government shall own all of the rights comprised in the copyright."

51. See 17 U.S.C. §§ 101 (definition of "work made for hire" as "a work specially ordered or commissioned"), 201(b) (allocating ownership rights as to works made for hire) (1982). The legislative history of this provision shows that Congress intended only for certain named categories of specially commissioned works to be eligible for "work made for hire" status. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121 (1976) [hereinafter HOUSE REPORT].

52. See 17 U.S.C. § 105 (1982). This provision permits the government to take copyrights by assignment, bequest, and the like, but not directly. The legislative history indicates that Congress considered and rejected the idea of the government's taking a copyright in works prepared by contractors. See HOUSE REPORT, supra note 51, at 59.

53. Since the government is prohibited from taking an ownership interest in it by operation of 17 U.S.C. § 105, and the special works clause prohibits the contractor from claiming ownership interests in it pursuant to 48 C.F.R. § 252.227-7020, the software would seem to be in the public domain.


55. See 17 U.S.C. § 101 ("derivative work" defined as a work based on "one or more preexisting works . . .") and 17 U.S.C. § 106(2) (1982) (giving copyright owners the exclusive right to prepare derivative works).

56. See SEI REPORT, supra note 18, at 67-74.
Although the government might argue that a derivative works right is implicitly included in the DoD rights,\(^{57}\) it is conceivable that a court might find that the DoD does not obtain the right to make derivative works of copyrighted material when it has unlimited rights.\(^{58}\) Furthermore, DoD’s argument for implicit intrusion is weakened because the newly proposed FAR explicitly defines unlimited rights to include a right to make derivatives.\(^{59}\)

If firms that have developed software with government funds retain the right to control the government’s preparation of derivative software, that would certainly be an important limitation on the government’s rights. Whether this is so is simply unclear. The regulations do not address this and give no clue as to what direction a court should take.

**VII. CONTRACTOR-PREPARED DERIVATIVES OF UNLIMITED RIGHTS SOFTWARE**

Though the government’s right to prepare derivative software may be a serious question, even more important from industry’s perspective may be whether the government will have any rights—or perhaps even unlimited rights—in any contractor-prepared derivative software intended for the commercial market.\(^{60}\) If DoD funds have paid for development of the original software and if some part of the original software is traceable in the derivative software, some DoD personnel might argue the government should have unlimited rights in the derivative software as well—despite the fact that delivery of derivative software may never have been called for under any contract.

The problem of what it might mean for the government to have unlimited rights in non-deliverables\(^{61}\) is a thorny one, but in the context of

\(^{57}\) DoD might argue that making derivative works is a “use” of the software within the meaning of the unlimited rights definition, yet there is clearly a difference between using software for its operational function (which DoD obviously has the right to do) and preparing derivative software.

\(^{58}\) It would be very easy for DoD to include a derivative works right in its definition of unlimited rights if that was what it thought it needed. Its failure to include derivative works right might be construed as intentional, or as so potentially misleading to software contractors who might have bid on projects in reliance on a narrower interpretation of the government’s claim of rights, such that it would be inequitable to enforce the government’s interpretation.

\(^{59}\) *See Proposed Subpart 27.4, supra note 38, at 413.*

\(^{60}\) *See supra note 2 and accompanying text.* One reason software firms may be willing to bid on military software contracts or subcontracts, and may be willing to bid low prices, may derive from the commercial potentials of "spinoff" programs. The ability of the firm to capitalize on this potential will depend on its ability to control others (including the government) in their distribution of the spinoff products.

\(^{61}\) *See SEI REPORT, supra note 18, at 23-24 for a more complete discussion of this issue.*
derivative software it could cause considerable concern. How a court would resolve a dispute of this sort is difficult to predict. It might seem inequitable to the software industry for the government to claim broad rights in derivative software that was never bargained for. Nonetheless, DoD might very well take the position that the government can and should exercise rights to derivative software.

VIII. THE EFFECT OF COPYRIGHTING SOFTWARE DEVELOPED AT PUBLIC EXPENSE

The making of derivative software from software developed at public expense can also be a complicated problem if the developer of the original software has copyrighted the software as the standard data rights clause permits and if a different company is selected to prepare the derivative software for the government. As was pointed out above, it is not entirely clear that the government has the right to authorize the making of derivatives. For the moment, let's assume it does. That still does not mean the government's ability to authorize the creation of derivatives is unlimited. One provision of the standard data rights clause suggests that the government's rights to do various things with copyrighted software and to authorize others to do the same is limited to circumstances in which they are done for governmental purposes. The regulation is somewhat ambiguous in this respect, but it may be that the effect of a contractor's copyrighting software it has developed with government funding will be to narrow the scope of the government's rights in that software from an "any purpose" license to a "government purposes" license, that is, to constrict the scope of unlimited rights. This constriction of the government's rights may be particularly important to the creation of derivative software, for it may permit the original developer, insofar as it may be a copyright owner, to control distribution of derivative software prepared by a second firm to anyone.

62. The standard data rights clause permits the contractor to copyright software unless the special works clause is used in the contract. See 48 C.F.R. § 252.227-7013(c)(1).
63. See supra notes 55-59 and accompanying text.
64. See 48 C.F.R. § 252.227-7013(c)(1).
65. After giving the government a government purpose license in software that has been copyrighted by its developer, the standard data rights clause goes on to say that as to unlimited rights software, "the license shall be of the same scope as the rights set forth in the definition of 'unlimited rights' in paragraph (a) above." 48 C.F.R. § 252.227-7013(c)(1). The clause is thus ambiguous about the scope of the license. Ambiguities in contract terms are generally construed against the drafter, here the DoD. See, e.g., Framlau Corp. v. United States, 568 F.2d 687, 692 (Ct. Cl. 1977).
besides the government. Thus, the first firm may not be able to prevent a second firm from preparing a derivative program for the government, but it may at least be able to prevent the second firm from copyrighting the derivative and selling it widely to commercial customers. The government cannot give to the second firm a wider set of rights than the first firm has given to the government. Furthermore, if the second firm—even with the government's permission—exceeds the scope of the government's license, it may be enjoined from infringing the first firm's copyright and thus be unable to bring the derivative to market.

IX. THE POLICY WHEN SOFTWARE IS DEVELOPED AT PRIVATE EXPENSE

In light of the risks and uncertainties involved when a firm accepts government funding for software development, a software firm may prefer to find some independent source of funding for the software to avoid the problems just described. The firm may think that private funding of software development will allow the company to restrict the government's use of the product. To an extent, this is true; to an extent, it may not be true. Even when a contractor firm uses its own funds for software development as a way of ensuring its ability to restrict the government's rights in the software, it must still follow a circuitous path through the data rights regulations to secure the restricted rights protection it desires.

X. COMMERCIAL SOFTWARE: THE OPTION

One of the potentially helpful provisions for industry as to privately developed "commercial software," which may take some experience with the clause to discern, is that the standard data rights clause allows contractors to opt whether to have their commercial software treated as "commercial software" or as "other-than-commercial-software."

66. If Contractor A copyrights the software and the government has government purpose rights (but not unlimited rights) in it, and the government lets a contract to Contractor B to develop a piece of derivative software and Contractor B wants to distribute the derivative to commercial customers, Contractor A's copyright might give Contractor A a right to enjoin Contractor B's distribution to other parties besides the government. See SEI REPORT, supra note 18, at 85-92.

67. One who exceeds the scope of license permission may infringe the underlying copyright. See, e.g., Gilliam v. American Broadcasting Co., 538 F.2d 14, 20 (2d Cir. 1976).

68. The standard data rights clause defines "commercial computer software" as "software which is used regularly for other than Government purposes and is sold, licensed or leased in significant quantities to the general public at established market or
The primary advantage of having one's software treated as "commercial software" is that its documentation will be subject to the same "restricted rights" as applies to the machine-readable code instead of being subject to the broader, government-wide rights that pertain to other software documentation. The primary disadvantage of opting for "commercial software" treatment is that a fixed and unnegotiable set of terms will apply to the code and the documentation; no further terms can be negotiated. Some firms with commercial software prefer to negotiate additional terms and thus exercise the option to have commercial software treated as "other-than-commercial-software."

XI. OTHER-TAN-COMMERCIAL-SOFTWARE: A "BOOBY TRAP"

The standard data rights clause contemplates that when DoD acquires other-than-commercial-software that has been developed at private expense, a separate licensing agreement will be negotiated between the government and the software firm that will then be made part of the government contract. This agreement can contain many different terms and conditions but must, at a minimum, include the standard four minimum restricted rights in the software.

An interesting question is: What happens if the firm fails to negotiate a separate license agreement and to have that agreement made part of the government contract? A cursory reading of the standard data rights clause might suggest to the layperson that if no license agreement was entered into between the government and the contractor, the government would have no more than the four standard minimum rights in the software. A closer reading of the clause itself, however, indicates that the failure to negotiate a separate license or the failure to have a separate agreement made part of the government contract may instead mean that the government will possess unlimited rights in the

catalog prices." 48 C.F.R. § 252.227-7013(a). The definition could be somewhat more precise. Commercial software restricted rights provisions, described at 48 C.F.R. § 252.227-7013(b)(3), indicate that software contractors whose products qualify as commercial software have the option to elect which restricted rights treatment to receive.

69. "Other-than-commercial-software" is not designated as such in the regulations, but 48 C.F.R. § 252.227-7013(b)(3)(i) applies to software that is not commercial software or commercial software whose owner elects to have it treated as other than commercial software. For the sake of giving this "other" software a name, the article refers to "other-than-commercial-software."

70. See 48 C.F.R. § 252.227-7013(b)(3)(ii) (including "related documentation" within the restricted rights for commercial software).

71. See supra notes 30-31 and accompanying text.


73. See 48 C.F.R. § 252.227-7013(b)(3)(i).

74. See supra note 9 and accompanying text.
software,\textsuperscript{75} that is, at least, in the machine-readable code. This may strike software industry people as unreasonable, but it is the result the regulations seem to contemplate for those who do not negotiate a separate agreement and have it made part of the contract. It would certainly be prudent to negotiate a separate licensing agreement \textit{and} have it made part of the contract if a firm wants to ensure that its privately developed software will be subject to tight restrictions.

\textbf{XII. OTHER TECHNICALITIES}

Similarly, the failure of the contractor to put a restrictive notice on the software or documentation,\textsuperscript{76} or to identify in his proposal a piece of software as to which he desires to negotiate restricted rights,\textsuperscript{77} could result in a government claim of unlimited rights in that software regardless of the complete absence of government funding. Further, even if the software and documentation were developed wholly at private expense, and even if one has been careful to comply with the technical requirements of the regulations, a software firm might be threatened with loss of its limited rights or, in the case of commercial software, its restricted rights protection for software documentation to the extent the documentation has been incorporated into a manual or other instructional material prepared for or required to be delivered under the government contract to assist with installation, operation, maintenance, or training. The government claims unlimited rights in all such manuals and materials.\textsuperscript{78} Unfortunately, virtually any piece of software documentation could arguably be construed to be within this rule,\textsuperscript{79} so there would seem to be within the regulation yet another potential pitfall.

\textbf{CONCLUSION}

Given this complicated and ambiguous regulatory environment, it is understandable that a software firm that might be jealously guarding its software and documentation to preserve its competitive edge in the

\textsuperscript{75} See 48 C.F.R. § 252.227-7013(b)(3)(i).

\textsuperscript{76} Contractors are required to put standard restricted rights notices on software delivered to the government. See 48 C.F.R. § 252.227-7013(b)(3)(i) and (ii). The clause states that "[s]uch restricted rights are of no effect unless the computer software is marked by the Contractor with [the standard] legend." \textit{Id.} at (b)(3)(i).

\textsuperscript{77} 48 C.F.R. § 252.227-7019 (1985) requires those who bid for a government contract to identify what software they will deliver with less than unlimited rights. The failure to identify software as "restricted" subjects such software to the government's presumption that software not identified as "restricted" is delivered with unlimited rights. 48 C.F.R. § 252.227-7013(b)(1)(ii).

\textsuperscript{78} See 48 C.F.R. § 252.227-7013(b)(1)(ii).

\textsuperscript{79} Software documentation is mainly useful for installation, operation, or maintenance purposes.
marketplace might be somewhat reluctant to do business with the Defense Department. It is a system in which the Defense Department's contracting personnel have their hands tied. Short of getting permission to grant a deviation, it would appear that contract officers have no authorization to make deals that go against clear provisions of the standard data rights clause.80

The fact that a contract officer would even consider entering into special arrangements, as well as honoring them, despite a lack of authority to do so, serves as a testament to the goodwill and reasonableness of the many DoD personnel who want the government to have good technology. These individuals realize that if the standard data rights policy is always insisted upon and enforced, excellent software technology will not be made available to the government. It is unfortunate that the Defense Department's procurement regulations make the job difficult for them, and, at the same time, put at risk software firms that want to make their technology available to the government on fair and reasonable terms and still have the government accommodate the industry's software protection needs.

It appears that the Defense Department is giving serious consideration to a significant revision of its software data rights regulations in response to recommendations made by the President's Blue Ribbon Commission on Defense Management.81 Until the regulations are altered to accommodate the needs and interests of those in DoD who want access to the highest quality software technology and of those who can supply it, software vendors must be prepared to journey through a complex and sometimes frustrating regulatory maze.

80. See supra notes 6-20 and accompanying text.
81. See PACKARD COMMISSION REPORT, supra note 32, at 65.
APPENDIX

48 CFR Ch. 2 (10-1-85 EDITION)

252.227-7013 Rights in technical data and computer software.

As prescribed at 227.412(a)(1), insert the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (MAY 1981)

(a) Definitions. "Commercial Computer Software", as used in this clause, means computer software which is used regularly for other than Government purposes and is sold, licensed or leased in significant quantities to the general public at established market or catalog prices.

"Computer", as used in this clause, means a data processing device capable for accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

"Computer Data Base", as used in this clause, means a collection of data in a form capable of being processed and operated on by a computer.

"Computer Program", as used in this clause, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or designed to satisfy the requirements of a particular user.

"Computer Software", as used in this clause, means computer programs and computer data bases.

"Computer Software Documentation", as used in this clause, means technical data, including computer listings and printouts, in human-readable form which (1) documents the design or details of computer software, (2) explains the capabilities of the software, or (3) provides operating instructions for using the software to obtain desired results from a computer.

"Limited Rights", as used in this clause means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Gov-
ernment, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data be (1) released or disclosed in whole or in part outside the Government, (2) used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software, or (3) used by a party other than the Government, except for:

(1) Emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, provided that the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or

(2) Release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (1) above.

“Restricted Rights”, as used in this clause, means rights that apply only to computer software, and include, as a minimum, the right to—

(1) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(2) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(3) Copy computer programs for safekeeping (archives) or backup purposes; and

(4) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (1) through (4) above that are listed or described in this contract or described in a license or agreement made a part of this contract.

“Technical Data”, as used in this clause, means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental or engineering work, or be usable or used to define a design or process or to procure, produce, support, maintain, or operate materiel. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer printouts. Examples
of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications and related information, and computer software documentation. Technical data does not include computer software or financial, administrative, cost and pricing, and management data or other information incidental to contract administration.

“Unlimited Rights”, as used in this clause, means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) Government rights.

(1) Unlimited rights. The Government shall have unlimited rights in:

(i) Technical data and computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract;

(iii) Computer data bases, prepared under a Government contract, consisting of information supplied by the Government, information in which the government has unlimited rights, or information which is in the public domain;

(iv) Technical data necessary to enable manufacture of end-items, components, and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components, processes, or computer software developed at private expense (but see subdivision (b)(2)(ii) (below).

(v) Technical data or computer software prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(vi) Technical data pertaining to end-items; components or processes, prepared or required to be delivered under this or any other Government contract or subcontract, for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("form, fit and function"
data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.);

(vii) Manuals or instructional materials prepared or required to be delivered under this contract or any subcontract hereunder for installation, operation, maintenance or training purposes;

(viii) Technical data or computer software which is in the public domain, or has been or is normally released or disclosed by the Contractor or subcontractor without restriction on further disclosure; and

(ix) Technical data or computer software listed or described in an agreement incorporated into the schedule of this contract which the parties have predetermined, on the basis of subparagraphs (i) through (viii) above, and agreed will be furnished with unlimited rights.

(2) Limited rights. The Government shall have limited rights in:

(i) Technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and

(ii) Unpublished technical data pertaining to items, components or processes developed at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data as may be included in the data referred to in subdivisions (b)(1)(i), (v), (vi), (vii), and (viii) above. The word unpublished, as applied to technical data and computer software documentation means that which has not been released to the public nor been furnished to others without restriction on further use or disclosure. For the purpose of this definition, delivery of limited rights technical data to or for the Government under a contract does not, in itself, constitute release to the public. Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted pursuant to subdivisions (2)(i) and (ii) above are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below in which is inserted:

A. the number of the prime contract under which the technical data is to be delivered,

B. the name of the Contractor and any subcontractor by whom the technical data was generated, and

C. an explanation of the method used to identify limited rights data.

**LIMITED RIGHTS LEGEND**

Contract No. _____ _____
Contractor: _____ _____

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Explanation of Limited Rights Data Identification Method Used

Those portions of this technical data indicated as limited rights data shall not, without the written permission of the above Contractor, to either (A) used, released or disclosed in whole or in part outside the Government, (B) used in whole or in part by the Government for manufacture or, in the case of computer software documentation, for preparing the same or similar computer software, or (c) used by a party other than the Government, except for: (1) emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, provided that the release or disclosure hereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or (2) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (1) above. This legend, together with the indications of the portions of this data which are subject to such limitations shall be included on any reproduction hereof which includes any part of the portions subject to such limitations.

(3) Restricted rights.

(i) The Government shall have restricted rights in computer software, listed or described in a license or agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights, provided, however, notwithstanding any contrary provision in any such license or agreement, the Government shall have the rights is included in the definition of "restricted rights" in paragraph (a) above. Such restricted rights are of no effect unless the computer software is marked by the Contractor with the following legend:

RESTRICTED RIGHTS LEGEND

Use, duplication or disclosure is subject to restrictions stated in Contract No. with (Name of Contractor) and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The Contractor may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license or agreement made a part of this contract prior to the delivery date of the software. Failure of the Contractor to apply a restricted rights legend to such computer software
shall relieve the Government of liability with respect to such unmarked software.

(ii) Notwithstanding subdivision (i) above, commercial computer software and related documentation developed at private expense and not in public domain may, if the Contractor so elects, be marked with the following Legend:

**RESTRICTED RIGHTS LEGEND**

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subdivision (b)(3)(ii) of the Rights in Technical Data and Computer Software clause at 252.227-7013.

(Name of Contractor and Address)

When acquired by the Government, commercial computer software and related documentation so legended shall be subject to the following:

(A) Title to and ownership of the software and documentation shall remain with the Contractor.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the Contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government may already have or obtains without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, provided, that the unmodified portions shall remain subject to these restrictions.

(E) If the Contractor, within sixty (60) days after a written request, fails to substantiate by clear and convincing evidence that computer
software and documentation marked with the above Restricted Rights Legend are commercial items and were developed at private expense, or if the Contractor fails to refute evidence which is asserted by the Government as a basis that the software is in the public domain, the Government may cancel or ignore any restrictive markings on such computer software and documentation and may use them with unlimited rights. Such written requests shall be addressed to the contractor as identified in the Restricted Rights Legend.

(4) No legend shall be marked on, nor shall any limitation or restriction on rights of use be asserted as to, any data or computer software which the Contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this paragraph shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(c) Copyright.

(1) In addition to the rights granted under the provisions of paragraph (b) above, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the Contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scopes the rights set forth in the definition of "unlimited rights" in paragraph (a) above. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definitions of "limited rights" in paragraph (a) above. With respect to computer software which the parties have agreed in accordance with subparagraph (b)(3) above will be furnished with restricted rights, the scope of the license is limited to such rights.

(2) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include in technical data or computer software prepared for or acquired by the Government under this contract any works of authorship in which copyright is not owned by the Contractor without acquiring for the Government any rights necessary to perfect a copyright license of the scope specified in subparagraph (c)(1).

(3) As between the Contractor and the Government, the Contractor shall be considered the "person for whom the work was prepared" for
the purpose of determining authorship under Section 201(b) of Title 17, United States Code.

(4) Technical data delivered under this contract which carries a copyright notice shall also include the following statement which shall be placed thereon by the Contractor, or should the Contractor fail, by the Government: This material may be reproduced by or for the U.S. Government pursuant to the copyright license under the clause at 252.227-7013 (date).

(d) Removal of unauthorized markings. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any technical data or computer software furnished hereunder if:

(1) the Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings, or

(2) the Contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of limited rights markings by clear and convincing evidence, or of restricted rights markings by identification of the restrictions set forth in the contract. In either case, the Government shall give written notice to the Contractor of the actions taken.

(e) Relation to Patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(f) Limitation on charges for data and computer software. The Contractor recognizes that the Government or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data or computer software on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data or computer software which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproductions, handling, mail-
ing, and similar administrative costs incident to the furnishing of such
data or computer software. In recognition of this policy, the Contra-
tor agrees to participate in and make appropriate arrangements for the
exclusion of such charges from such contracts, or for the refund of
amounts received by the Contractor with respect to any such charges
not so excluded.

(g) **Acquisition of data and computer software from subcontractors.**

(1) Whenever any technical data or computer software is to be ob-
tained from a subcontractor under this contract, the Contractor shall
use this same clause in the subcontract, without alteration, and no other
clause shall be used to enlarge or diminish the Government's or the
Contractor's rights in that subcontractor data or computer software
which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall
normally be delivered to the next-higher tier contractor. However,
when there is a requirement in the prime contract for data which may
be submitted with limited rights pursuant to subparagraph (b)(2) above,
a subcontractor may fulfill such requirement by submitting such data
directly to the Government rather than through the prime Contractor.

(3) The Contractor and higher-tier subcontractors will not use their
power to award subcontracts as economic leverage to acquire rights in
technical data or computer software from their subcontractors for
themselves.

(End of clause)

**ALTERNATE I (MAY 1981)**

As prescribed at 227.412(a)(2), add the following paragraph to the
basic clause:

**Notice of certain limited rights**

(h)(1) Unless the Schedule provides otherwise, and subject to (2) be-
low, the Contractor will promptly notify the Contracting Officer in
writing of the intended use by the Contractor or a subcontractor in per-
formance of this contract of any item, component or process for which
technical data would fall within subparagraph (b)(2) above.

(2) Such notification is not required with respect to:

(i) standard commercial items which are manufactured by more than
one source of supply; or

(ii) items, components or processes for which such notice was given
pursuant to predetermination of rights in technical data in connection
with this contract.

(3) Contracting Officer approval is not necessary under this clause
for the Contractor to use the item, component or process in the performance of the contract. (APR 1972).

**ALTERNATE II (MAY 1981)**

As prescribed at 227.412(a)(3), add the following paragraph to the basic clause:

( ) Publication for sale. If, prior to publication for sale by the Government and within the period designated in the contract or task order, but in no event later than 24 months after delivery of such data, the Contractor publishes for sale any data (1) designated in the contract as being subject to this paragraph and (2) delivered under this contract, and promptly notifies the Contracting Officer of these publications, the Government shall not publish such data for sale or authorize others to do so. This limitation on the Government’s right to publish for sale any such data so published by the Contractor shall continue as long as the data is protected as a published work under the copyright law of the United States and is reasonably available to the public for purchase. Any such publication shall include a notice identifying this contract and recognizing the license rights of the Government to all such data not so published by the Contractor, this paragraph shall be of no force or effect.