FUELING INNOVATION: RESOLVING AMBIGUITY AND STRIKING A BALANCE FOR MARKINGS ON UNLIMITED-RIGHTS DATA

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I. Introduction

A lawyer gets a call from a contracting officer located at a base that they support. The contracting officer oversees a contract for the acquisition of a major weapon system. The contractor must deliver all technical data for that weapon system as part of the contract. This critical information contains all the engineering data and descriptive documentation required to support the weapon system throughout its lifecycle. This data is voluminous, and ensuring the contractor delivers as required per the contract is a time-intensive process. To complicate matters, the markings on the technical data deliverables do not match the markings outlined in the applicable clauses of the Defense Federal Acquisition Regulation Supplement (DFARS). The contracting officer wants to know if they should accept or reject the deliverables as non-conforming. How will this issue impact the Department of Defense's (DoD) rights and ability to use and maintain this weapon system?

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The United States spends billions of dollars yearly on major weapon systems for the armed forces.[1] Just one of these systems contains thousands of drawings, millions of lines of software code, and hundreds of technical manuals.[2] A contractor's intellectual property markings on just a portion of this can significantly restrict the DoD's use of this data and its options for sustainment and future upgrades. This can ultimately lead to an undesirable vendor-lock situation where the government is locked into a sole-source contract with the contractor.[3] The DoD negotiates for certain data rights, and contractors' non-conforming markings placed on this data jeopardize all of the DoD's contracting teams' efforts and taxpayer dollars. Ambiguity and confusion in this area, as illustrated in the example above, cost even more taxpayer dollars. Every unclear marking that a contracting officer has to call and check on draws the acquisition process out even longer, costing time and valuable resources.

However, this problem is bigger than wasted taxpayer dollars. Today, more than ever, there is pressure for our military to develop and integrate new technologies to maintain and defend our nation's competitive edge against our adversaries.[4] The future of warfare lies within new technologies.[5] The use of autonomous and semi-autonomous drones in the conflict between Ukraine and Russia is just one recent example that demonstrated this firsthand.[6] Recognizing this, past and current

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[1] *Budget Basics: National Defense*, PETER G. PETERSON FOUNDATION (June 1, 2022), https://www.pgpf.org/budget-basics/budget-explainer-national-defense (citing OFF. OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2023 (2022)). In 2021 alone, the United States spent $141 billion on the procurement of weapon systems. *Id.*

[2] Howard Harris, Vanessa Cruz, David Frank, *Intellectual Property Markings*, DEF. ACQUISITIONS UNIV. (Nov. 26, 2022), https://www.dau.edu/library/defense-atl/blog/Intellectual-Property-Markings.

[3] *See* Virginia L. Wydler, *Gaining Leverage over Vendor Lock to Improve Acquisition Performance and Cost Efficiencies*, THE MITRE CORP. 7–8 (Apr. 1, 2014), https://www.mitre.org/sites/default/files/publications/gaining-leverage-over-vendor-lock-14-1262.pdf.

[4] Dr. Simona R. Soare & Fabrice Pothier, *Leading Edge: Key Drivers of Defence Innovation and the Future of Operational Advantage*, THE INT'L INST. FOR STRATEGIC STUD. (2021), https://www.iiss.org/blogs/research-paper/2021/11/key-drivers-of-defence--innovation-and-the-future--of-operational-advantage.

[5] GOVINI, NATIONAL SECURITY SCORECARD: CRITICAL TECHNOLOGIES EDITION (2022), https://govini.com/wp-content/uploads/2022/06/Govini-National-Security-Scorecard-Critical-Technologies.pdf [hereinafter GOVINI REPORT].

[6] *Id.*

presidential administrations have stressed the importance of innovation to keep pace with our adversaries in order to secure our national security.[7]

Accordingly, innovating and modernizing our military is a top priority included in the most recent National Security Strategy and the National Defense Strategy (NDS).[8] Data is critical to this innovation.[9] The 2022 NDS explicitly acknowledges that our military operations "rely on data-driven technologies and the integration of diverse data sources."[10] The most recent NDS pledges to "implement institutional reforms that integrate our data, software, and artificial intelligence efforts and speed their delivery to the warfighter."[11] To speed up this delivery, however, that data must be both readily accessible and implemented.[12] Allowing contractors to have the ability to muddy the waters by placing ambiguous markings on data, we risk losing the edge on the innovation that is so critical to fighting and winning the nation's wars. In the current operating environment, where the speed of data delivery is everything, this ambiguity in necessary data for DoD assets is something we cannot afford.

DFARS 227.252-7013(f) addresses what markings contractors can include on data deliverables to the government. In cases where the government has funded the complete research and development of an acquisition, the government receives an unlimited-rights license to the

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[7] *Id.*

[8] *See* PRESIDENT JOSEPH BIDEN, NATIONAL SECURITY STRATEGY (2022) [hereinafter BIDEN NSS] https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/11/8-November-Combined-PDF-for-Upload.pdf . The NSS emphasizes that to have a "free, open, prosperous, and secure international order" we must "modernize and strengthen our military so it is equipped for the era of strategic competition with major powers." *Id.* at 10–11; *see also* U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY (2022) [hereinafter 2022 NDS], https ://media.defense.gov /2022/Oct/27/2003103845/-1/1/1/2022 -NATIONAL-DEFENSE-STRATEGY-NPR-MDR.PDF (discussing a systematic approach to technology innovation that places importance on data rights).

[9] *See* Michael C. Horowitz & Lauren Kahn, *Why DoD's New Approach to Data and Artificial Intelligence Should Enhance National Defense*, COUNCIL ON FOREIGN RELATIONS (Mar. 11, 2022, 7:17 AM), https://www. cfr.org /blog/why-dods-new-approach-data-and-artificial-intelligence-should-enhance-national-defense (explaining how the innovation of new technologies, especially artificial intelligence, relies on data access and integration).

[10] 2022 NDS, *supra* note 8, at 19.

[11] *Id.*

[12] *See* Matt Rumsey, *Envisioning Comprehensive Entity Identification for the U.S. Federal Government*, DATA FOUNDATION 14 (Sept. 12, 2018), https://static1.squarespace.com/static/56534df0e4b0c2babdb6644d/t/5bf43dea0ebbe8893997e363/1542733295008/2018-09-12_GLEIF-and-Data-Foundation_ResearchReport_Envisioning-Comprehensive-Entity-Identification-for-the-US-Federal-Government_v1.1.pdf.

intellectual property.[13] This means that while the contractor retains the "ownership rights" to the intellectual property, the contractor may not restrict the government's use and disclosure of data without the government's approval.[14]

Unlike other types of licenses, currently, under the DFARS, there is no standardized marking for data delivered under an unlimited-rights license. [15] This creates confusion on how exactly this data can be marked. This confusion played out firsthand in the Federal Circuit Court of Appeals case, *Boeing Co. v. Secretary of the Air Force*.[16] There, the Federal Circuit issued an opinion casting this area of the law into uncertainty when it ruled that markings that included language outside of the prohibitions contained in DFARS 252.227-7013(f) would be allowed as long as they did not interfere with the government's data rights.[17] However, the court left unsettled what that means.[18]

This decision created ambiguity for both the government and contractors regarding what exact markings are allowed on data deliverables. While this issue may appear benign at first glance, it is far from it. Data is crucial to the DoD acquisition strategy because it empowers the government to manage, sustain, and evolve defense systems.[19] The markings on this data dictate its use. Ambiguous markings create confusion, and confusion in intellectual property discourages innovation. Every questionable marking can cause a clog in the defense acquisition process and create potential litigation.[20] This slows down the already lengthy acquisition process, which ultimately slows down the delivery of key data and software to the warfighter. The United States

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[13] 10 U.S.C. § 3771(b)(1).
[14] DFARS 252.227-7103-5(a) (January 2025).
[15] DFARS 252.227.7013(f) (January 2025).
[16] Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321, 1323 (Fed. Cir. 2020).
[17] *Id.* at 1327.
[18] *See id.* at 1334.
[19] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO 06-839, WEAPONS ACQUISITION: DOD SHOULD STRENGTHEN POLICIES FOR ASSESSING TECHNICAL DATA NEEDS TO SUPPORT WEAPON SYSTEMS (2006).
[20] *See* Stephanie Burris & Howard Harris, *Resolving Data-Rights Markings a Legal Battlefield*, DEF. ACQUISITION UNIV. (July 1, 2021), https://www.dau.edu/library/defense-atl/blog/Resolving-Data-Rights-Markings-a-legal-Battlefield.

cannot afford to slow down this process—timing is everything when trying to innovate technology to win wars.[21]

In 2022, the DoD proposed to amend various data rights clauses in the DFARS.[22] Among other provisions, the proposed amendment included a required marking on all noncommercial data deliverables where the government has unlimited rights.[23] In addition, the proposed amendment prohibited any other restrictive markings not outlined in the clauses of the DFARS.[24] After two years and much backlash from private industry, the final published rule struck any mention regarding markings on unlimited-rights data, leaving this issue unresolved.[25]

An amendment to the DFARS should be implemented to create a standard unlimited-rights marking that clears up the current ambiguity caused by the *Boeing* case but also allows the industry to put third parties on notice to protect its intellectual property rights. While the current state of the law surrounding data-rights markings needs to be clarified, the previously proposed rule, as drafted, should not be implemented as it strips contractors' ability to protect their intellectual property from third parties. Part IIA of this article will briefly define intellectual property and explain how data rights and data rights markings fit within the intellectual property legal construct. Part IIB of this article will discuss the current regulatory system surrounding data rights and data-rights markings, including the history and policies behind its implementation. Part III will discuss *Boeing Co. v. Sec'y of the Air Force* and the ambiguity left in its aftermath. Part IV will outline the DoD's prior proposed regulation and discuss the considerations for and against implementing this type of language, including a discussion of the concerns of the DoD and private industry. Finally, Part V will propose language for a sample marking that strikes a balance between the DoD and industry. This sample marking would resolve ambiguity by creating a standard unlimited-rights marking but

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[21] *See Promoting DOD's Culture of Innovation: Hearing Before the Committee on Armed Services House of* Representatives, 115th Cong. 115-102 (2018) (statement of Hon. Michael D. Griffin, Under Sec'y of Def. for Rsch. and Eng'g, Dept. of Def.).
[22] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. 77,680 (Dec. 19, 2022) (to be codified 48 C.F.R. pt. 212, 227, 252).
[23] *Id.* at 77,681.
[24] *Id.*
[25] DFARS: Small Business Innovation Research Data Rights, 89 Fed. Reg. 103,338 (Dec. 18, 2024) (to be codified 48 C.F.R. pt. 212, 227, 252).

would also allow the industry to put third parties on notice to protect its intellectual property rights.

II. Background

A. Intellectual Property & Data Rights

When a contractor enters into an agreement with the government to develop an acquisition, for example, a large weapons system containing complex technology, there are also associated intellectual property rights provisions negotiated and included in the contract. Intellectual property is the "intangible rights protecting commercially valuable products of the human intellect."[26] Under the current legal paradigm, categories of protections include patents, copyrights, trademarks, and trade secrets.[27] Under this construct, it is very common for owners of intellectual property to include various markings and symbols to protect their ownership rights and put other parties on notice.[28]

When contracting for a given acquisition, the government only receives a use license for the intellectual property, with the contractor retaining the actual ownership rights.[29] It can be helpful to think of intellectual property rights as a bundle of sticks. These sticks are different things that can be done with intellectual property now and in the future. The contractor gives the government some of the sticks out of that bundle but retains the rest.[30] For example, some of these uses may include the ability to use and modify the data or potentially even give it to another contractor to use in a government contract.[31] But, the government could

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[26] *Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[27] *Id.*
[28] DFARS: Rights in Technical Data, 60 Fed. Reg. 33,464; 33,465 (June 28, 1995) (noting that "[s]uch markings are commonly used in commercial practice to protract proprietary data or trade secrets." *Id.*); OFF. OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, INTELLECTUAL PROPERTY: NAVIGATING THROUGH COMMERCIAL WATERS, at 4-4 (Oct. 15, 2001) [hereinafter NAVIGATING THROUGH COMMERCIAL WATERS] (explaining that the "DoD's way of handling a contractor's previously developed, copyrighted material, proprietary data, and trade secrets is through the application of restrictive legends on deliverable data." *Id.*).
[29] JAMES G MCEWEN ET AL., INTELLECTUAL PROPERTY IN GOVERNMENT CONTRACTS: PROTECTING AND ENFORCING IP AT THE STATE AND FEDERAL LEVEL 66 (1st ed. 2009).
[30] *See* Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764, 773–74 (Tex. 2021).
[31] MCEWEN, *supra* note 29, at 74–80.

not sell the data outright to another contractor for profit as it does not own the underlying intellectual property rights in the data. The license obtained by the contractor allows the government to use the intellectual property in specific ways but does not transfer ownership outright, as various restrictions would still apply.[32]

This license the contractor provides the government covers both technical data and computer software.[33] Technical data is all recorded data that goes into the manufacture, design, and repair of items or processes acquired by the government.[34] Computer software is the actual program and the source code that can recreate the computer program.[35] (From here out, these terms will be referred to collectively as "data.") The rights in this data can be an extremely valuable intellectual property right in and of itself.[36] This data is inextricably interwoven into all of the DoD's weapon systems and infrastructure, and the regulatory framework of how intellectual property rights have been divided between the government and contractors over the years has varied dramatically.[37]

B. Regulatory History & Framework Around Data Rights

Balancing the division of data rights between private industry and the government has been a struggle for decades.[38] While challenging to achieve, this balance is of national importance. Early approaches by the government primarily focused on keeping maximum rights in all data.[39]

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[32] *Id.* at 65–66.
[33] *Id.* at 65–69.
[34] DFARS 252.227-7013(a)(15) (January 2025).
[35] DFARS 252.227-7013(a)(3) (January 2025).
[36] *See Valuing Intellectual Property Assets*, WORLD INTELL. PROP. ORG, https://www.wipo.int/sme/en/ip-valuation.html (last visited Mar. 10, 2023); *see also* Jeff E. Schwartz, *The Acquisition of Technical Data Rights by the Government*, 23 PUB. CONT. L.J. 513, 521(1993) (explaining how in some instances the intellectual property rights and ability to go and commercialize the technology is worth far more than what the government is paying the contractor to develop the technology).
[37] *See* Cubic Def. Applications, Inc., ASBCA No. 58519, 2018-1 B.C.A. ¶ 37049, 180359.
[38] *Id.*
[39] ACQUISITION LAW ADVISORY PANEL, REPORT OF THE ACQUISITION LAW ADVISORY PANEL TO THE U.S. CONGRESS, Executive Summary at 53-54 (1993) [hereinafter SECTION 800 PANEL REPORT], https://apps.dtic.mil /sti/pdfs/ADA264919.pdf. This report was transmitted to the congressional defense committees as directed by §800 of the 1991 National Defense Authorization Act (NDAA), Public Law No. 101-510, and is commonly known as the Section 800 Panel Report.

This changed during the 1980s and 1990s when it became apparent that the private sector's technological innovation in weapon systems was dramatically outpacing the DoD.[40] The DoD's old approach to data rights and intellectual property left contractors reluctant to work with the government for fear their intellectual property would be lost.[41]

Then, in 1986, Congress intervened by amending the Rights in Technical Data statute.[42] This amendment required the DoD to "prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process."[43] In addition, it required that "[s]uch regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law."[44] Congress additionally set up a data-rights scheme based on the funding source, i.e., whether the government or the contractor funded the project, and outlined corresponding license types for the different funding variations.[45]

To fulfill this congressional mandate, the DoD issued different iterations and drafts of various contract clauses within the DFARS.[46] These regulations are intended to establish a balance between the interests of the DoD and industry. The regulations were designed to promote creativity and innovation and to encourage firms to offer the DoD new technology.[47] In addition, the drafters specifically distinguished data from products commonly sold on commercial markets from noncommercial data from specialized government products.[48] Generally, noncommercial acquisitions are those in which there is no commercial market; e.g., these are "highly specialized" acquisitions involving items such as "advanced fighter jets, precision munitions, [and] nuclear submarines."[49] When

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[40] *Id.* at 53–54.
[41] *Id.*
[42] Rights in Technical Data, 10 U.S.C. § 2320 (1986) (current version at 10 U.S.C. § 3771).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *See* DFARS: Rights in Technical Data, 59 Fed. Reg. 31,584 (June 20, 1994); DFARS: Rights in Technical Data, 60 Fed. Reg. 33,464 (June 28, 1995).
[47] DFARS: Rights in Technical Data, 59 Fed. Reg. at 31,584 (June 28, 1995).
[48] *Id.* at 31,587.
[49] ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE U.S. CONGRESS, at 1 (2007), https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITIONADVISORY-PANEL-2007-Report_final.pdf.

dealing with noncommercial data, the DFARS set up categories of standard rights licenses that contractors provide to the DoD.[50]

Congress first created these categories, which were further defined by DFARS 227.7103, establishing four licenses for noncommercial data.[51] These categories include unlimited rights, government purpose rights, limited rights, and specially negotiated license rights.[52] Consistent with the statute, the funding source is the key criterion in determining which license rights the government obtains.[53] For the most part, the greater level of government funding equates to a greater level of rights granted.[54] The unlimited-rights license pertains to situations where the item being developed was exclusively government-funded.[55] Importantly, under this license, the government has no restrictions, and contractors may not restrict the government's use and disclosure of data without the government's approval.[56]

While the effect of data markings on the government's unlimited-rights license is the primary focus of this article, understanding the other license types is also helpful in understanding the broader legal construct. The two types of licenses that provide the government with the fewest rights and the contractor with the most intellectual property protections are limited use (applicable for technical data) and restricted use (applicable for computer software). [57] These licenses are applicable when the technology is financed entirely with private funding.[58] These licenses only allow for the use and distribution of data within the government and, with only a few exceptions, prohibit any release outside the government.[59]

Government purpose rights licenses are applicable when a mix of government and private funding is used to develop an acquisition.[60] In

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[50] DFARS 252.227-7103-5.
[51] DFARS 227.7103-5(a)–(d).
[52] *Id.*
[53] *See, e.g.*, DFARS 227- 7103-5(a)(1), (b)(1)(i), & (c)(1)(i).
[54] 10 U.S.C. § 3771(b)(1) (mandating that when an item or process is "developed by a contractor or subcontractor exclusively with Federal funds," the government "shall have the unlimited right to- (A) use technical data pertaining to the item or process; or (B) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons." *Id.*)
[55] DFARS 252.227-7013(b)(1); DFARS 252.227-7014(b)(1).
[56] MCEWEN, *supra* note 29, at 80; DFARS 252.227-7103(b).
[57] DFARS 252.227-7013(a)(14); DFARS 252.227-7014(b)(3).
[58] DFARS 252.227-7013(b)(3); DFARS 252.227-7014(b)(3).
[59] DFARS 252.227-7013(a)(13); DFARS 252.227-7014(a)(14)(i)-(iii).
[60] DFARS 252.227-7013(b)(2); DFARS 252.227-7014(b)(2).

these cases, the government obtains a license allowing unlimited use and distribution within the government, which can also be released to parties outside the government if there is a "Government Purpose."[61] Unless the parties agree otherwise, a government-purpose license will become an unlimited-rights license after five years.[62] Finally, parties can craft whatever license agreement they can agree upon under a specially negotiated license.[63] This allows the parties to agree on whatever restrictions they believe are appropriate as long as the license provides no less than the limited/restricted use license.[64]

The DFARS further requires that contracts dealing with noncommercial data delivered to the government contain a particular clause outlined in DFARS 7013.[65] This clause, referred to as -7013(f), requires two main things. First, it "require[s] a contractor that desires to restrict the government's rights in technical data to place restrictive markings on the data."[66] Second, it instructs the "placement of the restrictive markings, and authorizes the use of certain restrictive markings."[67] Finally, the DFARS provides the government the right to conformity within the markings placed on data deliverables. Specifically, it provides, without qualification or exception, that "[a]uthorized markings are identified in the clause at 252.227-7013, Rights In Technical Data-Noncommercial Items" and "[a]ll other markings are non-conforming markings."[68]

The interpretation of the above-discussed statutes and regulations was directly at issue in an appeal the Boeing Company made to the Armed Services Board of Contract Appeals (ASBCA) after the contracting officer, in that case, rejected data deliverables that Boeing made under a large contract with the United States Air Force.[69]

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[61] DFARS 252.227-7013(a)(12); DFARS 252.227-7014(a)(11).
[62] DFARS 252.227-7013(b)(2)(ii); DFARS 252.227-7014(b)(2)(ii).
[63] DFARS 252.227-7013(b)(4); DFARS 252.227-7014(b)(4).
[64] *Id.*
[65] DFARS 252.227-7103-6(a).
[66] DFARS 252.227.7103-10(b).
[67] *Id.*
[68] DFARS 227.7103-12(a).
[69] Appeals of Boeing Co., ASBCA Nos. 61387, 61388, 2021-1 BCA ¶ 37,762, 183308; Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321 (Fed. Cir. 2020).

III. The *Boeing* Case—Exposing Ambiguity in Data-Rights Markings

A. The ASBCA: Only Markings Contained Within the DFARS Are Authorized.

Boeing entered into a contract with the Air Force to equip the Air Force's F-15 with the Eagle Passive Active Warning Survivability System (EPAWSS).[70] The F-15 "is an all-weather, extremely maneuverable, tactical fighter designed to permit the Air Force to gain and maintain air supremacy over the battlefield."[71] The EPAWSS was designed to "equip the F-15 with advanced capabilities to jam radar, detect and geolocate threats to the aircraft, and fire antiaircraft missiles and expendable countermeasures."[72]

The contract required Boeing to deliver technical data to the government with an unlimited-rights license.[73] While performing the contract, Boeing submitted numerous technical data deliverables to the Air Force. The deliverables were originally marked with the following marking:

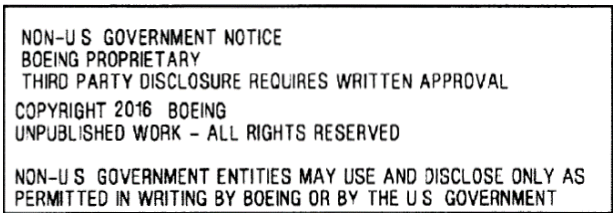

Figure 1. Boeing's Non-Conforming Marking[74]

The Air Force rejected the deliverables, maintaining that the markings on the data did not conform with DFARS 252.227-7013(f).[75] Boeing appealed the contractor's decision to the Armed Services Board of Contract Appeals (ASBCA) and requested a summary judgment.[76] Boeing

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[70] *Boeing Co.*, 983 F.3d at 1324-25.
[71] UNITED STATES AIR FORCE, https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104501/f-15-eagle/ (last visited June 12, 2025).
[72] Brief for Appellant at 8, Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321, No. 2019-2147 (Dec. 20, 2019), ECF No. 15.
[73] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183309.
[74] *Id.*
[75] *Id.* at 183310.
[76] *Id.* at 183308.

argued that the markings on the technical data conformed with the contract and DFARS 252.227-7013(f) and asserted that the Air Force wrongly rejected the deliverables.[77] The board denied the summary judgment and dismissed Boeing's appeal.[78]

At the core of the dispute was the interpretation of DFAR 252.227-7013(g), [79] which provides:

> (g) Marking requirements. The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (g)(6) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (g)(3) of this clause; the limited rights legend at paragraph (g)(4) of this clause; or the special license rights legend at paragraph (g)(5) of this clause; and a notice of copyright as prescribed under 17 U.S.C. 401 or 402. [80]

Focusing on the first sentence, Boeing took the position that because it was not asserting restrictions on the government's data rights, only the rights of third parties therefore, paragraph -7013(f) had no bearing on the dispute.[81] In contrast, the government relied on the second sentence in paragraph -7013(f) and took the position that the only authorized markings were those specifically referenced.[82]

Applying core principles of contract interpretation, the board found that Boeing's markings were non-conforming under the terms of the contract.[83] The board agreed with the Air Force that the second sentence in paragraph -7013(f) provided that the referenced markings are the only permissible markings for limiting data rights and that no other markings

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[77] *Id.*
[78] *Id.*; Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321 (Fed. Cir. 2020).
[79] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183313.
[80] DFAR 252.227-7013(g).
[81] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183313.
[82] *Id.*
[83] *Id.* at 183312–14.

are allowed.[84] In coming to this conclusion, the board reasoned that paragraph -7013(f) "speaks not only of legends that limit the government's rights but also a notice of copyright that would, in fact, provide notice to or limit the actions of third parties."[85] The board also concluded that other parts of the DFARS supported this reading of the regulation. Specifically, DFARS 227.7103-12(a)(1) states that "[a]uthorized markings are identified in the [-7013 clause]" and admonishes explicitly that "[a]ll other markings are non-conforming markings."[86]

Another important aspect of the board's decision is its discussion of Boeing's trade secret protections and the interplay they would have when delivering data under an unlimited-rights license. Boeing argued that the government's interpretation of the statute "fail[ed] to protect its intellectual property rights as required by 10 U.S.C. § 2320."[87] While refusing to rule on the issue in the summary judgment forum, the board, *in dicta*, concluded that Boeing lost any potential trade secret protections as soon as it delivered the data to the government with an unlimited-rights license.[88]

B. The Federal Circuit Court of Appeals Reversed the ASBCA.

After losing at the ASBCA, Boeing appealed to the Federal Circuit Court of Appeals. The Federal Circuit ultimately reversed the ASBCA's decision and remanded the case for further proceedings.[89] Interpreting paragraph -7013(f) entirely differently from the ASBCA, the Federal Circuit agreed with Boeing that this particular paragraph was only applicable when the markings interfered with the government's data rights.[90] The court concluded that the "plain language of the first sentence in Subsection [-]7013(f) makes clear that the two sentences together are describing the way in which a contractor 'may assert restrictions on the

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[84] *Id.* at 183313.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 183311.
[88] *Id.* (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); Conax Florida Corp. v. United States, 824 F.2d 1124, 1128–30 (D.C. Cir. 1987) (holding that a contracting officer's reasonable determination that Navy received unlimited data rights meant that contractor had no trade secret to protect)).
[89] Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321 (Fed. Cir. 2020).
[90] *Id.* at 1327.

government's rights.'"[91] Citing a canon of statutory interpretation, the Federal Circuit reasoned that the board's interpretation was flawed because it stripped away the meaning of the first sentence of the paragraph in question.[92] This interpretation rendered it superfluous when each word and sentence in a statute and regulation should be given meaning.[93]

The court further dismissed the board's logic regarding the inclusion of copyright license markings to mean that this also applied to markings that affected third parties.[94] In so doing, the court stated that the "fact that an authorized restriction might also restrict the rights of third parties in addition to the government's rights is immaterial."[95] The court concluded this point by surmising that because the copyright legend could restrict the government, it was consistent with the court's interpretation. [96]

Finally, the Federal Circuit dismissed the government's argument that the regulatory history supported the reading that the two sentences in paragraph -7013(f) addressed two separate issues and did not limit each other.[97] The court was unpersuaded by these arguments, stating that the regulatory history did not convince them to abandon what the court believed to be the plain reading of -7013(f).[98] Ultimately, the court reversed the board's summary judgment decision.[99] However, the "unresolved factual dispute remain[ed] between the parties regarding whether Boeing's proprietary legend, in fact, restricts the government's

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[91] *Id.*

[92] *Id.* at 1327–28 (citing TRW Inc. v. Andrews, 534 U.S. 19, 32 (2001)) (holding that "[i]t is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant' . . . . We are 'reluctant to treat statutory terms as surplusage in any setting.'" *Id.*) (internal citations omitted)).

[93] *Boeing Co.*, 983 F.3d at 1327-28.

[94] *Id.* at 1328.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1331. The government argued that prior to the implementation of Subsection -7013(f), there were numerous ways for a contractor to restrict government data rights. Therefore, the government's argument was that the purpose of the first sentence in paragraph -7013(f) was to establish marking as the only way to restrict the government's rights. *Id.* (citing the Brief for Appellee, *Boeing Co.*, 983 F.3d 1321, No. 2019-2147 (Mar. 30, 2020) ECF No. 22) (citing *Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA ¶ 18,415 (Sept. 23, 1985)).

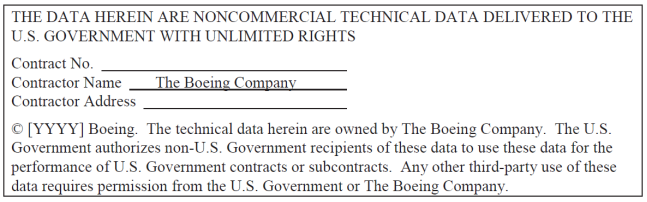
[98] *Id.*

[99] *Id.* at 1334.

rights." [100] The court remanded the case to the board for further proceedings consistent with its decision.[101]

C. Reaching a Settlement Agreement.

Instead of litigating the remaining issue of whether the disputed proprietary marking actually restricted the government's rights, the parties entered into a settlement agreement on November 17, 2022.[102] As part of the settlement, the parties compromised and agreed to affix the following marking, referred to as the "Permissible Third-Party Legend," to all noncommercial technical data delivered under the EPAWSS contracts with unlimited rights:


THE DATA HEREIN ARE NONCOMMERCIAL TECHNICAL DATA DELIVERED TO THE U.S. GOVERNMENT WITH UNLIMITED RIGHTS

Contract No. _____
Contractor Name The Boeing Company
Contractor Address _____

© [YYYY] Boeing. The technical data herein are owned by The Boeing Company. The U.S. Government authorizes non-U.S. Government recipients of these data to use these data for the performance of U.S. Government contracts or subcontracts. Any other third-party use of these data requires permission from the U.S. Government or The Boeing Company.

Figure 2.Permissible Third-Party-Legend.[103]

Interestingly, the parties' agreement went even further. They agreed that in order to "minimize further disagreements on this subject . . . and to improve consistency of markings, the Parties agree to consider the use of the Permissible Third-Party Legend for noncommercial, unlimited rights technical data delivered under other contracts between the Parties."[104] While the parties agreed to consider using this Permissible Third-Party Legend, they also stated that each case would be decided on a case-by-case basis, considering factors such as pre-existing agreements and changes in law, regulation, or policy.[105]

In addition, the Air Force carefully included a disclaimer in the settlement agreement that it took no position on "whether the Permissible

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[100] *Id.*
[101] *Id.*
[102] Order of Dismissal at 7, *Appeals of Boeing Co.*, 2018 ASBCA LEXIS 352 (Dec. 6, 2022) (No. 61387, 61388) [hereinafter Order of Dismissal].
[103] *Id.* at 4.
[104] *Id.* at 5.
[105] *Id.*

Third-Party Legend does, or does not, preserve any proprietary or trade secret interests that Boeing might have, if any, in the underlying technical data. . . [nor] whether the Permissible Third-Party Legend does, or does not, create third-party liability under DFARS 252.227-7025(c)(2) or other legal theories."[106] Finally, the parties agreed that the government would have the unilateral right to strike through the Permissible Third-Party Legend if the Air Force decided to authorize the underlying data for public release.[107]

D. What Ambiguities Are Left Unresolved?

With the entire case saga now at an end, there are still numerous questions left unanswered. Despite the ASBCA discussing trade secrets at length, the Federal Circuit's decision did not mention trade secret rights and the effect that providing an unlimited-rights license to the government had. [108] Even though the Air Force strenuously argued in its brief to the Federal Circuit that Boeing lost any trade secret or proprietary interest in the data when it was delivered with unlimited rights to the government,[109] the settlement agreement included a provision that the Air Force took no position regarding this point.[110]

While the Federal Circuit held that paragraph -7013 only applied to markings that restricted the government's rights, it said nothing about whether that particular marking actually restricted the government's rights. Instead, the court simply reversed the decision of the ASBCA and remanded for further proceedings. However, because the parties entered into the settlement agreement, the board will never issue a decision settling the ultimate issues.

Because neither the ASBCA nor the Federal Circuit ever settled these issues, numerous questions remain, leaving uncertainty and ambiguity in this area of the law. It is currently unclear what exact markings are allowed on unlimited-rights data. Does a marking that contains third-party notices similar to Boeing's original marking restrict the government's rights? Does not allowing a contractor to include a notice to third parties

[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Brief for Appellee, *Boeing Co.*, 983 F.3d 1321, No. 2019-2147, 55–60 (Mar. 30, 2020), ECF No. 22.
[110] Order of Dismissal, *supra* note 102, at 5.

impermissibly restrict their rights in its intellectual property? These questions currently leave a legal grey zone that demands to be answered.

IV. DoD Proposed to Amend the DFARS, Adding an Unlimited-Rights Data Marking

On December 19, 2022, the DoD took steps to clarify this area of the law by proposing to amend various data-rights clauses contained in the DFARS.[111] The proposed rules focused on implementing data-rights portions of the Small Business Innovative Research Program and Small Business Technology Transfer Program.[112] Included within the proposed revisions, the DoD proposed to update the marking requirements to require an "unlimited rights" marking for technical and software data provided to the government.[113] The newly proposed unlimited-rights marking was as follows:

Unlimited Rights
Contract Number _____
Contractor Name _____
Contractor Address _____

The Government has unlimited rights in this technical data or computer software pursuant to DFARS 252.227–7013, Rights in Technical Data—Noncommercial Items; DFARS 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation; or DFARS 252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of the above identified contract, as applicable. This marking must be included in any reproduction of this technical data, computer software, or portions thereof.

Figure 3.DoD's Proposed Unlimitied-Rights Marking.[114]

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[111] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,680–81.
[112] *Id.* at 77,680. Advanced notice of proposed rulemaking was previously provided on August 31, 2020. *Id.* Based on public comments, edits were made to the proposed rule to include changes to other DFARS clauses—specifically, the unlimited rights clauses discussed in Parts II.B. and III.A. of this article. *Id.*
[113] *Id.* at 77,680–81. These proposed amendments added to the pending DFARS case 2019-D043 that dealt with implementing the data-rights portions of the Small Business Innovative Research Program Policy directives. *Id.* at 77680.
[114] *Id.* at 77,692.

The announcement of the proposed regulation explained that these provisions were included to ensure clarity and consistency for data-rights markings under the DFARS.[115] Under the current regulatory paradigm, there are no "unlimited-rights" marking.[116] As such, government personnel may find it unclear whether data provided with no markings has been provided with unlimited rights or whether a restrictive marking was accidentally omitted.

In addition, the DoD proposed to amend certain provisions in the DFARS to prohibit any restrictive marking on noncommercial technical data and software other than those restrictive markings expressly provided for in the DFARS.[117] This change directly addressed the Federal Circuit's decision in *Boeing Co. v. Sec'y of the Air Force*, even mentioning the case by name when explaining this provision.[118] The proposed rule states that this provision clarifies the "long-standing intent of the DFARS marking requirements to limit restrictive markings on noncommercial technical data and software to those specified in the clauses."[119] This was essentially the argument made by the government in the *Boeing* case that the Federal Circuit rejected.[120]

The DoD's announcement included an analysis of the expected impact of the proposed rules.[121] This analysis focused almost exclusively on small businesses and the proposed changes that would directly impact them.[122] The analysis does mention that it would require all contractors only to use the newly proposed restrictive markings contained in the DFARS clauses.[123] However, the proposed rule provides no analysis of the potential widespread impact that the other more general provisions would have on industry as a whole.[124]

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[115] *Id.* at 77,681.
[116] DFARS 252.227-7013.
[117] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,681.
[118] *Id.*
[119] *Id.*
[120] Brief for Appellee, *supra* note 111, at 26–28; *Boeing Co.*, 983 F.3d 1327, 1330–31.
[121] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,685–86.
[122] *Id.*
[123] *Id.* at 77,691.
[124] *Id.* at 77,685–86.

Not surprisingly, private industry strenuously objected to the new proposed marking requirements.[125] Among them, the concern that the proposed marking requirements would result in contractors losing all rights in their technical data upon delivery to the Government.[126] After multiple comment period extensions to address the numerous concerns, all regulatory changes not relating to Small Business Innovation Research (SBIR) were removed from the final rule.[127]

Even though the language having to do with unlimited-rights data markings was removed from the final rule, it was only done so in order to finalize the other SBIR portions and to allow additonal consideration on the unlimited-rights data markings.[128] It is clear that there is still a need to clarify this area of the law and additional regulation is necessary. This article will next analysize the previously proposed provisions having to do with unlimited-rights markings and discuss the impacts and considerations of both the DoD and contractors of implementing this type of language.

A. Considerations That Support Implementation

1. Current Ambiguous State of the Law

After the Federal Circuit's opinion in the *Boeing* case, it is unclear what exact markings would and would not restrict the government's unlimited-rights license and, therefore, would be prohibited by the current regulatory data-rights scheme. As there is no case law providing parameters to prevent contractors from putting third-party markings on data, they currently have carblanche to put whatever marking they desire, as long as it is aimed at third parties and not the government. This creates confusion, especially when no specified unlimited-rights marking exists.

As noted in the previously proposed rule, whenever data deliverables are left blank under the current state of the law, it is unclear whether this

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[125] DFARS: Small Business Innovation Research Data Rights, 89 Fed. Reg. at 103,338; *see also* Aerospace Indus. Assc., Comments to the Proposed Rule for DFARS Case 2019–D043, "Small Business Innovation Research Data Rights" (Mar. 20, 2023), https://www.regulations.gov/comment/DARS-2020-0033-0022.

[126] Aerospace Indus. Assc., Comments to the Proposed Rule for DFARS Case 2019–D043, "Small Business Innovation Research Data Rights" (Mar. 20, 2023), https://www.regulations.gov/comment/DARS-2020-0033-0022, at 8.

[127] DFARS: Small Business Innovation Research Data Rights, 89 Fed. Reg. at 103,338.

[128] *Id.*

is because it was inadvertently omitted or because it was delivered with unlimited rights.[129] This problem would benefit from the standardization of one unlimited-rights marking for all unlimited-rights data deliverables. One standardized marking would greatly assist with the government's review of data deliverables to ensure it was getting what it bargained for, and that the contractor was delivering as agreed upon under the contract. Standardization would help in other regards as well.

2. One Standardized Marking Could Save Money & Fuel Innovation

As discussed at the beginning of this paper, the United States spends billions of dollars yearly on major weapon systems.[130] The data in these weapon systems is absolutely critical to the innovation, operation, and sustainment of these DoD assets.[131] When the government spends the money to fund the development of these assets, it is crucial that the government gets the unlimited-rights license that it contracted for, and that is often desired for the lifecycle management of the weapon system. This avoids numerous potential issues later in the acquisition's lifecycle, especially an undesirable vendor-lock situation.[132]

One of the fundamental concepts underlying government procurement law is that competition in the market keeps overall prices down and increases quality.[133] Competition would be negatively affected when a contractor places markings on data, potentially restricting the government from providing that data to third parties to solicit follow-on maintenance

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[129] *Id.* at 77,681.

[130] *Budget Basics: National Defense*, *supra* note 1.

[131] *See DOD Issues New Data Strategy,* U.S. DEP'T OF DEF. (Oct. 8, 2020) https://www.defense.gov/News/Releases/Release/Article/2376629/dod-issues-new-data-strategy/.

[132] *See* DFARS 207.106(b)(1)(B)(2); *see also* Burris, *supra* note 21 (explaining that non-conforming markings on data impacts "DoD's ability to use data in competitive procurements, potentially interfering with the DoD's ability to comply with competition requirements in the Competition in Contracting Act, 41 U.S.C. §253, and FAR Part 6, Competition Requirements." *Id.*).

[133] *See* ADAM SMITH, THE WEALTH OF NATIONS 477 (Edwin Canaan, ed., Univ. of Chi. Press 1976) (1776); *see also* Professor Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002).

and sustainment services.[134] This situation should not happen where the government has unlimited rights. However, a third party could easily see the marking and not want to get involved with an acquisition if it thought it could potentially be liable for infringing the original contractor's intellectual property rights.[135] A standardized marking resolves ambiguity not only for the government but industry as a whole, leading to an increased opportunity for competition which thereby saves taxpayer dollars in the long run.

The standardization would also save governmental time and effort, which would, in turn, also pass savings along to the taxpayer.[136] Currently, because of the ambiguity and lack of standardization, it takes a considerable amount of time for the government to check the thousands and thousands of pages of data deliverables from any given acquisition to ensure that the markings conform with the contract. As the scenario at the beginning of this article illustrates, every ambiguous marking causes a potential obstacle in an already complex system. Every call back to a contractor or an attorney causes delays in the overall acquisition process and additional expenses.

The second- and third-order effects of standardizing unlimited-rights markings would also further technological innovations. As discussed above in Part I, data fuels innovation. Many new technologies, including artificial intelligence, depend on mass amounts of data to develop and maintain the technology.[137] Allowing contractors to muddy the waters by placing any marking they want on data slows down the entire acquisition process. These data deliverables are often hundreds and thousands of pages. The government must inspect all of these pages to ensure that any markings conform with the contract provisions. Then ideally, the data has to be able to be shared easily within the government and uploaded to

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[134] *See* Elec. Sys. U.S.A., Inc., B-200947, 81-1 CPD ¶ 309 (Comp. Gen. Apr. 22, 1981) (sustaining a protest in a sole-source award for lack of competition where the agency failed to do adequate research and based justification of sole source primarily on the claim that the incumbent contractor owned proprietary rights in the required technology).

[135] *See* Burris, *supra* note 20 (explaining that non-conforming markings can lead to "[t]hird parties' refusal to accept documents with nonconforming, restrictive markings. This refusal can create a sole-source environment and increase the risk of suboptimal outcomes." *Id.*).

[136] *Id.* (Another impact of non-conforming marking on data is an "enormous loss of time, effort, and taxpayer dollars spent by DoD personnel addressing and resolving disputes with contractors over nonconforming markings. This also leads to a loss of productivity and efficiency in executing critical programs.")

[137] *See DOD Issues New Data Strategy*, *supra* note 131.

various databases in order for it to be utilized efficiently to innovate within the DoD.[138] Any pause in this process will cause ripple effects that ultimately lead to a delay in delivery to the warfighter. This is especially true in the area of unlimited-rights data markings because this typically involves the development of specialized noncommercial large weapon systems—the innovation of which our country cannot afford to delay.

While a standardized unlimited rights marking would resolve ambiguity, save taxpayer dollars, and fuel innovations, there are also considerations against implementing the types of marking that was previously proposed that could have an overall negative impact.

B. Considerations Against Implementation

1. Protection of Intellectual Property Rights from Third Parties.

As discussed in Part IIA, various ways to protect intellectual property include patents, copyrights, trademarks, and trade secrets.[139] Out of the various options available, contractors often rely on trade secrets to protect their intellectual property rights contained in the technical data and computer software provided to the government for an acquisition.[140] The main reason contractors rely on trade secrets versus a patent is because obtaining a patent requires that the information first be publicly disclosed through a patent application.[141] Patents also have costs associated with the filing and maintenance required to obtain and maintain the patent, whereas trade secrets do not.[142] However, in order for intellectual property to be protected as a trade secret, the owner must make reasonable efforts to keep the information secret, and the information must provide an economic

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[138] *See* Rumsey, *supra* note 12, at 14; *see also DOD Issues New Data Strategy*, *supra* note 131.

[139] *Intellectual Property*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also* DFARS: Rights in Technical Data, 60 Fed. Reg. 33,464, 33,465 (June 28, 1995) (noting that "[s]uch markings are commonly used in commercial practice to protract proprietary data or trade secrets"); NAVIGATING THROUGH COMMERCIAL WATERS, *supra* note 29, at 2-1.

[140] S. A. Browne, Patents for Soldiers 74 (June 10, 2016) (MMAS dissertation, U.S. Army Command and General Staff College); *see also* U.S. DEP'T OF ARMY, CHANGE 1, IMPLEMENTATION GUIDANCE TO ACCOMPANY ARMY DIRECTIVE 2018-26 ENABLING MODERNIZATION THROUGH MANAGEMENT OF INTELLECTUAL PROPERTY 7 (17 Dec. 2020) [hereinafter ARMY DIR. 2018-26 GUIDE].

[141] ARMY DIR. 2018-26 GUIDE, *supra* note 140; Browne, *supra* note 140, at 75.

[142] Browne, *supra* note 140, at 74–77.

advantage to the owner over competitors who do not know the information.[143] The protection of trade secrets stems from state laws, as there was no federal trade secret law until 2016.[144]

While a trade secret may have advantages, a patent has much greater legal protections.[145] A patent holder can sue for infringement of their patent.[146] Whereas with a trade secret, if someone discovers the information on their own, the trade secret loses its value.[147] In addition, the only way to legally enforce a trade secret is after an "unauthorized disclosure" has occurred.[148] The requirements to enforce a trade secret are one of the reasons industry tries to limit and restrict the government's ability to use and disclose trade secret information.[149] Finally, because trade secret protections stem from state law, the protections offered and requirements to enforce trade secret protections can vary from jurisdiction to jurisdiction.[150]

Trade secret protections and the effect granting an unlimited rights license has on those protections was hotly contested in the *Boeing* case, both at the ASBCA and the Federal Circuit.[151] While the ASBCA agreed with the government in *dicta* that an unlimited rights license extinguishes any trade secret, the Federal Circuit did not address this issue.[152] There is case law to support each side's position. The government asserts that if an individual discloses their trade secret to someone who is under no obligation to protect the secrecy of the information, then its property rights are extinguished, and there is no longer trade secret protection.[153] The government argued that Boeing lost any trade secret protections as soon

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[143] ARMY DIR. 2018-26 GUIDE, *supra* note 140, at 7.
[144] Congressional Research Services. (Jan. 27, 2023) *An Introduction to Trade Secrets Law in the United States* (CRS Report No. IF12315). https://sgp.fas.org/crs/secrecy/IF12315.pdf.
[145] ARMY DIR. 2018-26 GUIDE, *supra* note 140, at 7.
[146] *Id.*
[147] *Id.*
[148] Browne, *supra* note 140, at 75.
[149] ARMY DIR. 2018-26 GUIDE, *supra* note 140, at 7.
[150] *See* CRS, *supra* note 144; *see also* R. Mark Halligan, *Protecting U.S. Trade Secret Assets in the 21st Century*, 6 LANDSLIDE 12 (2013).
[151] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183311; Brief for Appellant, *supra* note 72, at 51–57; Brief for Appellee, *supra* note 109, at 55–60.
[152] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183311; *Boeing Co*., 983 F.3d 1321.
[153] Brief for Appellee, *supra* note 109, at 59 (citing Ruckelhaus v. Monsanto, Co., 467 U.S. 986 (1984); L-3 Comms. Westwood Corp. v. Robichaux, No. 06-279, 2008 WL 577560, at *6–7 (E.D. La. Feb. 29, 2008)).

as it provided the data to the government under an unlimited-rights license.[154] The government reasoned that as it is under no obligation to protect Boeing's property rights, Boeing would lose any trade secret protections because the government can do anything with the data under an unlimited-rights license.[155] This includes giving it to a third party or making it entirely public.[156]

Boeing argued that the government's position essentially meant that Boeing lost all property rights in the data as soon as it was delivered to the government. Boeing asserted that this was a position that the legislative and regulatory policy and history did not support.[157] The government made this argument, despite agreeing with Boeing that it still possessed all remaining property interests in the data after it was delivered to the government.[158] Boeing also cited numerous cases that supported its position that a contractor can still retain trade secret protections from third parties after data is delivered under an unlimited-rights license.[159] Ultimately, the Federal Circuit did not discuss trade secrets specifically. But, the court did agree with Boeing that it was entitled to protect its intellectual property rights from third parties, which lends support that the

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[154] Brief for Appellee, *supra* note 109, at 56–60.
[155] *Id.*
[156] *Id.*
[157] Appellant's Reply Brief at 35, *Boeing Co.*, 983 F.3d 1321, No. 2019-2147 (June 10, 2020) ECF No. 27.
[158] *Boeing Co.*, 983 F.3d at 1325, 1332.
[159] Brief for Appellant, *supra* note 72, at 51–57 (citing United States v. Liew, 856 F.3d 585, 601 (9th Cir. 2017) (explaining that "*Monsanto* does not stand for the principle that disclosure of trade secret information to a competitor who is not required to protect it destroys trade secret protection, nor has any court read *Monsanto* as establishing this principle"); GlobeRanger Corp. v. Software AG, 27 F. Supp. 3d. 723, 748 (N.D. Tex. 2014) (holding that if a "[i]f a voluntary disclosure occurs in a context that would not ordinarily occasion public exposure, and in a manner that does not carelessly exceed the imperatives of a beneficial transaction, then the disclosure is properly limited and the requisite secrecy retained"); Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113 (5th Cir. 1991) (holding that filing architectural plans with a city does not make them public information within the context of trade secrets for the same reason); Vianet Grp. PLC v. Tap Acquisition, Inc., No. 3:14-cv-3601, 2016 WL 4368302 (N.D. Tex Aug. 16, 2016); Wellogix, Inc. v. Accenture, LLP, 823 F. Supp. 2d 555, 564 (S.D. Tex. 2011), aff'd, 716 F.3d 867 (5th Cir. 2013)).

court did, in fact, agree that trade secrets could survive a grant of an unlimited-rights license.[160]

One argument that the Federal Circuit specifically rejected was the government's argument that should Boeing want to include notices to third parties in the markings, it should have negotiated for a special license.[161] The court cautioned that this logic was problematic, explaining that if every contractor who needed to put third parties on notice had to negotiate a special license instead of using the standardized DFARS clause, the standardized clauses would no longer be useful.[162] Basically, these special licenses would cease to be special. This point is also a relevant consideration against implementing the proposed rule as written. If the proposed rule's language is not changed, a contractor would be left with no choice but to negotiate a special license to protect its trade secrets. Besides making the standardized contract clause no longer useful, this option is not feasible as so few government personnel are available with sufficient experience to be qualified to negotiate this type of license.[163]

Ultimately, to keep trade secret protection, the owner of the information must make reasonable efforts to keep the information secret.[164] In a typical situation where a contractor provides data to the government, the reasonable effort that the contractor takes to protect its trade secrets is ensuring that the information is marked properly.[165] This ensures that if the government gives the data to anyone outside the government, third parties are notified that there are still remaining intellectual property rights that the contractor owns. The DoD's previously

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[160] *Boeing Co.*, 983 F.3d at 1332 (explaining that "[o]ur interpretation of Subsection 7013(f) allows Boeing a bare minimum of protection for the data, namely, the ability to notify the public of its ownership" and the court concluded that "[a] contrary interpretation would result in Boeing *de facto* losing all rights in any technical data it delivers to the government." *Id.*).

[161] *Id.* at 1332.

[162] *Id.*

[163] *See* GOVERNMENT-INDUSTRY ADVISORY PANEL ON TECHNICAL DATA RIGHTS, 2018 REPORT, Paper 16 at 2 (Nov. 13, 2018) [hereinafter 813 PANEL REP.] https://www.ndia.org/-/media/Sites/NDIA/Policy/Documents/Final%20Section%20813%20Report (explaining the problem "that [Specially Negotiated License Rights (SNLR)] are difficult to negotiate, and that there are too few Government personnel available with enough experience, who are qualified to negotiate SNLR").

[164] Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 179 (7th Cir. 1991).

[165] DFARS: Rights in Technical Data, 60 Fed. Reg. at 33,465 (noting that "[s]uch markings are commonly used in commercial practice to protract proprietary data or trade secrets"); NAVIGATING THROUGH COMMERCIAL WATERS, *supra* note 28, at 4-4.

proposed rule would strip this ability away from the contractor, thus potentially stripping trade secret protections.

The previously proposed amendments to the DFARS data-rights clauses included a blanket prohibition against any other restrictive marking other than those specifically provided in the DFARS.[166] Any other markings, including those not directed at the government but directed explicitly at potential third parties, are not authorized and would be considered non-conforming markings.[167] Contractors are opposed to these proposed changes.[168] This is unsurprising given that intellectual property is often the "lifeblood of their company and often a primary source of profit."[169] However, the potential stripping away of intellectual property rights protections has even more significant implications.

2. The Previously Proposed Rule as Written Would Conflict with Statute.

Under 10 U.S.C. § 3771, Congress has tasked the DoD with the duty to "prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process."[170] The statute then specifically prohibits any regulation that may "impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law."[171] If a contractor cannot include ownership notices in its data, it could be impaired—in violation of 10 U.S.C. § 3771(a)(2)—in its ability to discourage competitors from unauthorized use of its data.[172] Contractors must make reasonable efforts to keep the information secret. The proposed

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[166] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,691, 77,694.
[167] *Id.*
[168] Aerospace Indus. Ass'n, Comment Letter on Proposed Rule to DFARS: Small Business Innovation Research Data Rights (Feb. 2, 2023), https://www.regulations.gov/comment/DARS-2020-0033-0014.
[169] Burris & Harris, *supra* note 20.
[170] 10 U.S.C. § 3771(a)(2).
[171] 10 U.S.C. § 3771(a)(2). This was formerly 10 U.S.C. § 2320(a)(1) before the NDAA reorganized the statute.
[172] *Cf.* DFARS: Rights in Technical Data, 60 Fed. Reg. at 33,465 (noting that "[s]uch markings are commonly used in commercial practice to protract proprietary data or trade secrets").

rule's general restriction barring third-party notices strips that ability away and thus impairs the trade secret rights of contractors because they arguably would not be able to enforce their rights in a court of law. As the Federal Circuit concluded, this is the "bare minimum" protection a contractor would be entitled to—"namely, the ability to notify the public of its ownership."[173] The previously proposed rule would result in a contractor "*de facto* losing all rights in any technical data it delivers to the government."[174]

This type of regulation risks being struck down as unconstitutional if implemented in the proposed form. When implementing a statute into regulation, an agency must stay within the bounds of the authority granted to it by statute.[175] A regulation can be declared unconstitutional when it exceeds the scope of the statute under which it was promulgated.[176] This is evidenced by the regulation being contrary to or not in harmony with the statute's overall purpose.[177] Here, 10 U.S.C.§ 3771 specifically provides that the regulations implementing the statute shall not impair a contractor's rights in technical data. The general prohibition on additional markings contained in the proposed rule would infringe on a contractor's trade secret protections and therefore be contrary to the statute's scope. Because of this, the provision would likely be struck down as unconstitutional.

When Congress amended the Rights in Technical Data statute, it did so with the intent to strike a balance between the government and industry.[178] This was the legislative intent behind the implementation of this statute that specifically prohibits the impairment of any right of the government or any contractor with respect to their rights in technical data.[179] Disruption of this carefully-struck balance is not only contrary to the statute, but it could also stifle innovation.

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[173] *Boeing Co.*, 983 F.3d at 1332.
[174] *See id.*
[175] City of Arlington v. FCC, 569 U.S. 290, 297 (2013).
[176] *Id.*; Rocha v. Bakhter Afghan Halal Kababs, Inc., 44 F. Supp. 3d 337, 356 (E.D.N.Y. 2014); Barber v. La. Workforce Comm'n, 266 So. 3d 368, 380 (La. Ct. App. 2018).
[177] *Rocha*, 44 F. Supp. 3d at 356; *Barber*, 266 So. 3d at 380.
[178] *See* SECTION 800 PANEL REPORT, *supra* note 39, at 53–54, 5-1; *see also* Schwartz, *supra* note 36, at 524, 527.
[179] SECTION 800 PANEL REPORT, *supra* note 39, at 53–54, 5-1.

3. The Proposed Rule as Written Could Discourage Innovation

History should teach us lessons in this regard. Prior to Congress amending the Rights in Technical Data statute and its implementation into the DFARS, the government approached data rights with a take as much as you can type of attitude.[180] This policy discouraged private industry from wanting to do business with the government because it was essentially stripped of its intellectual property rights.[181] Because of this, a major policy shift occurred.[182] Beginning with adopting the DFARS provisions that implemented the amendments made to the Rights in Technical Data statute, the DoD's policy changed to only acquire the data rights necessary to satisfy its actual needs.[183] The new data-rights scheme that was implemented sought to establish a balance between the interests of the government and industry, specifically seeking to "encourage creativity, encourage firms to offer [the DoD] new technology, and facilitate dual-use development."[184]

The previously proposed rule would contradict this policy, as the DoD would now strip private industry's ability to protect its intellectual rights from third parties. The government does not need to do this. Industry can be allowed to put third parties on notice of its ownership rights without conflicting with the government's interests. Those same concerns that outlined the data-rights policy and regulatory scheme are still imperative today. The DoD needs creative, innovative contributions from industry and to maintain a robust industrial base. Industry needs to retain its ability to commercialize and protect its intellectual property rights in federally funded technologies. A balanced policy approach to data rights has continually been reaffirmed and linked to the importance of our national security. In 2018, then-Secretary of the Army Mark Esper reiterated the importance of being:

> [C]areful to ensure that the policies and practices governing [intellectual property] provide us with the

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[180] *See* 10 U.S.C. § 2320 (1986) (current version at 10 U.S.C. § 3771); s*ee also* SECTION 800 PANEL REPORT, *supra* note 41, at 53–54, 5-1; *see also* Schwartz, *supra* note 37 at 516–18, 521.

[181] *See* SECTION 800 PANEL REPORT, *supra* note 41, at 53–54, 5-1; *see also* Schwartz, *supra* note 37 at 516–18, 521.

[182] *See* SECTION 800 PANEL REPORT, *supra* note 41, at 53–54, 5-1; *see also* Schwartz, *supra* note 37, at 527.

[183] DFARS: Rights in Technical Data, 59 Fed. Reg. at 31,587.

[184] *Id.* at 31,585.

> necessary support for our weapon systems, but do not constrain delivery of solutions to the warfighter and do not dissuade commercial innovators from partnering with us. *This partnership with the industrial base is critical to developing the capabilities we need to be successful during future conflicts.*[185]

Currently, the United States is dealing with threats from near-peer adversaries, and specifically, U.S. National Security and National Defense Strategies are concerned with keeping pace with those adversaries.[186] Often, these adversaries have authoritarian-type governments that can make streamlining and encouraging technological innovations much easier and faster.[187] Democratic governing structure and economic systems of capitalism force the U.S. Government to work with industry in order to fuel innovation. Industry cannot be forced into compliance and be expected to continue to seek partnerships with the government. The proposed rule may make it easier for the government in the short term, but it will likely drive industry away and ultimately discourage innovation.

V. Balance Between the Two Positions Can and Should Be Struck

On the one hand, increasing competition and avoiding vendor-lock situations is important. There is also the need for clarity concerning what markings are authorized on data. Standardizing and streamlining the process of getting crucial data into the hands of the warfighter so it can actually be used is critical to innovation. However, these concerns must be balanced with the other policy objectives—primarily encouraging industry to invest its time, effort, and resources in working with the DoD to create these innovations in the first place.

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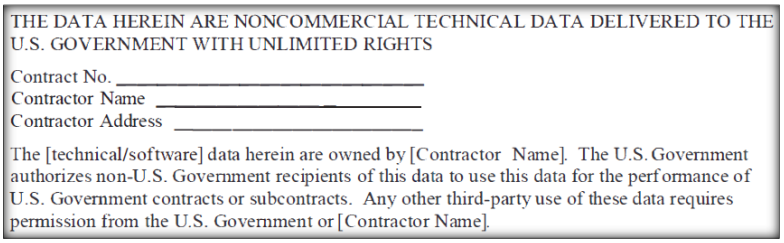
[185] U.S. DEP'T OF THE ARMY, DIR. 2018-26, ENABLING MODERNIZATION THROUGH THE MANAGEMENT OF INTELLECTUAL PROPERTY para. 2 (Dec. 7, 2018) [hereinafter AD 2018-26] (emphasis added).
[186] BIDEN NSS, *supra* note 8, at 23, 32; 2022 NDS, *supra* note 8, at 5, 7, 17.
[187] U.S. DEPT. OF STATE, MILITARY-CIVIL FUSION AND THE PEOPLE'S REPUBLIC OF CHINA, https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Pager.pdf (last visited June 12, 2025).

A. The "Permissible Third-Party Legend" Is a Great Place to Start to Strike a Needed Balance

Instead of the unlimited-rights marking contained in the previously proposed rule, the DoD should amend the DFARS to include an unlimited-rights marking that is similar to the "Permissible Third-Party Legend"[188] agreed upon by the parties in the *Boeing* settlement agreement. With some slight changes, this marking provides a great place to begin when striking a balance between the interests and concerns of the DoD and industry. Below is a sample marking created based on the Permissible Third-Party Legend:


THE DATA HEREIN ARE NONCOMMERCIAL TECHNICAL DATA DELIVERED TO THE U.S. GOVERNMENT WITH UNLIMITED RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____

The [technical/software] data herein are owned by [Contractor Name]. The U.S. Government authorizes non-U.S. Government recipients of this data to use this data for the performance of U.S. Government contracts or subcontracts. Any other third-party use of these data requires permission from the U.S. Government or [Contractor Name].

Figure 4. Sample Marking.[189]

This example would provide the standardized marking that the government needs and bring much-needed clarity to unlimited-rights data markings. But unlike the proposed rule's unlimited-rights marking, this sample marking would also allow contractors to protect their intellectual property by allowing them to have some ability to put third parties on notice that another contractor owns the data.

The proposed rule asserts that the amendments "allow the DoD to better protect the [intellectual property] interests of all of its industry partners."[190] As the proposed changes were written, that statement is simply not true. However, the sample marking allows contractors to notify the public of its ownership, thereby not infringing on the contractor's ability to enforce trade secret protections against third parties' unauthorized use of its intellectual property. As the Federal Circuit states, this is the "bare minimum protection for [its] data" a contractor is entitled

[188] Order of Dismissal, *supra* note 104, at 7.
[189] *Id.*
[190] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,681.

to under the law.[191] A marking that does not allow the contractor to have this ability would "result in [the contractor] *de facto* losing all rights in any technical data it delivers to the government."[192]

The sample marking is also much easier to read and understand than the marking contained in the proposed rule. When creating a marking, it is essential to think of the long-term implications of the marking itself. Most individuals reviewing these markings will not be lawyers, and markings should be created in a format a layperson can read and understand.[193] It should also be created in a way that assists the reader in understanding it without having to reference numerous outside sources. The majority of the information needed to understand the marking should be contained inside the actual marking. The marking in the proposed rule references four different sources that the reader would potentially have to go and look at to understand what can and cannot be done with the document in which the marking is affixed.[194] Additional confusion is unnecessary in an area already fraught with complex laws and regulations. The sample marking provided in this article is much simpler to read and understand as it has the majority of everything needed on its face to inform the reader what can and cannot do with the data.

Contractors could argue that the sample marking in this article would still be problematic. This is mainly because the proposed rule includes a provision that prohibits any other restrictive markings not explicitly provided for in the newly proposed DFARS 252.227–7013.[195] However, removing this entire provision would open back up the floodgates and reinsert similar ambiguity into the problem the proposed rule largely attempts to resolve. There is a need for a "transparent and consistent framework" that allows the DoD to efficiently process and correct any

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[191] *Boeing Co.*, 983 F.3d at 1332.
[192] *Id.* (emphasis in the original).
[193] *See* CREATIVE COMMONS, *About the Licenses*, https://creativecommons.org/licenses/ (last visited June 12, 2025).
[194] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,692. The marking in the proposed rule contains three references to various DFARS clauses and a reference to the clause in the contract that is also supposed to be referenced in the marking. *Id.*
[195] *Id.* at 77,691. The current proposed rule includes the following provision: "(2) Other restrictive markings. Any other restrictive markings, including markings that describe restrictions placed on third-party recipients of the technical data, are not authorized and are nonconforming markings governed by paragraph (i)(2) of this clause." *Id.*

non-conforming data markings.[196] Allowing contractors the ability to include any marking, so long as it does not restrict the rights of the government, would bring us back to a similar position that we were in without any amendments to the DFARS. Moreover, the concerns outlined in this article would remain unresolved.

V. Conclusion

It is clear that the current ambiguity in the realm of markings on unlimited-rights data needs to be resolved. Numerous considerations support the implementation of a standardized unlimited-rights marking, including increased competition, savings to the taxpayer, clarity for government and industry alike, and improved data usability to fuel innovation. However, none of these considerations justify the infringement on a contractor's ability to protect its intellectual property when another alternative is also available. The *Boeing* settlement agreement demonstrates that the government does not need to prevent a contractor from including third-party notices. A balance can and should be struck between the two positions. Maintaining the delicate balance between the government and industry in the realm of data rights is crucial to our country's continued national security. As such, the DoD should amend the DFARS to include a standardized unlimited-rights marking similar to the sample provided in this article.

[196] *Id.* at 77,686.