

Headquarters U.S. Air Force

Integrity - Service - Excellence

Proprietary Information*



** Everything You Need to Know,
But Didn't Know to Ask*

**DTIC 2007 Conference
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**Richard M. Gray
Office of the General Counsel**



- **Focus on the management and handling of proprietary information within DoD.**
- **The distribution statement reason "Proprietary Information" is intended to provide notice of the need to protect information not owned by the U.S. Government and marked with a contractor or third-party imposed restrictive legend asserting intellectual property rights.**
- **Proprietary information includes patented technologies, trademarks, trade secrets and copyrights.**
- **The process of factoring intellectual property rights into determining appropriate distribution in compliance with policy, law, and contracts or agreements.**



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Overview

- **Why Am I Here?**
- **Overview of “Proprietary Information” – IP in Nutshell**
- **How Do I Exploit and Protect IP in the Real World?**
- **Questions?**



Why Am I Here?

- Someone said there would be *pie*
- Proprietary information is a key element of my job
- My boss says proprietary information is ...
- Proprietary information is an inescapable and key element of developing cutting edge stuff
- There are consequences – both LEGAL and practical
 - Personal – financial, CRIMINAL, career
 - Programmatic – financial, schedule, mission-impact



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Digital Information Age

- The Catch-22, or the Double-Edged Sword: heretofore unimaginable capabilities . . .
 - **The Good** – creation, management, and sharing
 - **The Bad** – hacking, infringement, etc – ANONYMOUSLY!
 - **The Ugly** – inadvertent ... or **RECKLESS** release

- Increased reliance on commercial, and Rapidly-changing –
 - Information management tools AND
 - Technologies – integrated into our DoD systems

- ALL of the Legal Requirements Still Apply!!!!
 - CRIMINAL penalties – including misuse of PROPRIETARY

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Teaching Points

- **Proprietary Information is critical to accomplishing DoD's mission**
- **It is YOUR responsibility**
- **Proprietary Information” is a general category – it does NOT define a specific set of restrictions**
- **You MUST look beyond the Distribution Stmt**



“Proprietary Information” (PI)

– Intellectual Property (IP) in a Nutshell



Background—Whaddya mean "IP"?

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- **PATENT** - right to exclude others from making, using, or selling an invention
- **COPYRIGHT**— exclusive right to copy, distribute, perform, display, modify a creative work
- **TRADEMARK** – word, name, symbol used in commerce to identify a source of goods
- **TRADE SECRET**-- information that (1) has economic value by not being known to the public, and (2) owner takes reasonable steps to protect from disclosure



Intellectual Property Basics

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- Most Basic: any information that has value

- More Commonly: patents, copyrights, trade secrets, trademarks, even mask works, vessel hulls, etc.
 - These are Legal Schemes of Protection

- IP as an Intangible Personal Property Interest
 - Distinguished from tangible product

 - Rules by statute, regulation, and case law



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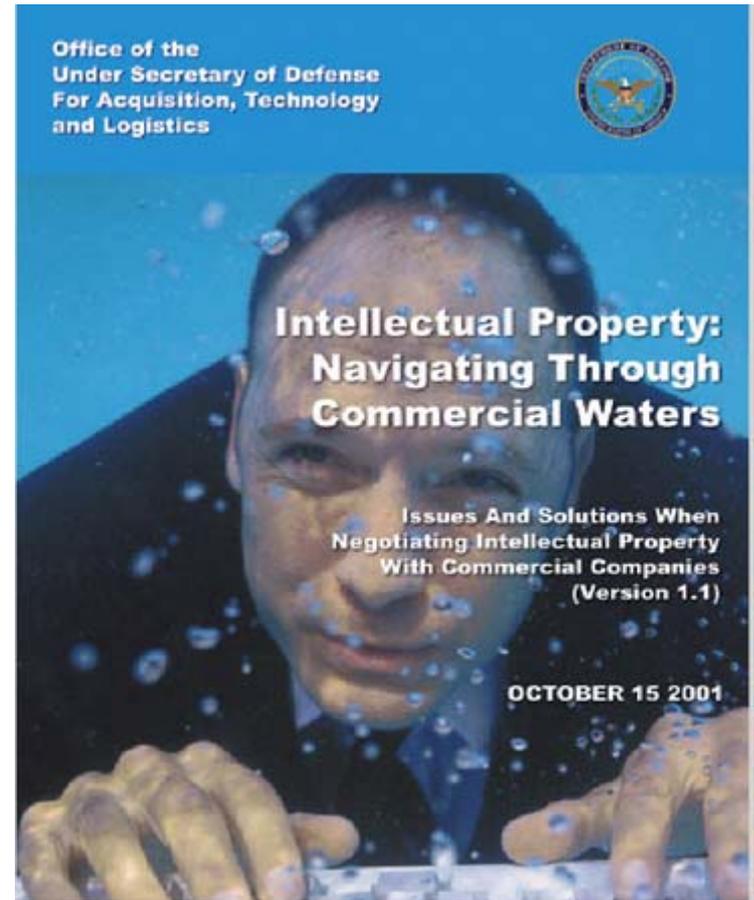
Overview of IP in a DoD Acquisition

USD(AT&L) Guidebook:

Navigating Through Commercial Waters: Issues and Solutions When Negotiating Intellectual Property With Commercial Companies

(Ver 1.1, 15 Oct 2001)

<http://www.acq.osd.mil/dpap/specificpolicy/intellectualproperty.html>





Pretty much self-explanatory...

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*Table 2-1. The Most Common Types of Intellectual Property Protection
(See Appendix B for detailed discussion)*

Type of IP Protection	Protectable Subject Matter	Nature of Protection/Rights Granted to the IP Owner	Requirements for Protection	Remedies Available	Duration of Protection	Statutory Basis	DoD-Specific Statutes/Regs
Patents ¹	Processes, machines, articles of manufacture, and compositions of matter.	Right to exclude others from making, using, selling, or importing the invention; sometimes referred to as the right to exclude others from "practicing" the invention.	Application filed in U.S. Patent & Trademark Office; invention must be new, useful, and non-obvious.	Money damages, and injunction. ²	20 years from application date.	Title 35 U.S.C.; 28 U.S.C. 1498(a).	FAR 27.1 to 27.3 and related clauses; DFARS 227.3 and 227.70, and related clauses.
Copyrights	Original, creative works fixed in a tangible medium of expression (e.g., literary, musical, or audiovisual works; computer programs).	Exclusive right to (1) copy; (2) modify; ³ (3) perform; (4) display; and (5) distribute copies of the copyrighted work. No protection against independent creation of similar works, or against certain "fair uses."	Automatic when fixed in a tangible medium; added remedies for registration and notice.	Money damages (actual or statutory), injunction, ² and criminal sanctions. ⁴	Life of the author plus 70 years.	Title 17 U.S.C.; 28 U.S.C. 1498(b).	10 U.S.C. 2320 and 2321; DFARS Subparts 227.71 and 227.72, and related clauses.
Trade Secrets	Any information having commercial value by being kept secret (e.g., technical, business, or financial information)	Right to control the disclosure and use of the information through contracts or nondisclosure agreements; protection against theft or misappropriation of that information, but not from independent creation or discovery by another party.	Must take reasonable steps to safeguard the information from disclosure; reasonableness depends on the value of the information.	Money damages, injunction, and criminal sanctions. ⁴	Potentially unlimited, as long as remains secret.	18 U.S.C. 1905; 18 U.S.C. 1831-39; various state laws.	10 U.S.C. 2320 and 2321; DFARS Subparts 227.71 and 227.72, and related clauses.
Trademarks and Service Marks	Distinctive words, phrases, or symbols that identify the source of goods or services.	Protection from confusingly similar marks, deception, and unfair competition in the marketing of goods and services.	Automatic upon use in commerce; added remedies for registration and notice.	Money damages, injunction, and criminal sanctions. ⁴	Federal registration can be renewed every 10 years.	Title 15 U.S.C.; various state laws.	None; although a new draft FAR subpart is under development.

Notes:

1. Information provided here for "utility" patents—the type most common in DoD acquisitions; see Appendix B for details on "plant" patents and "design" patents.
2. There is no injunctive relief available against the Government for patent or copyright infringement; see 28 U.S.C. 1498(a) and (b).
3. This right is more formally called the right to create a "derivative work" by modifying an existing copyrighted work.
4. Although private individuals cannot enforce criminal penalties, violations of criminal statutes may be reported to the appropriate authorities.



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Contractor-Developed IP

- We almost never "own" the IP
 - Contractor may retain title
 - Gov't takes only a nonexclusive license
- Policy: we take only the MINIMUM necessary
 - Deliverables
 - License rights



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DoD Acquisition Contracts

- **Rights in Inventions & Patents (FAR Part 27)**
 - **Subject Inventions – mandatory, non-negotiable**
 - **Background Inventions – no coverage**

- **Rights in Technical Data and Computer Software (DFARS Part 227)**
 - **Hybrid License – trade secrets & copyright & ...**
 - **Commercial vs. Non-commercial**
 - **Negotiation vs. standard or “default” licenses**
 - **Standard licenses based on who funded**



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Rights in NONcommercial TD & CS

(See the IP Guide -- Navigating Through Commercial Waters...)

Table 2-2. Rights¹ in Noncommercial Computer Software (CS) and Technical Data (TD) Covering Noncommercial Items

Rights Category ²	Applicable to TD or CS?	Criteria for Applying Rights Category	Permitted Uses within Government	Permitted Uses outside Government ³
Unlimited Rights (UR)	Both TD and CS	Development exclusively at Government expense; ⁴ also any deliverable of certain types—regardless of funding. ⁵	Unlimited; no restrictions.	
Government Purpose Rights (GPR)	Both TD and CS	Development with mixed funding. ⁴	Unlimited; no restrictions.	Only for "Government purposes"; no commercial use.
Limited Rights (LR)	TD only	Development exclusively at private expense. ⁴	Unlimited, except may not be used for manufacture	Emergency repair/overhaul; evaluation by foreign government.
Restricted Rights (RR)	CS only	Development ¹ exclusively at private expense. ⁴	Only one computer at a time; minimum backup copies; modification.	Emergency repair/overhaul; certain service/maintenance contracts.
Prior Government Rights	Both TD and CS	Whenever Government has previously acquired rights in the deliverable TD/CS	Same as under the previous contract.	
Specifically Negotiated License Rights (SNLR)	Both TD and CS	Mutual agreement of the parties; use whenever the standard rights categories do not meet both parties' needs	As negotiated by the parties; however, must not be less than LR in TD, and must not be less than RR in CS. ⁶	

Notes:

1. Critical Need to Specify Deliverables. The standard clauses address rights but do not include delivery requirements. The contract must explicitly specify the content, format, and



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Rights in Commercial TD & CS

(See the IP Guide -- Navigating Through Commercial Waters...)

Table 2-3. Rights^{1,2} in Commercial Computer Software^{3,4} (CS) and Technical Data (TD) Covering Commercial Items^{3,4}

Rights Category ⁵	Applicable to TD or CS?	Criteria for Applying Rights Category	Permitted Uses within Government	Permitted Uses outside Government
Unlimited Rights (UR)	TD only	Any TD of certain specified types or classes, regardless of commercial status. ⁶	Unlimited; no restrictions.	
Standard DFARS "7015" Rights	TD only	Default rights category for all TD covering commercial items except those qualifying for UR as stated above.	Unlimited, except may not be used for manufacture.	Only for emergency repair overhaul.
Standard Commercial License	CS only	Default rights category for all commercial CS.	As specified in the license customarily offered to the public, DoD must negotiate for any specialized needs.	
Specifically Negotiated License Rights (SNLR)	Both TD and CS	Mutual agreement of the parties; should be used whenever the standard rights do not meet both parties' needs.	As negotiated by the parties; however, by statute, the Government cannot accept less than the minimum standard 7015 rights in TD. ⁷	

Notes:

1. Critical Impact on IP Delivery Requirements. DoD policy is to acquire, in addition to lesser rights, only those IP deliverables that are customarily offered to the



How Do I Exploit and Protect IP in the Real World?



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“Duality” of STINFO

- **SHARE** information as widely as possible w/in the DoD scientific & technical community
- **PROTECT** info so only **AUTHORIZED** persons
- **Balanced . . . Harmonious . . . Flip-sides of same coin . . . Yin and Yang**



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DoDD 5230.24

DoDD 5230.24

- What does the Directive cover?
 - DoDD 5230.24 governs the distribution statements on technical documents.

- Discussion Points ...
 - What are technical documents?
 - Who places the distribution statements on documents?
 - What are distribution statements?
 - What are 3rd party or Contractor Imposed distribution statements?



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Technical Documents

- *What are Technical Documents?*
 - Defined in E2.1.12. as a “any recorded information that conveys scientific and technical information or technical data.” It includes “informal documents as working papers, memoranda, and preliminary reports when such documents have utility beyond the immediate mission requirement, or will become part of the historical record of technical achievements.”
 - What does this include? Conference proceedings, draft and published journal articles, lab notes, research findings, presentations and speeches. It could, conceivably, cover anything related to technical and scientific matters. Whether DoDD 5230.24 applies is governed by the **content** of the documents, not the type of document!



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Technical Information

- *That's helpful ... but what's technical information?*
 - Technical Information is defined in E2.1.13. as “information, including scientific information, that relates to research development, engineering, test, evaluation, production, operation, use, and maintenance of munitions and other military supplies and equipment.
 - So what does this definition cover? Nearly everything!
 - But it does not cover documents categorized as cryptographic and communications security, communications and electronic intelligence, and documents in any other categories designated as excepted by the Director of the NSA and the Chief of the Central Security Service (see par. 2.4).
 - Moral of this story? Look for a Distribution Statement on all documents containing any type of technical or scientific information.



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MARKINGS

AND

LEGENDS

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Markings and Restrictive Legends

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- **Always LOOK for the marking -- "conspicuous" req't**
 - However -- cover page, inside cover, header/footer, storage media or transmittal docs
 - **ESPECIALLY** tricky with electronic documents
 - Divide up a single document into smaller components
 - Internet as a source ... check those copyright notices!

- **Always UNDERSTAND the restrictions**
 - "Easy" when it's a defined/regulated mark
 - Harder – commercial/industry practices
 - **Multiple markings – most restrictive governs**
 - Procedural requirements for release!!!!
 - Example: DFARS Standard Use & Non-Disclosure Agreement



Markings and Restrictive Legends

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- **Always REPRODUCE the markings ...**
 - **Direct: Cut – and – paste, excerpts**
 - **REMEMBER:** the governing legend may not be contained on the portion you are using
 - **CAVEAT: Electronic searching ... don't lose sight of the source**
 - **Indirect: your brain is the reproduction means**
 - **Good time to double-check whether your "paste" is an authorized use**

- **NEVER ignore or remove a restrictive legend ... except when –**
 - **You're the Controlling DoD Office (or equivalent)**
 - **Following the established protocols**



Markings and Restrictive Legends

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- **Defined or Regulated Legends**
 - **Distribution Statements (DoDD 5230.24)**
 - **For Official Use Only (AF Supp to DoD 5400.7-R)**
 - **Export Control (DoDD 5230.25)**
 - **Classified / Info Security (DoD 5200.1-R)**
 - **Proposals / Source Selection**
 - **Deliverable Data and Software under the DFARS**
 - **Only the NON-Commercial legends are specified**

- **Commercial or Industry Practices**
 - **Nearly unlimited potential for confusion, mistake**



Distribution Statements

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- *OK ... so we have to look for a distribution statement, whatever that is?*
 - What's a Distribution Statement?
 - **Defined in E2.1.5. as a “statement used in marking a technical document to denote the extent of its availability for distribution, release, and disclosure without additional approvals or authorization.”**
 - **Note that a distribution statement is “distinct from and in addition to a **security classification marking** assigned in accordance with DoD 5200.1-R.”**



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Placement of Distribution Statements

- *Now that I know what all these terms mean ... is it my job to put these things on these papers?*
- **It depends. Do you or your component generate or acquire/receive technical documents? If so, then it is your job to ensure that the proper statement is placed on the document (see par. 6.1).**
- **If not, you still have a responsibility to look for and observe the restrictions placed on the documents. Additionally, if you come across a document without a restriction, question whether it's been through the marking process before releasing the information!**



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What do I do?

- *What Marking should be used and, by the way, what do they mean?*
 - Is it unclassified? Then use distribution statement A, B, C, D, E, F, or X (see par. 6.3.1.).
 - Is it classified? Then use distribution statement B, C, D, E, or F (see par. 6.3.2.).



Distribution Statement A

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- **What does Distribution Statement A say?**
 - **“Approved for public release; distribution is unlimited.”**
 - **When can this be used? Only on unclassified documents that have been cleared for public release by the proper authority.**
 - **What can be done with Distribution Statement A documents? They may be made available or sold to the public, foreign nationals, companies, and governments (including adversary governments) and they may be exported.**



Distribution Statement B

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- **What does Distribution Statement B say?**
 - **“Distribution authorized to U.S. Government Agencies only __ (insert reason) __, __ (date of determination) __. Other requests for this document shall be referred to __ (insert controlling DoD office) __.”**
 - **This may be used on classified and unclassified documents for a variety of reasons. Consult E3.1.1.2.2. for examples.**



Distribution Statement C

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- **What does Distribution Statement C say?**
 - **“Distribution authorized to U.S. Government Agencies and their contractors __ (insert reason) __, __ (date of determination) __. Other requests for this document shall be referred to __ (insert controlling DoD office) __.”**
 - **This may be used on classified and unclassified documents for a variety of reasons. Consult E3.1.1.3.2. for examples.**



Distribution Statement D

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- **What does Distribution Statement D say?**
 - **“Distribution authorized to the Department of Defense and U.S. DoD contractors only __ (insert reason) __, __ (date of determination) __. Other requests for this document shall be referred to __ (insert controlling DoD office) __.”**
 - **This may be used on classified and unclassified documents for a variety of reasons. Consult E3.1.1.4.2. for examples.**



Distribution Statement E

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- **What does Distribution Statement E say?**
 - **“Distribution authorized to DoD components only ___(insert reason)___, ___(date of determination)___.
Other requests for this document shall be referred to ___(insert controlling DoD office)___.”**
 - **This may be used on classified and unclassified documents for a variety of reasons. Consult E3.1.1.5.2. for examples.**



Distribution Statement F

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- **What does Distribution Statement F say?**
 - **“Further dissemination only as directed by __ (insert controlling DoD office) __, __ (date of determination) __ or higher DoD authority.**
 - **This may be used on classified and unclassified documents for a variety of reasons. Consult E3.1.1.6.2. for examples.**



Distribution Statement X

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- **What does Distribution Statement X say?**
 - **“Distribution authorized to U.S. Government Agencies and private individuals or enterprises eligible to obtain export-controlled technical data in accordance with DODD 5230.25, __ (date of determination)__. Controlling DoD office is __ (insert controlling DoD office)__.”**
 - **This may be used on unclassified documents when Distribution Statements B, C, D, E, or F do not apply.**



Distribution Statements

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■ *Generic Structure*

- Distribution is authorized to [general category of recipient]
 - Inside the fence: USG or only DoD
 - Outside the fence: Contractors (to USG or DoD-only)
 - The Fence: Military or Civilian Employee . . . Not Actually the Fence

- REASON and date for the limitation

- Further distribution only by permission of Controlling Office (which is identified)



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P.I. as the REASON for a D.S.

- *Now: “Proprietary Information” as the reason:*
 - *“To protect information not owned by the U.S. Government and protected by a contractor's “limited rights” statement, or received with the understanding that it not be routinely transmitted outside the U.S. Government.”*
 - Cited for B, E, F
 - Enclosure 4: Contractor-Imposed dist stmts...

- Future: it’s so, so much more than “limited rights”
 - Model: Proprietary Information: [specific restrictions]
 - Specific-Restriction Examples: “DFARS Limited Rights” or “DFARS SBIR Rights” or “Negotiated License H-007 Contract #####...”



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Contractor-Imposed Distribution Statements

- *What are they?*
 - Distribution statements placed on contractor-generated scientific and technical information by contractors.
 - The Government distribution statements have set formats. Do Contractors have a template they must follow as well?
 - Yes. Contractor-imposed Distribution Statements are governed by Subpart 27.4 of the Federal Acquisition Regulation (the “FAR”).



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Contractor-Imposed Distribution Statements

■ When are they used?

- Whenever the Contractor is asserting rights in the information or (conversely) whenever the Contractor is asserting the Government has less than unlimited rights (e.g., “limited rights”) in the information.**
- How long are the statements effective? Until changed, cancelled under contractual terms, permission for release is given by the Contractor, or until the DoD component controlling the information notifies recipients of the document that it may be changed.**
- When the statement is no longer effective, what controls the distribution of the document? The security statement if classified and if unclassified, the appropriate Government Distribution statement.**



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Contractor-Imposed Distribution Statements

- **What are “Limited Rights?”**
 - **Defined as the right of the US Government to use, duplicate, or disclose the technical data in whole or in part by or for the US Government with the expressed limitation that such technical data without the written permission of the party furnishing such technical data may not be**
 - **Released or disclosed in whole or in part outside the Government**
 - **Used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for reproduction of computer software**
 - **Used by a party other than the Government, except for:**
 - **Emergency repair and overhaul work only by or for the Government**
 - **Release to a foreign government, as the interest of the US may require, only for information or evaluation within such government or for emergency repair or overhaul work by and for such government.**



Draft DoDI 5230.24 Enclosure 4

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- **Why are third party markings allowed?**
 - **Contractors are generally permitted to retain ownership of IP that is delivered or provided to the Government, provided that said IP was developed at private expense.**
 - **In these cases, the Government usually gets Government Purpose Rights (GPR) in this information. GPR is a license to use, reproduce, modify, release and disclose the information for Government purposes.**
 - **The rights the Government obtains in data is, again, dependent on the funding. They can be more restrictive than GPR (e.g., restricted/limited rights) or broader (unlimited rights) or the rights may be specially negotiated or determined by a commercial license contract.**



Draft DoDI 5230.24 Enclosure 4

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- **If a Contractor or a third party is going to assert that the Government has less than unlimited rights in information, what does it need to do?**
 - **It needs to MARK the information with restrictive markings.**
 - **Just as important, the marking must be appropriate to the restrictions being asserted and it must follow the format set forth in the DFARS**
 - **See DFARS subparts 227.71 and 227.72 for the markings governing technical data and computer software/computer software documentation, respectively.**



DFARS Marking Scheme

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- Non-Commercial Tech Data and Software
- Only 5 legends are permitted – generally indicates the scope of the Government's license
 1. Copyright Notice from 17 USC 401 or 402
 2. "Government Purpose Rights" – both Tech Data and
 3. "Special License Rights" – both Tech Data and Software
 4. "Limited Rights" – only for Tech Data (incl. software documentation)
 5. "Restricted Rights" -- only for Computer Software
- OK, there are a couple more
 - "SBIR Data Rights"
 - Pre-existing markings
- All other legends are **"nonconforming"**



DFARS Marking Scheme

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- **Commercial Technologies**
 - **Tech Data**: **A** restrictive legend is required under 252.227-7015(d) but ... no specific format
 - **Computer Software**: no clause, and no specific requirement for a legend – follow standard commercial practices
- **No specific legends provided for proprietary information other than data/software (e.g., non-technical info such as financial, commercial, or business information)**



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Restrictive Legends – Common Ambiguities

- **"*Company* Proprietary"**
 - Often used as generic "trade secret" mark
 - Any restrictions on use within the Govt?
 - What about our Support Contractors?
 - What about subcontractors ... working for *Company* ?
 - Possible solution: ADD information specifying contract/license

- **"© *Company* 2003" perhaps with "All rights reserved"**

- **Unmarked?**
 - Unlimited Rights – Noncommercial data/software, and arguably commercial tech data
 - This does NOT necessarily mean "public release"
 - If it's at Technical Document – it SHOULD have a Distribution Statement!!!
 - No markings required for COPYRIGHT protection
 - Markings are a CORE element for Trade Secrets, but not an absolute requirement



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- *We've been talking about this in the realm of Government Contracts, but what if there is no contract? What if we're under another regime?*
- **In these cases, the Government's rights and the form for the marking should be set forth in the terms of the legally binding agreement.**
- **In other words ... require markings and the form for them in the agreement before anything's delivered!**



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■ Reading Markings

- 1) Is there a 3rd Party marking? Read this one first and determine what rights the Government has in the information (e.g., what to whom can be distributed).
- 2) Read the distribution statement. This statement could modify (e.g., further restrict the ability to disclose the information) the 3rd Party marking.
- 3) Distribute the information in accordance with the restrictions and requirements of the distribution statement and the marking.



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- ***What if the Distribution Statement conflicts with the 3rd Party Marking?***
 - **1) Is the 3rd party marking appropriate and accurate?**
 - **2) If no, challenge the marking.**
 - **3) If yes, 3rd party marking controls, unless the Distribution Statement is more restrictive.**



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Overview

Questions & Answers



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Specific Questions

- **When the Government has GPR, is Distribution Statement C the appropriate marking to use?**
 - **What does “C” state? “Distribution authorized to U.S. Government Agencies and their contractors __ (insert reason) __, __ (date of determination) __. Other requests for this document shall be referred to __ (insert controlling DoD office) __.”**
 - **Answer? It depends. Is there a 3rd party restriction on the data? If so, this may not be appropriate. If there is no 3rd party marking or other issue (classification, etc.), “C” would probably be the appropriate marking.**



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Specific Questions

- **Is there some portion of the contractor's request for a report where the Government has Government Purpose Rights that includes a use and non-disclosure agreement (i.e., that the requestor will not use the technical data for any commercial purpose and will not release to parties other than subcontractors or potential subcontractors that also agree to use and non-disclosure restrictions).**
- **Distribution Statements do not expressly require NDAs and the like. However, if there is a 3rd party restriction that requires an NDA . . . Then you must presume the USG is bound to do so . . .**



Specific Disconnects

- **E4.1.3.2 Step 2: Apply the Distribution Statement.** The appropriate distribution statement is entirely dependent on the scope of the Government's license rights in those materials. In most cases, the reason "Proprietary Information" will provide the basis for distribution statements B, C, D, E, or F. If the Government has unlimited rights in the information, then the materials may even qualify for distribution statement A, after appropriate clearance procedures DoD Directive 5230.9 and DoDI 5230.29 reference (g) and (h).
- However, **NOTE** that "Proprietary Information" automatically limits distribution to US Government employees only. DTIC instructs controlling offices to apply Distribution B, E or F and to exclude statements C and D that authorize release to contractors in these cases.



Teaching Points

- **Proprietary Information is critical to accomplishing DoD's mission**
- **It is YOUR responsibility**
- **Proprietary Information” is a general category – it does NOT define a specific set of restrictions**
- **You MUST look beyond the Distribution Stmt**



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Questions?

**Intellectual Property Office
Acquisition Law Division (SAF/GCQ)
Department of the Air Force
Office of the General Counsel
Phone: (703) 588-xxxx
DSN: 425-xxxx**

**Richard M. Gray – x5091,
richard.gray@pentagon.af.mil**

**Harry Lupuloff – x5090,
harry.lupuloff@pentagon.af.mil**

**Dan Dzara – x5092,
david.dzara@pentagon.af.mil**





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BACKUP SLIDES

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Issues – Copyright and Data Rights

Procurement Contracts

- **The DFARS** – Defense Federal Acquisition Regulation Supplement (DoD 3210.6-R; also 32 CFR Parts 21 to 37)
 - Technical Data – DFARS Part 227.7100
 - R&D Contracting – FAR Part 35 and DFARS Part 35

- “Hybrid” Copyright and Trade Secret license in “technical data” – See DFARS 227.7103
 - 100% Govt funded → Unlimited Rights (UR)
 - Mixed Govt-private funding → Govt Purpose Rights (GPR)
 - 100% Private Funding → Limited Rights (LR)
 - Specially Negotiated License → anything LR or above
 - Special case: SBIR – treated as privately developed for at least 5 yrs

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Issues – Copyright and Data Rights

Procurement Contracts (cont'd)

- **Doctrine of Segregability** (DFARS 227.7103-4(b))
 - Source of funding determination is done at the “lowest practical level”
 - Divide up the item into its component parts and allocate rights to each component

 - **Example**: mixed funding project – GPR by default
 - Some elements 100% Govt → Unlimited Rights
 - Some elements mixed → Govt Purpose Rights
 - Some elements 100% private → Limited Rights



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Why is DoD “Special”

- Sharing results of R&D efforts with the public **IS** a goal for DoD, but ...
- Our R&D mission is more focused on our own, internal needs – developing defense technologies to ensure the warfighting dominance of the United States of America
- In the post-9/11 world, we are also carefully re-examining the type of information that we make available to the general public ... which includes Osama Bin Laden



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Grants, Cooperative Agreements, and Technology Investment Agreements

- **The DoDGARs** – DoD Grant and Agreement Regulations (DoD 3210.6-R; also 32 CFR Parts 21 to 37)

- **Grants and CAs, generally:** USG’s copyright license in
 - Any work developed under the award
 - Any “data first produced under the award”
 - To reproduce, **publish**, and otherwise use the work
 - For “**federal purposes**” (not defined)
 - And to authorize others to do so

- **TIAs:** recommends a “**Government Purpose**” license – but allows for flexibility, depending on the needs of the parties
 - “Government Purpose” is defined same as in the DFARS →



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Issues – Copyright and Data Rights

Procurement Contracts (cont'd)

- From clause 252.227-7013, paragraph (a) definitions:

(12) “Government purpose rights” means the rights to—

- (i) Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and
- (ii) Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes.

(11) “Government purpose” means--

- any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations.
- Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.



Intellectual Property Basics

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- USD(ATL) Guide: "Intellectual Property: Navigating Commercial Waters" (<http://www.acq.osd.mil/dpap/Docs/intelprop.pdf>)
 - Chapter 2 – Intellectual Property Framework
 - Table 2.1: Most Common Types of IP Protection
 - Tables 2.2 & .3: Overview of DFARS data & software rights
 - Appendix B: all of the grotesque details behind Table 2.1
- Patents & Trademarks:
 - USPTO Website: <http://www.uspto.gov>
- Copyrights:
 - Copyright Office: <http://www.loc.gov/copyright/>
 - CENDI – FAQ About Copyright:
<http://www.dtic.mil/cendi/publications/00-3copyright.pdf>



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Table 2-2. Rights¹ in Noncommercial Computer Software (CS) and Technical Data (TD) Covering Noncommercial Items

Rights Category ²	Applicable to TD or CS?	Criteria for Applying Rights Category	Permitted Uses within Government	Permitted Uses outside Government ³
Unlimited Rights (UR)	Both TD and CS	Development exclusively at Government expense; ⁴ also any deliverable of certain types—regardless of funding. ⁵	Unlimited; no restrictions.	
Government Purpose Rights (GPR)	Both TD and CS	Development with mixed funding. ⁴	Unlimited; no restrictions.	Only for “Government purposes”; no commercial use.
Limited Rights (LR)	TD only	Development exclusively at private expense. ⁴	Unlimited, except may not be used for manufacture	Emergency repair/overhaul; evaluation by foreign government.
Restricted Rights (RR)	CS only	Development ¹ exclusively at private expense. ⁴	Only one computer at a time; minimum backup copies; modification.	Emergency repair/overhaul; certain service/maintenance contracts.
Prior Government Rights	Both TD and CS	Whenever Government has previously acquired rights in the deliverable TD/CS	Same as under the previous contract.	
Specifically Negotiated License Rights (SNLR)	Both TD and CS	Mutual agreement of the parties; use whenever the standard rights categories do not meet both parties’ needs	As negotiated by the parties; however, must not be less than LR in TD, and must not be less than RR in CS. ⁶	

Notes:

- Critical Need to Specify Deliverables. The standard clauses address rights but do *not* include delivery requirements. The contract must explicitly specify the content, format, and delivery medium for all IP deliverables that are necessary to meet DoD’s needs. For TD, it is necessary to specify the level of detail and requirements for delivery in preferred electronic/digital formats. For CS, it is critical to specify requirements for both the executable code and the source code.
- Mandatory Listing Requirements. All TD and CS to be delivered with less than UR *must* be identified in a list attached to the contract. Pre-award listing requirements are specified at DFARS 252.227-7017; post-award requirements are at DFARS 252.227-7013(e) and -7014(e).
- Release Procedures/Restrictions. All authorized third-party recipients of TD/CS with other than UR must either sign the standard NDA from DFARS 227-7103-7 or receive the TD/CS under a contract containing DFARS 252.227-7025. Additional notice requirements exist for releases of LR data or RR software.
- Source of Development Funding—at the “Lowest Practicable Level.” For TD, the determination is based on the funding for the development of the item, component, or process (ICP) to which that data pertains (vice the development of the technical data itself). For CS, the determination is based on the source of funding for that software. If the ICP or software is developed with mixed funding, the default GPR license may be inequitable if the Government has funded only a small portion of the overall development costs. This imbalance is resolved by determining the source of funding at “lowest practicable level”: the deliverable ICP or software is divided into segregable components (e.g., sub-elements of ICPs, or sub-routines of CS), and the funding determination is made for each of the components individually. For TD, see DFARS 227.7103-4(b) and 252.227-7013(a)(6)-(9); for CS, see DFARS 227.7203-4(b) and 252.227-7014(a)(6)-(9).
- Unlimited Rights—Regardless of Funding Source. Paragraph (b)(1) of the DFARS 252.227-7013 and -7014 clauses establish numerous categories for which the Government is entitled to receive UR, regardless of which party funded the development of the underlying technology. For example, “form, fit, and function” data; or data/software that is publicly available without restrictions. See 10 U.S.C. 2320(a)(2)(C).
- Minimum Rights. For TD, the minimum rights are established by statute (10 U.S.C. 2320) and are nonnegotiable. For CS, the minimum rights are based solely on the DFARS, for which the parties could seek a deviation in circumstances in which DoD’s requirements can be satisfied with less than RR.



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Table 2-3. Rights^{1,2} in Commercial Computer Software^{3,4} (CS) and Technical Data (TD) Covering Commercial Items^{3,4}

Rights Category ⁵	Applicable to TD or CS?	Criteria for Applying Rights Category	Permitted Uses within Government	Permitted Uses outside Government
Unlimited Rights (UR)	TD only	Any TD of certain specified types or classes, regardless of commercial status. ⁶	Unlimited; no restrictions.	
Standard DFARS "7015" Rights	TD only	Default rights category for all TD covering commercial items except those qualifying for UR as stated above.	Unlimited, except may not be used for manufacture.	Only for emergency repair overhaul.
Standard Commercial License	CS only	Default rights category for all commercial CS.	As specified in the license customarily offered to the public, DoD must negotiate for any specialized needs.	
Specifically Negotiated License Rights (SNLR)	Both TD and CS	Mutual agreement of the parties; should be used whenever the standard rights do not meet both parties' needs.	As negotiated by the parties; however, by statute, the Government cannot accept less than the minimum standard 7015 rights in TD. ⁷	

Notes:

- Critical Impact on IP Delivery Requirements. DoD policy is to acquire, in addition to lesser rights, only those IP deliverables that are customarily offered to the public. In many cases this will be substantially different (e.g., less detailed TD; no source code for CS) than the deliverables DoD typically receives for noncommercial TD or CS. DoD must specifically negotiate for any additional IP deliverables that it requires.
- Key: Early Identification of Commercial Technologies. Because both the IP deliverables and the license rights are significantly affected when acquiring commercial technologies, it is critical to identify how these issues affect the acquisition strategy early in the acquisition process.
- Definitions. "Commercial item" is defined at FAR 2.101 (and 52.202-1), and "commercial computer software" is defined in DFARS 252.227-7014(a)(1).
- Adapting/Modifying Commercial Items. Commercial items may be modified to meet DoD's requirements without losing their commercial status, as long as the adaptations qualify as "minor modifications" or modifications "of a type customarily available in the commercial marketplace." See FAR 2.101(c), and DFARS 252.227-7014(a)(1) and (12).
- DFARS Rights versus Standard Commercial Licenses. Rights in TD covering commercial items are specified at DFARS 252.227-7015; the default rights are similar to limited rights that apply to noncommercial TD. There is no clause covering commercial CS; DoD takes the rights customarily offered to the public (often a "shrink-wrap" or "click-wrap" license) unless those rights do not meet DoD's minimum needs or violate Federal procurement law. In all cases, a copy of the standard commercial license agreement or any SNLR must be attached to the contract.
- Unlimited Rights—Regardless of Commercial Status. DFARS 252.227-7015(b)(1) lists numerous categories of TD for which the Government is entitled to receive UR—regardless of the commercial status or source of funding for the technology. For example, "form, fit, and function" data or data/software that is publicly available without restrictions. The categories are based on 10 U.S.C. 2320(a)(2)(C).
- Minimum Rights. For TD, the minimum rights are established by statute (10 U.S.C. 2320) and are nonnegotiable.



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Procurement Contracts –

Tech Data & Computer Software

- **Hybrid license – license rights cover both**
 - **Copyright**
 - **Trade secret**

- **Critical Distinction: Noncommercial vs. Commercial Technologies**

- **Noncommercial – rights generally based on relative funding for development**

- **Commercial – generally take minimum rights to use**
 - **Tech Data: ~ Limited Rights**
 - **Software: standard commercial license -- as long as...**

Integrity - Service - Excellence



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Procurement Contracts –

Deliverables vs. Rights

- Standard clauses do NOT include delivery requirements
- Content
- Recording/storage format
- Delivery medium