Do You Own It or Not? - A Primer on Noncommercial Software Licensing

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<th>Report Date</th>
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<td>APR 2010</td>
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**Title andSubtitle**

Do You Own It or Not? - A Primer on Noncommercial Software Licensing

**Performing Organization**

Carnegie Mellon University, Software Engineering Institute, Pittsburgh, PA, 15213

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**Supplementary Notes**

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**Abstract**

[Abstract content]

**Subject Terms**

[Subject terms]

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Agenda

Introduction
Do You Own It Or Not – The Answer
What the Regulations Say
License Types and the Rights They Convey
Defining Agency Needs
Ensuring You Get the Software Computer Rights You Expected
Summary
Introduction
Background – Finding the Pain of Software Rights

• PEO representatives from across the Services
• Loosely structured discussion to determine pain points of current programs that could have been prevented by better RFPs and contracts
• Software rights loomed large
Background - A Chance Encounter

A developer/contractor was selling logistics software to the Services and was concerned about competitors being able to see his code.

- Original code developed at private expense by contractor’s company
- Contractor’s company merged with another company under new name, and contractor was a partner
- A large software company added money to the pot to further develop the product
- A piece of the product was developed under contract to one of the Services
- There were no discussions about rights to the intellectual property or software licenses with the Government
Workshop on Acquiring Rights to Computer Software and Technical Data

Presented in November 2008 to PEO representatives and contracting officers to work through conditions that could affect future software licensing needs

Software Criticality Issues

• Changes to integration and interface needs; software reuse; insufficient reliability, availability, and maintainability (RAM); discovery of high risk vulnerabilities

Programmatic Issues

• Changes in policies; inadequate market research; contractual changes; lack of software documentation; budget cuts and inadequate estimation practices; decisions regarding Joint and foreign government use; lack of appropriate planning for sustainment; changing information assurance certification and accreditation
Do You Own It or Not?
The Answer
Intellectual Property vs. Licensing - Current Department of Defense Framework

DoD does not “own” the technical data and computer software included in deliverables, even if the Department paid for 100 percent of the development costs.

As a general rule under Government contracts, the contractor-developer is allowed to retain ownership of the technical data and computer software it developed.

The Government receives only a license to use that technical data and computer software.

The scope of the license depends on the needs of the agency, source of funding for development, and the negotiations between the parties.
What the Regulations Say . . .
Federal Acquisition Regulation (FAR) – takes precedence over all other regulations.

Defense Federal Acquisition Regulation Supplement (DFARS) – includes DoD-unique process for acquiring intellectual property (IP) license rights for computer software that is developed or delivered under a contract.
Acquisition Regulations for Computer Software (cont.)

DFARS SUBPART 227.72 - Rights In Computer Software and Computer Software Documentation

• Prescribes policies and procedures for the acquisition of computer software and computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclose such software or documentation

• Does not apply to computer software or computer software documentation acquired under GSA schedule contracts

DFARS SUBPART 252.227 – In combination with FAR, provides contract clauses for inclusion in RFPs and contracts
"Other Transaction" Authority (OTA)

Awarded pursuant to authority of 10 U.S.C. 2371 and generally not subject to the Federal Acquisition Regulation (FAR), its supplements, or laws

Two types of commonly-used OTAs

- “Other Transactions” for prototype projects – authorized under certain circumstances for prototype projects directly relevant to weapons or weapon systems.
- “Other Transactions” for basic, applied or advanced research projects in accordance with 10 U.S.C. 2371

OTA for prototype authority provides flexibility to negotiate terms and conditions appropriate for the acquisition

When Do You Plan for Rights That Will Be Acquired?

DoD requires that the Data Management Strategy (DMS), which is part of the Acquisition Strategy, include a licensing strategy for noncommercial computer software.

These documents must be completed prior to the solicitation.

Based on this strategy, the offeror/contractor will provide a list of all noncommercial software products that have restrictions as part of the proposal and prior to award of a contract.
License Types and the Rights They Convey
High Level Explanation of Rights

Rights that a licensor grants to the Government are:

- Unlimited rights
- Government purpose rights
- Restricted rights (noncommercial computer software and software documentation)
- Specifically negotiated license rights
- Prior Government Rights
- Commercial license
## Comparison of License Rights

<table>
<thead>
<tr>
<th>UNLIMITED RIGHTS</th>
<th>GOVERNMENT PURPOSE RIGHTS – GPR</th>
<th>RESTRICTED RIGHTS (NONCOMMERCIAL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Broad use and disclosure by Government for any purpose whatsoever and for commercial purpose</td>
<td>Disclosure within Government; disclosure outside for Government purposes; supports commercial development by developer; GPR period negotiated; after GPR period, becomes unlimited rights</td>
<td>Limited to one terminal or central processing unit; transfer to other Gov't agency without permission; contractors can diagnose, modify etc with signed disclosure agreement</td>
</tr>
</tbody>
</table>

*Developed exclusively with Government funds*  *Developed with mixed funding*  *Developed exclusively at private expense*
**Comparison of Licensed Rights (cont.)**

<table>
<thead>
<tr>
<th>SPECIFICALLY NEGOTIATED RIGHTS</th>
<th>PRIOR GOVERNMENT RIGHTS</th>
<th>Note: Commercial Software</th>
</tr>
</thead>
<tbody>
<tr>
<td>Modifications to unlimited, GPR, and restricted rights by mutual agreement; shall not provide the Government lesser rights than in previous clauses; contractors are not required to provide the additional rights</td>
<td>Terms based on pre-existing rights, unless—&lt;br&gt; (i) The parties have agreed otherwise; or&lt;br&gt; (ii) Any restrictions have expired or no longer apply</td>
<td>There is no specific contract clause governing the Government's rights in commercial computer software or commercial computer software documentation per 227.72. User rights are the same as those of the public and included in the commercial license agreement.</td>
</tr>
</tbody>
</table>
Defining Agency Needs
What Rationale Do You Use to Select License Type?

DoD policy for noncommercial computer software is “to acquire only the computer software and computer software documentation and the rights in such software or documentation, necessary to satisfy agency needs”

[DFARS 227.7203-1]
Four Questions to Determine the Agency’s Licensing Needs for Noncommercial Software

X. Who needs to use or modify the product at various times of the product lifecycle and to what extent?

X. What restrictions on access by terminals and central processing units or on transfer to other Government agencies are acceptable?

X. Are there any plans that the product will be developed or used for commercial purposes?

X. Who is going to fund or has funded the noncommercial computer software development and to what extent?
From Assumptions to Licensing Decisions

1. Identify assumptions.

**Example Assumption for Software Criticality:**
The system is highly reliant on the software and is complex; so software is critical to the system and mission.
Forming Agency Needs and Licensing Decisions for Noncommercial Software

1. Identify assumptions.

2. Construct one or more high-level statements that describe the Government’s plan to support the assumption.

Example Plan:
The Government must ensure operations and availability during the life of the system.
Forming Agency Needs and Licensing Decisions for Noncommercial Software (cont.)

1. Identify assumptions.
2. Construct one or more high-level statements that describe the Government’s plan to support the assumption.
3. Identify the necessary capabilities/decision drivers that the Government must have to be successful with its plan.

Example Capability/Decision Drivers:
The Government must have:

- access to all code, tools, test scripts, etc. to repair defects;
- legal rights to perform or authorize others
- authority to engage competing contractor, including creating derivative works,
- qualified talent available throughout life cycle
Forming Agency Needs and Licensing Decisions for Noncommercial Software (cont.)

1. Identify assumptions.
2. Construct one or more high-level statements that describe the Government’s plan to support the assumption.
3. Identify the necessary capabilities/decision drivers that the Government must have to be successful with its plan.
4. Assign a numerical or rank order score to each decision driver to distinguish higher priorities from lower ones.

**Example Prioritization:**
- Priority 3 - access to all code, tools, test scripts, etc to repair defects;
- Priority 1 - legal rights to perform or authorize others
- Priority 2 - authority to engage competing contractor, including creating derivative works,
- Priority 4 - qualified talent available throughout life cycle
Forming Agency Needs and Licensing Decisions for Noncommercial Software (cont.)

1. Identify assumptions.
2. Construct one or more high-level statements that describe the Government’s plan to support the assumption.
3. Identify the necessary capabilities/decision drivers that the Government must have to be successful with its plan.
4. Assign a numerical or rank order score to each decision driver to distinguish higher priorities from lower ones.
5. Select the option that best supports each decision driver.

**Example Prioritization:**
- Priority 3 - access to all code . . . Any type
- Priority 1 - legal rights . . . Unlimited
- Priority 2 - authority . . . Unlimited
- Priority 4 - qualified talent . . . Any type
1. Identify assumptions.

2. Construct one or more high-level statements that describe the Government’s plan to support each assumption.

3. Identify the necessary capabilities/decision drivers that the Government must have to be successful with its plan.

4. Assign a numerical or rank order score to each decision driver to distinguish higher priorities from lower ones.

5. Select the option that best supports each decision driver.

6. Review the selections and the priority weights to select the best option.
And the Winner Is:

CRITICALITY ASSUMPTION: The system is highly reliant on the software and complex, so is critical to the system.

CRITICALITY PLAN: The Government will ensure operations and availability during the life of the system.

<table>
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<tr>
<th>CAPABILITY/DECISION DRIVERS</th>
<th>AGENCY NEED</th>
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<tbody>
<tr>
<td></td>
<td>Unlimited Rights</td>
</tr>
<tr>
<td>P3 - Access to all code, tools, test scripts, etc to repair defects</td>
<td>X</td>
</tr>
<tr>
<td>P1 - Legal rights to perform any necessary work or authorize others to do it</td>
<td>X</td>
</tr>
<tr>
<td>P2 - Authorize competing contractor to modify work, including creating derivative works</td>
<td>X</td>
</tr>
<tr>
<td>P4 - Qualified talent available throughout life cycle</td>
<td>X</td>
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Four Questions to Determine the Agency’s Licensing Needs for Noncommercial Software

X. Who needs to use or modify the product at various times of the lifecycle and to what extent?

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X. Who is going to fund or has funded the noncommercial computer software development and to what extent?
Ensuring You Get the Software Computer Rights You Expected
Contract Clauses in the RFP or Contract Are Not Enough - CDRLs

227.72 - Noncommercial Computer Software and Computer Software Documentation

• 227.7203-3 Policy
  – (b) Solicitations and contracts shall—
    – Establish separate contract line items, to the extent practicable, for the computer software or computer software documentation to be delivered under a contract and require offerors and contractors to price separately each deliverable data item
**Contract Clauses in the RFP or Contract Are Not Enough – Example CDRL Topics**

Important CDRLs for software acquisitions include (but are not limited to):

<table>
<thead>
<tr>
<th>Source code and source code listings</th>
<th>Software Requirements Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Software Interface Design Description</td>
<td>Object code listings</td>
</tr>
<tr>
<td>Software Design Description</td>
<td>Software Test Plan</td>
</tr>
<tr>
<td>Test procedures, scripts, cases, and results</td>
<td>Algorithms and formulae</td>
</tr>
<tr>
<td>Processes, flow charts, and related material that would enable the software to be reproduced, recreated, or recompiled</td>
<td>Owners manuals</td>
</tr>
<tr>
<td>Licenses</td>
<td>Users’ manuals</td>
</tr>
<tr>
<td>Software Architecture Description</td>
<td>Installation instructions</td>
</tr>
</tbody>
</table>
Contract Clauses in the RFP or Contract Are Not Enough – CDRLs and Restrictive Markings

Sample CDRL-Software End Product

... Item to be clearly labeled with the license terms associated with the product as appropriate (“Unlimited Rights,” “Government Purpose Rights,” “Limited Rights,” or other). If the item consists of elements with different levels of licenses, each constituent element is to be listed and labeled with the appropriate rights.

Contract Clauses in the RFP or Contract Are Not Enough – Restrictive Markings on Software

Sample Source Code Headers

Unlimited

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The Most Important Advice You Can Get

In determining the approach for the acquisition strategy, RFP, and contract, consult:

- Legal Counsel
- Contracting Officer

EARLY AND OFTEN
“Program managers should consider the cost and benefits of acquiring data rights—or consequences of not obtaining them.”

REF: Kove, L. S. The Importance of Data and Data Rights. Defense AT&L: July-August 2007
Summary

- FAR and DFARS provides the policy, definitions, and contract clauses to be used in determining and requiring rights to computer software etc.
- Data rights strategies need to be anticipated at the beginning of the acquisition effort to avoid surprises.
- Rights to computer software, documentation, and technical data must be incorporated into the acquisition strategy and the RFP.
- Data rights strategies must take into account both expected and possible changes in circumstances throughout the life of the product.
- Computer rights restrictions must be reflected in contract clauses, lists of deliverables, and as markings in/on products themselves.
Questions
References and Additional Resources

- Federal Acquisition Regulation (FAR)
- Defense Federal Acquisition Regulation Supplement (DFARS)
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