

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

2019 - 2147

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THE BOEING COMPANY,

*Appellant,*

v.

SECRETARY OF THE AIR FORCE,

*Appellee.*

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Appeal from the Armed Services Board of Contract Appeals in  
Nos. 61387, 61388, Administrative Judge Michael N. O'Connell,  
Administrative Judge Richard Shackelford, Administrative Judge J.  
Reid Prouty.

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**REPLY BRIEF OF APPELLANT THE BOEING COMPANY**

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June 10, 2020

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## CERTIFICATE OF INTEREST FOR THE BOEING COMPANY

1. The full name of every party or amicus represented by me is:

The Boeing Company

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2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

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3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

The Boeing Company has no parent corporation. As of June 10, 2020, no corporation had filed a Schedule 13 with the U.S. Securities and Exchange Commission disclosing ownership of ten percent or more of the stock of The Boeing Company.

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4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal is:

None

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Date: June 10, 2020

/s/ Scott M. McCaleb

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## INTRODUCTION

The Government’s interpretation of Defense Federal Acquisition Regulation Supplement (“DFARS”) 252.227-7013(f) defies that regulation’s plain meaning, because the Government refuses to coherently and concordantly apply—as a whole—its plain language. This regulation comprises just two complementary sentences; the Government, however, propounds an interpretation that would jettison the first and focus exclusively on just nine words in the second. This approach flouts the interpretive canon requiring reading “the text of the regulation . . . as a whole,” *Aqua Products, Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017), instead of reading “isolated sentences,” *Beecham v. United States*, 511 U.S. 368, 372 (1994). The Government’s brief fails even to address these well-settled principles and cases.

The Boeing Company’s (“Boeing’s”) interpretation, on the other hand, is faithful not only to the entirety of the plain text, but also to the regulatory framework and to the legislative and regulatory history upon which Section 7013(f) was promulgated. In its entirety, the first paragraph of Section 7013(f) states as follows:

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 f(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph f(2) of this clause; the limited rights legend at paragraph f(3) of this clause; or the special license rights legend at paragraph f(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

In short, a contractor can assert “restrictions on *the Government’s* rights” in deliverable technical data if the contractor marks the data with one of the legends designated in the second sentence. The regulation says nothing about—and thus does not apply to—markings that restrict only third party rights. The Government’s interpretation of Section 7013(f) would be potentially correct only if the first sentence of the regulation were ignored.

The Government attempts to bolster its interpretation by asserting a series of arguments irrelevant to the plain language of Section 7013(f). These arguments fail as well.

*First*, the Government argues that the regulatory history supports its interpretation because that history does not specifically address third party markings. Regulatory history, however, cannot overcome the plain meaning of Section 7013(f), and the history’s silence about

third party markings is entirely consistent with Boeing's interpretation of the regulation: that it focuses exclusively on restrictions on *the Government's* rights, not on those of third parties. This is unsurprising, given the DFARS' purpose of regulating the relationship between the Government and its contractors.

*Second*, the Government argues that Boeing's marking impairs its unlimited rights license—an argument the Armed Services Board of Contract Appeals (“ASBCA” or “Board”) correctly rejected. The Board recognized that Boeing's marking *expressly acknowledges* the Government's unlimited rights, and it calls those rights out to others. To the extent that Boeing's marking directs that any third-party use must be authorized by the Government or by Boeing, it is not an impairment on the Government's rights, but protects them—which is in fact exactly what the DFARS contemplates.

*Finally*, the Government contends that Boeing waived its argument that the Board's interpretation conflicts with the mandate of 10 U.S.C. § 2320(a) requiring that the DFARS not impair contractor rights in technical data. The Government admits, however, that “Boeing

*squarely presented* this issue to the Board.”<sup>1</sup> Gov. Br. at 53. The fact that Boeing and the Government agreed that the Board had decided the interpretive question before it, thus resolving the entire appeal, does not constitute a waiver of Boeing’s argument that the Board erred by failing to interpret Section 7013 in harmony with 10 U.S.C. § 2320. Moreover, this Court may decide the issue in any event because regulatory interpretation is a matter of law, and the parties have thoroughly briefed the Board’s failure to construe Section 7013(f) in harmony with Section 2320. *Am. Bankers Ass’n v. United States*, 932 F.3d 1375, 1385 n.7 (Fed. Cir. 2019) (“[A]n appellate court may choose to decide [an] issue even if not passed on by the trial court’ where the issue ‘is one of law’ and ‘has been fully vetted by the parties on appeal.’”).

For the reasons discussed in Boeing’s opening brief and below, the Board’s decision is wrong as a matter of law, and this Court should reverse and remand for a decision in Boeing’s favor. In addition, the Board’s decision is ill conceived. As noted by *amici*, The Chamber of

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<sup>1</sup> All emphases are added unless noted otherwise.

Commerce of the United States and The Professional Services Council, the ASBCA’s decision—if left to stand—could have potentially far reaching and deleterious effects on technological innovation. *Amici* foresee that the decision likely will “adversely impact businesses and innovators who license technology . . . to the federal government” by “prevent[ing] companies from validly notifying the public about ownership rights in technical data and intellectual property developed for and licensed to the federal government.” ECF No. 19 at 2. We respectfully submit that this public policy ground supports Boeing’s interpretation, as well. Accordingly, we request that the Court overturn the Board’s decision.

## ARGUMENT

### I. **The Plain Language of Section 7013(f) Compels Boeing’s Interpretation.**

The Government argues that the Board correctly held that Section 7013(f) applies to *all* legends delineating restrictions on the use of a contractor’s technical data, not just to legends restricting *the Government’s* rights. For several reasons, chief among which is the plain language of Section 7013(f), the Government and the Board are incorrect, and the Board’s decision must be reversed.

**A. Boeing's Interpretation Is Faithful to the Text of Section 7013(f), Gives Meaning to All Parts, and It Comports with the DFARS' Context and Framework.**

Section 7013(f) comprises just two complementary sentences. The first sentence of Section 7013(f) provides that a contractor seeking to restrict *the Government's* rights must mark its technical data; the second sentence dictates which such markings are permissible. Read together, these sentences provide for the only markings available to restrict *the Government's* rights in technical data and have nothing to do with markings applied to restrict *third party* rights. This controlling interpretation is based on a plain reading of the entirety of that language, construing the language "both as a whole and in the context of its surrounding sections." *Aqua Prods.*, 872 F.3d at 1316.

Indeed, this interpretation is grounded in four salient points that emerge from the plain language of Section 7013(f). Boeing Br. at 35-36. First, Section 7013(f) focuses exclusively on restrictions asserted on *the Government's* rights in technical data. Second, Section 7013(f) provides that the method for asserting those restrictions on *the Government's* rights is by marking the data delivered to the Government. Third, there are only four permissible markings a

contractor may use to restrict *the Government's* rights in such data; each actually restricts the Government's rights. Fourth, if the contractor restricted *the Government's* rights in technical data under a prior government contract, it may continue to mark those data with the prior restrictive legend. These four points compel Boeing's interpretation that the only markings governed by Section 7013(f) are markings that restrict the Government's rights. Markings restricting unauthorized third-party use are not implicated.

Moreover, this interpretation is consistent with the purpose of the DFARS: although the DFARS establishes the rights and obligations of the Government vis-à-vis its contracting partners, it does not regulate such rights and obligations of contractors vis-à-vis *third parties*. See DFARS 201.101. In the same way, nothing in Section 7013(f) restricts markings directed to *third party* rights.

**B. The Government's Interpretation Violates Binding Canons of Construction by Failing To Read Adjacent Sentences Together.**

In principle, the Government accepts that the plain language of Section 7013(f) should control its interpretation. Gov. Br. at 25. Like the Board, however, the Government views the interpretation of Section

7013(f) as demanding a false choice between the first and second sentences of that section. *See* Appx12 (“Boeing focuses on the first sentence . . . . The government focuses on the second sentence . . . . We agree with the government.”); Gov. Br. at 26 (“Here, the operative sentence in paragraph (f) is the second sentence . . . .”) (italics in original). That approach is wrong.

Discerning the plain meaning of a regulation requires consideration of “the text of the regulation . . . **as a whole**,” *Aqua Prods.*, 872 F.3d at 1316, “not of isolated sentences,” *Beecham*, 511 U.S. at 372. *See also Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1577 (Fed. Cir. 1995) (en banc). The Government’s brief is tellingly silent with respect to this controlling canon and to the cases cited in Boeing’s opening brief. Instead, the Government flatly declares that “there is no natural relationship between the first and second sentences of paragraph (f),” Gov. Br. at 33, and, focusing exclusively on the second sentence in Section 7013(f), asserts that “[t]hat sentence”—i.e., the second sentence—“makes no distinction between legends that restrict the Government’s rights and legends that do not.” *Id.* at 27. It cites not a single case, however, that would permit reading adjacent sentences in such strict isolation.

The Government argues that the two sentences of Section 7013(f) should not be read together because they “address two separate issues.” Gov. Br. at 34. Specifically, the “first sentence of paragraph (f) serves the distinct function of making clear the method for restricting the Government’s rights,” *id.* at 35; the “second sentence, on the other hand, sets forth a limited universe of authorized legends.” *Id.* at 36. What the Government’s argument ignores is that the “method for restricting the Government’s rights” set forth in the first sentence is to apply one of the “authorized legends” referenced in the second sentence. *See id.* at 35, 36.

The Government also argues that, because the Department of Defense (“DoD”) used the word “marking” in the first sentence and the word “legends” in the second sentence, there is no relationship between the two sentences. Gov. Br. at 32-33. The Government admits, however, that “marking” is a verb describing the act required to “assert restrictions on the Government’s rights.” *Id.* at 32. “Legends,” in turn, is a noun referring to the language that a contractor applies when “marking” its technical data *as required by the first sentence*. The DFARS thus makes clear that “markings,” as a noun, is synonymous



with “legends,” with either term relating solely to restrictions on the Government’s rights.<sup>2</sup>

In further support of its dissection of Section 7013(f), the Government advances three primary arguments, but none is availing. First, the Government points to regulatory history regarding an entirely different, inapposite section of the DFARS—a section addressing rights in software, not rights in technical data. Gov. Br. at 27 (citing DFARS 252.227-7014(f)). This argument is doubly misguided because (a) regulatory history cannot overcome the plain language of the regulation, and (b) the regulatory history cited does not relate directly to Section 7013(f). It is revealing that the Government must rely for its argument on the history of *other* DFARS sections in order to interpret the second sentence of Section 7013(f), rather than to simply read the immediately preceding sentence.

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<sup>2</sup> DFARS 227.7103-10(b)(1) explains that Section 7013(f) “[r]equires a contractor that desires *to restrict the Government’s rights* in technical data to place *restrictive markings* on the data, provides instructions for the placement of *the restrictive markings*, and authorizes the use of *certain restrictive markings*[.]”

Compounding these problems, the Government also misreads the history it cites. In promulgating Section 7014, *Rights in noncommercial computer software and noncommercial computer software documentation*, DoD considered scenarios in which contractors intend to integrate commercial software with Government-funded software in executing a government contract. The DoD suggested that a contractor “**might consider** using a marking authorized by [Section 7014] or a marking agreed to by the contracting officer” to protect its interests in connection with such derivative noncommercial software. Gov. Br. at 27-28. On this tenuous basis, the Government contends that contractors have only these two options to protect noncommercial technical data. The Government is mistaken.

DoD’s comments responded to a concern that the proposed regulations would “require commercial software manufacturers to place government markings on such software” or risk “the Government’s obtaining unlimited rights in unmarked commercial computer software.” 60 Fed. Reg. 33,464, 33,465 (June 28, 1995). This context is critical, because it demonstrates that DoD was only suggesting ways contractors **might mark** their software to highlight restrictions on **the**

**Government's** rights in that software. Nothing about how a contractor might choose to restrict **the Government's** use of its software, however, is relevant to whether Section 7013 prohibits proprietary **third party markings** on noncommercial technical data.<sup>3</sup>

Second, the Government again reaches outside of Section 7013 (a section addressing **noncommercial** data) to argue that “the distinct, more liberal approach for **commercial** data legends in DFARS 252.227-7015 demonstrates the flaw” in Boeing’s interpretation. Gov. Br. at 33-35. This argument is inapposite because commercial data rights regulations are irrelevant to this appeal. In any event, the absence of a prescribed legend in Section 7015 reinforces, rather than undermines, the relationship between the two sentences of Section 7013(f). Section

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<sup>3</sup> The Government’s reliance on DFARS 252.227-7025 (Gov. Br. at 34) is also misplaced. That clause ensures that contractors who receive technical data or computer software from the Government respect the scope of any restriction **on the Government’s rights** in those items. If the contractor exceeds those restrictions, the contractor must indemnify the Government for any resulting claims or liabilities. *See* DFARS 252.227-7025(c)(1).

7015 has no counterpart to the first sentence of Section 7013(f) because the default license rights under Section 7015 limit the Government to using or disclosing most commercial data “only within the Government[;]” contractors need not affirmatively assert these restrictions. DFARS 252.227-7015(2); DFARS 227.7102-2(a). Logically, then, there is no need, either, for a counterpart to the second sentence of Section 7013 in Section 7015.<sup>4</sup>

Third, the Government contends that the two sentences in Section 7013(f) are unrelated because the second sentence does not repeat the words “restrictions on the Government’s rights” contained in the first sentence. Thus, the Government accuses Boeing of trying “to rewrite the -7013 clause by inserting words into the clause,” while it isolates the second sentence and reduces its plain language to the words “only the following legends are authorized under this contract.” Gov. Br. at 21, 32. There can be no reasonable debate, however, that the markings

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<sup>4</sup> Like the rest of the data rights regulations, Section 7015 is focused on *the Government’s* rights, not on third parties’ rights. This is confirmed in the very commentary cited by the Government. See 60 Fed. Reg. at 33,465 (“Marking is not mandatory but contractors must mark when they desire to restrict *the Government’s* rights . . .”).

described in Section 7013(f) are not, *per se*, the “only” markings permitted on technical data.

The Board itself implicitly recognized that such a reading of the second sentence would exclude other markings required by law, such as export control markings under International Traffic in Arms Regulations, DoD distribution statements, and destruction notices. *See* Appx13. The Board mistakenly concluded that the clause applies to all “markings concerning data rights.” *Id.* That interpretation cannot be correct without ignoring the plain language of both sentences, read as a whole, dictating that Section 7013(f) is confined to markings that “restrict[] . . . the Government’s rights” in technical data.

The Government also argues that the sentences in Section 7013 ***must be*** decoupled because, otherwise, there would be no constraint on the markings contractors may place on technical data. Gov. Br. at 41-42. Whatever limitation the Government might think should exist on a contractor’s ability to mark technical data as to third party rights, the solution is not found in 7013(f) because that section is confined to markings governing Government rights, and simply does not address third party rights.

**C. The Regulatory Scheme Strongly Supports Boeing's Interpretation.**

The Government contends that other parts of Section 7013, and other DFARS provisions, undermine Boeing's interpretation because those provisions would not apply to Boeing's third party marking. Gov. Br. at 41-43. But these other regulatory parts and provisions are irrelevant here; moreover, they actually support Boeing's argument, because they also concern restrictions solely regarding *the Government's* rights, not the rights of third parties.

First, the Government contends that even though Section 7013(e) requires a contractor's "[i]dentification" "of data to be furnished with restrictions on use," that would not require the disclosure of Boeing's markings because, "[u]nder Boeing's theory, the contractor has no obligation to disclose other restrictions on the data." Gov. Br. at 42-43. That is correct. The distinction is explicit in the text of Section 7013(e), which requires the contractor to identify all asserted restrictions on *the Government's* rights in an assertions table that states: "The Contractor asserts for itself . . . that *the Government's* rights to use, release, or disclose the following technical data *should be restricted.*"

DFARS 252.227-7013(e). This language does not apply to restrictions directed solely to third parties.

Second, the Government relies on the “[g]eneral marking instructions” in Section 7013(f)(1), which require contractors to mark technical data with “authorized legends,” to argue that these instructions would not apply to Boeing’s legend under Boeing’s interpretation. Again, that is correct, but irrelevant. Section 7013(f)(1) is a subparagraph under Section 7013(f) and the legends discussed in that subparagraph are the very legends discussed in the preceding paragraph of Section 7013(f) and thus refer only to legends that restrict *the Government’s* rights. The repeated references in the marking instructions to the “asserted restrictions” reinforces this conclusion.

Third, the Government suggests that, under Boeing’s interpretation, “each contractor [is able] to decide what form the third-party authorization should take and the terms of the authorization,” rather than limiting the authorization to the nondisclosure agreement at DFARS 227.7103-7 and the Government Furnished Information clause at DFARS 252.227-7025. Gov. Br. at 42. This is not Boeing’s position. To be sure, Boeing’s marking restricts third party rights when third

parties lack authorization from either the Government or Boeing, but the marking does not demand that the Government exercise its rights in any particular way. It requires only that the Government provide authorization before use by a third party—as it must under the regulation. Nor does Boeing’s legend obligate the Government to have third parties sign a non-disclosure agreement of Boeing’s choosing.<sup>5</sup> Boeing’s marking simply does not dictate the Government’s exercise of its unlimited rights license.

Fourth, the Government argues that DFARS 227.7103-12(a)(1), addressing DoD’s review of “nonconforming markings,” undermines Boeing’s interpretation, but this is incorrect. As DoD explained, “the nonconforming marking procedures address only the proper format for a marking.” 60 Fed. Reg. at 33,466. The Government attempts to explain away this comment as relating “only to the *procedures* in DFARS 227.7103-12(a)(2),” not the “*definition* of a non-conforming marking.”

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<sup>5</sup> The non-disclosure provisions confirm that the regulatory structure is focused on restrictions on *the Government’s* rights. The cited provisions restrict the Government’s rights to disclose contractor data, consistent with the scope of the limited rights and government purpose rights licenses. See DFARS 252.227-7013(b)(2)(iii).



Gov. Br. at 30. As the Government acknowledges, however, Section 7103-12(a)(1) defines “authorized markings” by reference to Section 7013(f), which embraces only markings that restrict the Government’s rights. *See* Gov. Br. at 28-29. The Government’s circular argument therefore is unavailing.

In sum, the regulatory scheme supports Boeing’s interpretation and confirms that the only markings addressed by Section 7013 are those that restrict *the Government’s* rights. All other markings fall outside the scope of the clause. Indeed, the Government’s brief is replete with references to clauses, policy statements, and regulatory history that focus exclusively on *the Government’s* rights, and none that seek to regulate *third party* rights.

**D. The Ability To Negotiate Licenses Does Not Change the Plain Meaning of Section 7013(f).**

The Government argues that Boeing should have sought a specially negotiated license from the Government to apply its marking. This argument is wrong for at least four reasons.

First, by its plain terms, Section 7013(f) does not apply to Boeing’s marking, so there was no need for Boeing to seek a specially negotiated license.

Second, a special license is used in “unusual situations” where “*standard rights* may not satisfy the Government’s needs or the Government may be willing to accept lesser rights in data in return for other consideration.” DFARS 227.7103-5. In other words, a special license alters *the Government’s* standard rights. Here, however, the Government has a standard unlimited rights license, with which Boeing has no quarrel. Boeing simply seeks to protect its ownership of its technical data vis-à-vis third parties, not the Government. A special license is neither necessary nor appropriate for that purpose.

Third, the limited rights, government purpose rights, and unlimited rights licenses are standard licenses, which reduce transaction costs through predictability. The ability to mark unlimited rights technical data with third party markings is highly important to industry. See ECF No. 19 at 2. If the Government’s argument were credited, it would lead to contractors demanding specially negotiated license rights for the vast majority of data otherwise subject to unlimited rights.

The DoD is ill-equipped to manage this burden, and the Government is wrong to dismiss concerns about the viability of specially negotiated license rights as “speculation.” Boeing has cited the 2018 report of the

Congressionally established Government-Industry Advisory Panel on Technical Data Rights, which was charged with reviewing laws governing data rights in DoD acquisitions. The Panel “received ***Government comments*** that SNLR [Specifically Negotiated License Rights] are difficult to negotiate, and that there are too few Government personnel available with enough experience, who are qualified to negotiate SNLR.” 813 Panel Rep., Paper 16 at 2. No Panel members dissented from these observations. Even if a special license were appropriate here, which it is not, it simply is not practical to negotiate one.

Fourth, the Government makes the unfounded contention that, despite these issues, Boeing still should have sought a special license because there were “ample warning signs” that its interpretation would be rejected. Gov. Br. at 30-31. As an initial matter, even if “warning signs” existed, they cannot defeat the plain language of Section 7013(f). At any rate, there were not “warning signs.” Boeing explained to the Air Force that the previous F-15 Contracting Officer, in coordination with Air Force counsel, agreed that Boeing’s markings were permissible. Appx220-221. Boeing has relied on that representation

since 2002. *Id.* The Air Force in 2017 rejected that guidance “from another Contracting Officer [on] previous contract(s),” because it “does not alter or modify the F-15 EPAWSS [Eagle Passive Active Warfare Survivability System] TMRR contract.” Appx168, Appx175. Before then, all “signs” suggested that Boeing could affix its legend to technical data Boeing owned.

**E. A Copyright Notice Asserts Restrictions on the Government’s Rights.**

The Government asserts that Boeing is incorrect that nothing in 7013(f) relates to third party rights because “Boeing acknowledged [through contract correspondence] that the copyright notice restricts third-party rights, not Government rights.” Gov. Br. at 40. The Government mischaracterizes Boeing’s correspondence, and in any event, the Government’s argument fails.

As an initial matter, a copyright notice restricts the Government’s rights, Boeing Br. at 36-37, confirming that Boeing’s interpretation of Section 7013(f) as applying to Government rights is correct, and that the two sentences of this regulation should be read harmoniously. It is irrelevant that a copyright notice also restricts third-party rights.

The relevant portion of Boeing’s letter, *see* Gov. Br. at 40, states that “the Government has a copyright license in the information ***co-extensive with its DFARS part 227 license***, notwithstanding that the contractor may have placed the copyright notice on the information.” Appx223. This accurately states the law and comports with Boeing’s position that a copyright notice restricts the Government’s rights. Because the Government’s copyright license is commensurate in scope with its data rights license, if the Government reproduces, distributes, displays, or creates derivative works of copyrighted technical data ***beyond the scope of its license***, it is liable for copyright infringement. *See* 17 U.S.C. § 106; 28 U.S.C. § 1498(b). That is a restriction on the Government’s rights.

The Government’s only response is to claim that “a copyright notice itself does not limit the ability of the Government to use or distribute data.” Gov. Br. at 40. For this novel proposition, the Government cites *Jennette v. United States*, 77 Fed. Cl. 126 (2007), a case involving a *pro se* plaintiff alleging that he possessed “a security interest in the name RANDALL JENNETTE©,” and that sending a “Copyright Notice” to the Government gave rise to a “self-executing contract.” *Id.* at 128. The

Government mischaracterizes *Jennette* as “holding that a copyright notice did not create any contractual obligations for the Government.”

Gov. Br. at 40. In fact, the court simply held that Mr. Jennette had not registered his alleged copyright. 77 Fed. Cl. at 131-32.

## **II. The Government’s Remaining Arguments Provide No Basis To Depart from the Plain Language.**

Apart from its purported plain language argument, the Government asserts various other arguments, all of which fail. Contrary to the Government’s position, (1) the regulatory history actually supports Boeing’s construction; (2) Boeing’s interpretation does not impair the Government’s unlimited rights, as the ASBCA correctly concluded; and (3) Boeing argued before the ASBCA that Section 7013(f) must be construed, if possible, in a manner that does not conflict with 10 U.S.C. § 2320, and Boeing did not waive that argument—although even in its absence, Boeing would prevail on the plain language alone.

### **A. The Regulatory History Confirms Boeing’s Interpretation.**

The Government largely agrees with Boeing’s description of the relevant regulatory history. In particular, the Government agrees that the 1995 regulations sought to implement “the long-recognized need to balance Government rights and contractor rights in technical data.”

Gov. Br. at 44. Nevertheless, the Government argues that “[n]one of this history demonstrates that the balance struck in 1995 included DoD’s approval for contractors to craft their own restrictive legends for noncommercial technical data.” *Id.* at 44-45. The Government misses the point entirely.

The 1995 regulations corrected DoD’s ongoing failure to weigh “the contractor’s legitimate interest in protecting data, its competitive position and economic interests, against the Government’s need for data.” Packard Rep., App. I at 115. As the Packard Report recognized, protecting contractor data rights “encourages innovation, keeps suppliers in the industrial base, and increases contractors’ willingness to permit government access to and use of data.” *Id.*

Those concerns apply fully to contractors’ ownership rights in data developed exclusively with Government funding. *Id.* at 64; *see also id.*, App. I at 120. Commercial companies routinely assign their best and brightest minds to Government-funded projects, often with relatively low profit margins, so their ownership of the resulting technical data and ability to commercialize it is of great value. ECF No. 19 at 12, 14-15.

The history is clear: The 1995 regulations were intended to expand contractor rights, not restrict them. Nevertheless, the Government's construction ignores this important context. Instead, the Government's reading focuses myopically on nine words—"only the following legends are authorized under this contract"—which were added to Section 7013 in 1995 as part of the effort to strike a new balance that *expanded* contractor technical data rights vis-à-vis the Government. The Government cites nothing in the regulatory history to suggest these words were added to address contractor markings restricting third-party rights. Given the intent to *expand* contractor rights, this silence is fatal to the Government's view that these words impose such a restriction.

The Government also cites comments in the regulatory history rejecting concerns about requiring contractors to mark every page of technical data subject to restrictions, arguing that these comments reflect an "understanding that contractors only mark the pages when there is less than unlimited rights" and that unclear markings could "make it difficult for the Government to exercise its license rights." Gov. Br. at 46, 47 (internal quotation marks omitted). This is a non



sequitur. DoD's response captures its concerns over markings that might not clearly state restrictions on *the Government's* rights; DoD was not addressing markings directed at third parties. 60 Fed. Reg. at 33,465.

Similarly, the Government is mistaken when it claims the history shows there is no need "for a contractor to mark its data when it delivers data with unlimited rights." Gov. Br. at 47. From DoD's perspective, there is no need to mark unlimited rights data because DFARS markings assert restrictions on the Government's rights. This says nothing, however, about the contractor's need to mark data for purposes of putting third parties on notice of the contractor's ownership rights.

**B. Boeing's Marking Does Not Restrict the Government's Unlimited Rights.**

The Government incorrectly claims that Boeing's marking impairs the Government's unlimited rights. The Board correctly rejected this argument when it found that "Boeing's compromise legend *clearly states that the government has unlimited rights* and can grant authority to others so it is not clear what type of 'downstream confusion' this might cause." Appx10-11. The Board also noted the protective

effect for the Government inherent in the disputed markings; it stated that “one might think that a legend stating that the government has unlimited rights might be preferable to one that is silent on this issue.”

Appx11. The Board also specifically rejected the Government’s contention that “[a]uthorizing’ a third party to use and distribute the data, as Boeing purports to require, would be highly burdensome on the Government and, therefore [would be] inconsistent with its unlimited rights” because “the clause speaks of this very thing, defining unlimited rights to mean ‘rights to use, modify . . . and to have or authorize others to do so.” *Id.* (emphasis and alterations in original and noting the “Air Force does not explain why it would be burdensome to do what a government-drafted clause expressly contemplates.”).

The Government asks this Court to affirm the Board’s decision while at the same time urging the Court to reject the portion of the decision it does not like. The Court, however, is “‘without authority to affirm’ on a basis not addressed by the Board because the Board’s decisions must be upheld, if at all, ***on the basis articulated by the Board.***” *Agility Pub. Warehousing Co. v. Mattis*, 852 F.3d 1370, 1385–86 (Fed. Cir. 2017) (quoting *Heyl & Patterson, Inc. v. O’Keefe*, 986 F.2d 480, 483 (Fed. Cir.

1993), *overruled on other grounds by Reflectone*, 60 F.3d 1572).

Accordingly, the Court should decline even to consider the Government's argument that the Board erred in concluding that Boeing's legend does not impair the Government's rights.

Even on the merits, the Government never explains how Boeing's marking actually impairs its unlimited rights. Instead, it spends pages of its brief emphasizing the broad nature of the unlimited rights license. Gov. Br. at 47-52. The scope of that license, however, is not at issue here.

The Government also complains that Boeing's proposed legend "demand[s] that the Government exercise its rights in only one way—Boeing's way." Gov. Br. at 49. Nothing could be further from the truth. Boeing attempted to negotiate its marking to resolve any concerns. The Government, however, rejected these attempts and "reiterated that all non-conforming markings must be removed and that the USAF would not accept data deliverables as part of the F-15 EPAWSS Program with non-conforming markings." Appx167, Appx174. The Government refused to engage Boeing on the language in Boeing's proposed legend, so it should not now be heard to complain about that same language.

Likewise, the Government's parade of horribles fails to identify any actual impairment of its rights. For example, the Government argues that "[w]ith an unlimited rights license, the Government could freely release the technical data to the world," but "Boeing's legends would require Boeing or the Government to grant permission to every member of the public who receives this freely released data." Gov. Br. at 50-51. Setting aside that the Government is highly unlikely to release to the world technical data pertaining to the F-15's electronic warfare suite, Boeing's marking creates no such barrier. If the Government actually released Boeing's data to the public, any use of that data would be with authorization from the Government and thus fully consistent with Boeing's marking.

The Government similarly asserts that "Boeing wants to restrict third-party contractors with whom the Government has contracted[.]" Gov. Br. at 50. This assertion is incorrect because Boeing's marking explicitly acknowledges the Government's right to authorize third-party contractors to use the data. Most tellingly, the Government contends that it may "have (without providing explicit authorization) a support contractor further distribute technical data to various subcontractors

for use in the performance of a Government contract.” *Id.* at 51.

Boeing’s marking, however, is no impediment because such use would, in fact, be authorized.

At bottom, the Government is really arguing that a grant of unlimited rights is equivalent to placing the data in the public domain, permitting third parties to use the data without authorization from anyone. This view conflicts facially with Section 7013, which makes clear that the contractor retains ownership of the data, even after granting an unlimited rights license. DFARS 252.227-7013(b), (c). Moreover, every owner of intellectual property rights—even a licensee like the Government—must manage and administer those rights. The Government’s position that it should be uniquely exempt from administering its licenses (by having to authorize third-party use) is unworkable and wrong.

The consequences of the Government’s position are profound. If unlimited rights data constitute public domain information, the grant of the license extinguishes the very rights being licensed. The Government would lose any ability to control who can access and use the data, creating significant national security risks.

**C. Boeing Did Not Waive Its Argument that the Board's Interpretation Conflicts with 10 U.S.C. § 2320.**

The Government contends that Boeing waived its argument that the Board's interpretation is inconsistent with the mandate in 10 U.S.C. § 2320 that Section 7013 "may not impair any right of . . . any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law." 10 U.S.C. § 2320(a). The Government misapprehends Boeing's argument, which is fully preserved in the record.

Boeing argues that, in addition to misinterpreting the plain language of Section 7013(f), the Board erred because its ruling creates a conflict with 10 U.S.C. § 2320, the statute under which Section 7013 was promulgated. Even though "regulations must be construed to avoid conflict with a statute if fairly possible." *Smith v. Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994), *superseded on other grounds by* 38 U.S.C. § 7111, the Board rendered its interpretation of Section 7013(f) in isolation, saying it would be willing to consider *in the future* whether that interpretation ran afoul of Section 2320. Appx13.

The Board was mistaken. Its task was to construe Section 7013(f), if at all possible, in harmony with Section 2320. The Board had

everything it needed to do so. Boeing indisputably owns the technical data relating to the EPAWSS electronic warfare suite. In order to alert third parties that it owns those data and that third parties cannot use them without authorization from Boeing or the Government, Boeing proposed to mark those data “Boeing Proprietary,” which is “commonly used in commercial practice to [protect] proprietary data or trade secrets.” 60 Fed. Reg. at 33,465.<sup>6</sup> Proprietary information includes “trade secrets, commercial or financial information, or other commercially sensitive information that is not customarily shared outside of the company.” DFARS 252.204-7012.

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<sup>6</sup> The Government states that this comment was not “blessing a practice whereby Government contractors could — notwithstanding paragraph (f) of the -7013 clause and DFARS 227.7103-12 — apply one of the ‘commonly used’ commercial markings on noncommercial technical data.” Gov. Br. at 45-46. That is beside the point. DoD recognized that these markings are commonly used in commercial practice and yet did not address them in the regulations. This confirms that the regulations concern only restrictions on the Government’s rights.

There is no dispute that the EPAWSS electronic warfare suite is commercially sensitive information, not customarily shared outside of the company, and which Boeing retains rights to market, insofar as any sale (for instance, to a foreign government)<sup>7</sup> does not infringe upon the rights granted in the Government license. It easily qualifies as Boeing proprietary information, and the Board was well aware Boeing considered it as such. Appx9 (Boeing “maintains that it has trade secret and other *proprietary rights* in the technical data delivered under the Contracts.”). The Board’s interpretation of Section 7013(f) that Boeing is not permitted to affix a “Boeing Proprietary” legend to the EPAWSS data it owns plainly impairs Boeing’s rights in violation of Section 2320.

This issue was “squarely presented” by Boeing to the Board, as the Government concedes. Gov. Br. at 53. The fact that the parties agreed

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<sup>7</sup> The Government’s right to share unlimited rights technical data with foreign governments, *see* Gov. Br. at 61-62, in no way compromises a contractor’s ability to license that technical data to foreign governments through direct commercial sales.



that the Board had decided the only interpretive question before it and jointly requested final judgment, so Boeing could appeal to this Court, does not constitute waiver of Boeing's argument that the Board erred by failing to interpret Section 7013 in harmony with Section 2320.<sup>8</sup>

In any event, “an appellate court may choose to decide [an] issue even if not passed on by the trial court’ where the issue ‘is one of law’ and ‘has been fully vetted by the parties on appeal.” *Am. Bankers Ass’n*, 932 F.3d at 1385 n.7 (quoting *Glaxo Grp. Ltd. v. TorPharm, Inc.*, 153 F.3d 1366 (Fed. Cir. 1998)). The “exercise of that discretion is especially appropriate in cases that do not present new issues on appeal,” or where, as here, “the issue has been fully briefed by the parties.” *Ericsson Inc. v. TCL Commc’n Tech. Holdings Ltd.*, 955 F.3d 1317, 1322–23 (Fed. Cir. 2020) (internal quotes omitted).

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<sup>8</sup> The case cited by the Government, *Golden Bridge Technology, Inc. v. Nokia, Inc.*, 527 F.3d 1318 (Fed. Cir. 2008), is inapposite. There, the plaintiff not only asked the Court “to decide a new issue raised for the first time on appeal,” but also asked “an appellate court to make factual findings.” *Id.* at 1323.

The Government's additional complaint that "Boeing again points to no facts or case law demonstrating that it has trade secret rights in the unlimited rights data" is misguided. Gov. Br. at 55. While Boeing disagrees with the Government's characterization of the cases Boeing cited to show that Boeing maintains rights in unlimited rights data,<sup>9</sup> this Court need not resolve that issue "because it was neither presented to the Board, nor is it relevant to the sole question at issue here." Boeing Br. at 54. The Government appears to agree that the Board's statements on this issue were dicta, Gov. Br. at 52-53, and the issue therefore does not require any further discussion.

What matters is that Boeing indisputably retains residual proprietary rights in the data as "[a]ll rights not granted to the

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<sup>9</sup> For example, the Government attempts to distinguish *Vianet Group PLC v. Tap Acquisition, Inc.*, because the disclosure of trade secrets to potential customers there, "though made without confidentiality agreements, would not ordinarily occasion public exposure." No. 3:14-cv-3601-B, 2016 WL 4368302, at \*21 (N.D. Tex. Aug. 16, 2016). That is the precisely the case here as well. Though Boeing granted the Government an unlimited rights license to technical data delivered under the EPAWSS contract, delivering technical data to DoD for a weapons system does "not ordinarily occasion public exposure," *id.*, because DoD rarely, if ever, discloses such information.

Government are retained by the Contractor.” DFARS 252.227-7013(c); *see also* Appx5 (“The government concedes that Boeing retained ownership of the data.”); Appx212. Whether those rights include trade secrets is a question of state law that was not before the Board.

The Government also errs in complaining that Boeing’s interpretation cannot be correct because if Boeing’s data were released to the public, “the data would have a restrictive legend seeking to enforce a trade secret that does not exist.” Gov. Br. at 57. This scenario is common and presents no issue. Old books enter the public domain, yet still contain copyright markings applied by the publisher, and old goods still contain markings referring to now-expired patents. Markings that have been overtaken by events do not impair anyone’s rights and do not create the vast confusion the Government imagines.

Finally, the Government’s relentless refrain that it funded development under the contracts at issue here, Gov. Br. at 19, is equally irrelevant to the question before this Court. That changes neither the plain language of Section 7013(f) nor the balance struck in the 1995 regulations under which the Government obtains an unlimited rights license in data funded by the Government, while the contractor retains

ownership. Indeed, the contractor owns the data “even if the Government funded 100% of the development of that technical data or computer software.” *See* Air Force Space & Missile Sys. Center Tech. Data Handbook at 5-6; DFARS 227.7103-4.

This balance was struck because even where the Government funds development, private industry contributes its substantial talents, expertise, and innovation to its work for the Government. Leaving ownership in the hands of those who create intellectual property is not unfair, it is the norm. *See* 17 U.S.C. § 201 (“Copyright in a work protected under this title vests initially in the author or authors of the work.”); *Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys.*, 563 U.S. 776, 785 (2011) (“Our precedents confirm the general rule that rights in an invention belong to the inventor.”). Denying contractors the ability to protect data they own deprives them of their side of the bargain, regardless of who funded the effort.

## CONCLUSION

This Court should reverse and remand for a decision in favor of Boeing.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 10, 2020, the foregoing Reply Brief of Appellant The Boeing Company was served via ECF on all counsel of record.

/s/ Scott M. McCaleb  
Scott M. McCaleb

Dated: June 10, 2020

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). The brief contains 6,997 words, excluding the parts of the brief exempted by rule. This number was generated using the Microsoft Word “Word Count” feature.

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Dated: June 10, 2020