2019-2147

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

THE BOEING COMPANY,
Appellant,

v.

SECRETARY OF THE AIR FORCE,
Appellee.

Appeal from the Armed Services Board of Contract Appeals Nos. 61387, 61388,
Administrative Judge Michael N. O'Connell

BRIEF FOR APPELLEE

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, appellee's counsel states that she is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title.

To counsel's knowledge, no other cases pending before this or any other court or agency will directly affect or be directly affected by the Court's decision in this appeal.

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STATEMENT OF THE ISSUE

Whether the Armed Services Board of Contract Appeals (the board) correctly held that the Defense Federal Acquisition Regulation Supplement (DFARS) and the DFARS 252.227-7013 contract clause — which together specify only four "authorized" technical data legends and deem all other legends to be "nonconforming" — precluded The Boeing Company (Boeing) from unilaterally applying a restrictive legend of its own making to the technical data Boeing delivered to the Government with an unlimited rights license.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

Boeing appeals from the decision of the board in *The Boeing Company*, ASBCA Nos. 61387, 61388, 2018 WL 6705542 (Nov. 28, 2018). In that board appeal, Boeing challenged an adverse contracting officer's final decision relating to two contracts with the United States Air Force (Air Force). Appx4. The final decision determined that Boeing's contracts, pursuant to which Boeing granted the Government unlimited rights in technical data delivered to the Air Force, did not authorize Boeing to mark that data with legends of Boeing's own making.

At the board, Boeing filed an early motion for summary judgment seeking a ruling that the contracts allowed it to mark its technical data with self-created legends that allegedly do not restrict the Government's rights. *Id*. The Air Force opposed the motion, arguing that the legends are contractually unauthorized and, further, restricted the Government's rights in the data — rights the Government obtained by exclusively funding Boeing's development of the data. The board denied Boeing's motion for summary judgment, concluding that the contracts identified an exclusive set of legends and that Boeing's proposed legends were unauthorized. Appx10. Boeing and the Air Force then jointly requested that the board enter final judgment denying Boeing's appeals because the summary judgment decision had resolved the only issue presented in the contracting officer's

final decision. Appx2, Appx249. The board thus denied Boeing's appeals. *Id.* This appeal followed.

I. Statutory And Regulatory Background

The allocation of technical data rights between contractors and the Government has always been a balancing act. *See Cubic Def. Applications, Inc.*, 18-1 B.C.A. (CCH) ¶ 37049, 2018 ASBCA LEXIS 141, at **20 (May 8, 2018). Following decades of disagreement about that balance, in 1984, Congress stepped in and directed DoD to include certain criteria for technical data rights in DoD's regulations. *See id*. at **32–35.[1] To fulfill that mandate, beginning in 1987, DoD issued many iterations of draft and interim regulations and standard contract clauses in the DFARS.[2] *Id.* at **41–42. In October 1998, DoD issued a set of interim rules and standard contract clauses at DFARS Subpart 227.4 and Part 252 that remained in place through 1995. *Id.* at **42-50; *see also* DFARS 227.473-1 (1988).

The June 1995 final regulations and contract clauses, which significantly revised the 1988 interim regulations, were based on proposed regulations issued in

[1] *Citing* Defense Procurement Reform Act of 1984, Pub. L. No. 98-525, Title XII, 98 Stat. 2492, 2595-96 (codified at 10 U.S.C. § 2320(a)).

[2] DoD's "implementation and supplementation of the [Federal Acquisition Regulation] is issued in the Defense Federal Acquisition Regulation Supplement (DFARS)." 48 C.F.R. § 201.301. The DFARS are codified in 48 C.F.R. Chapter 2. We cite herein to provisions in the DFARS as "DFARS" followed by the relevant section of 48 C.F.R. Chapter 2.

1994 by a joint Government-industry committee and comments to those proposed regulations. *See* Rights in Technical Data, 59 Fed. Reg. 31,584 (proposed June 20, 1994); Rights in Technical Data, 60 Fed. Reg. 33,464 (June 28, 1995) (codified at DFARS Parts 211, 227, and 252). The joint committee had considered the 1988 regulations to be a "disincentive to companies that create new technology with their own funding to provide that technology to the Defense Department." 59 Fed. Reg. at 31,585. The 1995 regulations and contract clauses were intended to "establish a balance between data developers' and data users' interests and [to] encourage creativity, encourage firms to offer DoD new technology, and facilitate dual use development." *Id*. at 31,584.

The 1995 regulations distinguish between noncommercial technical data for specialized Government and defense items, and commercial technical data for items more commonly sold in the commercial market. *Id*. at 31,587. Generally speaking, noncommercial acquisitions are those in which there is no non-governmental or commercial market, such as "highly specialized" acquisitions involving "advanced fighter jets, precision munitions, [and] nuclear submarines." Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the U.S. Congress* at 1 (2007), https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf. The regulations and DFARS

contract clauses relating to noncommercial technical data were published, respectively, at DFARS 227.7103 and DFARS 252.227-7013.[3] Neither has changed materially since 1995.

Thus, when a DoD contract requires a contractor to deliver technical data pertaining to noncommercial items, three sources of law govern the Government's rights in the data: (1) 10 U.S.C. § 2320, *Rights in technical data*; (2) DFARS Part 227.7103; and (3) the contract clause DFARS 252.227-7013, *Rights in technical data—noncommercial items* (the -7013 clause).[4]

A. 10 U.S.C. § 2320

Pursuant to section 2320 of Title 10 of the United States Code, *Rights in technical data*, DoD "shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process." 10 U.S.C. § 2320(a)(1) (2018). Section 2320(a)(1) mandates that the "regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law." *Id.*

[3] The DFARS regulatory provision (DFARS 227.7**10**3) and the DFARS contract clause (DFARS 252.227-7**01**3) involved here are, perhaps unfortunately, similarly numbered.

[4] In its brief, Boeing refers to this clause as "Section 7013."

Section 2320(a)(2) dictates certain provisions that DoD must include in its regulations. In particular, DoD's regulations must provide that when an item or process is "developed by a contractor or subcontractor exclusively with Federal funds," the Government "shall have the unlimited right to- (i) use technical data pertaining to the item or process; or (ii) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons." 10 U.S.C. § 2320(a)(2)(A). DoD's regulations also must (1) allow a contractor to restrict the Government's use if the technical data was developed "by a contractor . . . exclusively at private expense," and (2) allow the Government to have "government purpose rights" in technical data that was "developed in part with Federal funds and in part at private expense." *Id.* §§ 2320(a)(2)(B), (a)(2)(E)-(F). Thus, in general, the source of funding to develop the technical data determines the rights that the Government receives in that data.

B. DFARS 227.7103[5]

The regulatory scheme implementing 10 U.S.C. § 2320 with respect to technical data is codified in DFARS Subpart 227.71. DFARS 227.7103 addresses data rights in noncommercial items or processes, and establishes four licenses for noncommercial technical data, three of which convey to the Government "standard

[5] All citations to DFARS 227.7103 and DFARS 252.227-7013 in this brief are to the 2014 version, unless otherwise noted.

license rights": (1) unlimited rights; (2) Government purpose rights; and (3) limited rights. DFARS 227.7103-5(a)–(c). The fourth is a special license with "specifically negotiated license rights." DFARS 227.7103-5(d). Consistent with 10 U.S.C. § 2320, the source of funding is the key criterion in determining which license rights the Government obtains in the technical data. *See*, *e.g.*, DFARS 227-7103-5(a)(1), (b)(1)(i), & (c)(1)(i).

If a contractor will deliver technical data with restrictions on use, modification, reproduction, release, performance, display, or disclosure, the detailed scheme in DFARS 227.7103 establishes certain procedures to protect the contractor's interests in that data. Specifically, third parties must execute a use and non-disclosure agreement, which language is prescribed with particularity in the regulation. DFARS 227.7103-7(c).

The DFARS also mandates that DoD incorporate a particular contract clause, the -7013 clause, into any contract in which noncommercial technical data will be delivered to the Government. DFARS 227.7103-6(a). The DFARS explains that the -7013 clause: (1) "requires a contractor that desires to restrict the Government's rights in technical data to place restrictive markings on the data;" and (2) "provides instructions" for the "placement of the restrictive markings, and authorizes the use of *certain* restrictive markings." DFARS 227.7103-10(b) (emphasis added). Relatedly, the DFARS regulations establish a "Government

right to establish conformity of markings." DFARS 227.7103-12(a). Specifically, DFARS 227.7103-12(a) provides, without qualification or exception, that "[a]uthorized markings are identified in the clause at 252.227-7013, Rights In Technical Data-Noncommercial Items" and "*[a]ll other markings are nonconforming markings.*" DFARS 227.7103-12(a) (emphasis added).

C. DFARS Contract Clause 252.227-7013

The -7013 clause comprehensively addresses, in detail, the contractor's and the Government's contractual obligations regarding their respective rights in noncommercial, technical data. To start, the -7013 clause provides that the contractor grants the Government one of four enumerated, royalty free, worldwide, nonexclusive, irrevocable license rights in noncommercial technical data. DFARS 252.227-7013(b). The four licenses are: (1) unlimited rights; (2) Government purpose rights; (3) limited rights; or (4) specifically negotiated rights. DFARS 252.227-7013(b). Paragraph (c) of the -7013 clause provides that the contractor retains all rights not granted to the Government. DFARS 252.227-7013(c).

The -7013 clause defines unlimited rights as an unconditional license granting the Government the "rights to use modify, reproduce, release, perform, display, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, *and* to have *or* authorize others to do so." DFARS 252.227-7013(a)(16) (emphasis added). This is a broad license that, as described by one

commentator, gives "the Government, and anyone who is given that information by the Government, the right to use the information to duplicate the product shown in the data, and then to compete for any business opportunities for sales of that product to the U.S. Government or to any prospective customer, anywhere." Matthew S. Simchak, *Protecting Rights in Technical Data and Computer Software: Applying the Ten Practical Rules and Their Corollaries*, 33 Pub. Cont. L.J. 139, 141 (2003).

The -7013 clause obligates the Government to use Government purpose rights data and limited rights data under certain standardized terms and conditions that are specified in the contract. Specifically, the -7013 clause provides that the Government cannot use Government purpose rights data for commercial purposes or authorize third parties to do so for a specified period of time. DFARS 252.227-7013(b)(2)(iv). Consistent with the regulations, the clause also prohibits the release or disclosure of Government purpose rights data unless the intended recipient is subject to a non-disclosure agreement or the DFARS 252.227-7025 contract clause, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. DFARS 252.227-7013(b)(2)(iii). With a limited rights license, the Government generally may not use the data to manufacture additional end items and may not disclose the data outside the Government, except in narrowly defined situations. DFARS 252.227-7013(a)(14).

In some instances, the recipient of limited rights data may be required to execute a standardized non-disclosure agreement. DFARS 252.227-7013(b)(3)(iv)(D).

Paragraph (e) of the -7013 clause provides that the contractor must identify any data subject to use, release, or disclosure restrictions in an attachment to the contract. DFARS 252.227-7013(e). Relatedly, paragraph (f) of the -7013 clause specifies that there is only one way for a contractor to assert restrictions on the Government rights: "by marking the deliverable data subject to restriction." DFARS 252.227-7013(f).

Paragraph (f) of the -7013 clause also identifies the specific wording for the legends that a contractor may affix to its data to give notice that it is delivering the data with either Government purpose rights, limited rights, or specifically negotiated rights. DFARS 252.227-7013(f)(2)–(4). Consistent with the breadth of the Government's unlimited rights license, paragraph (f) does not identify any legend to be applied to data delivered with unlimited rights.

Further, paragraph (f) provides that only four legends are authorized under the contract:

> 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.

DFARS 252.227-7013(f) (emphasis added). The dispute in this appeal primarily involves the interpretation of paragraph (f) of the -7013 clause.

II. The Dispute Regarding Boeing's Proposed Legends

A. The Contracts And Boeing's Proposed Legends[6]

The F-15 Eagle "is an all-weather, extremely maneuverable, tactical fighter designed to permit the Air Force to gain and maintain air supremacy over the battlefield."[7] The contracts at issue here involve the Air Force's Eagle Passive/Active Warning Survivability System (EPAWSS) program for the F-15 Eagle. Appx173. The EPAWSS program will modernize the F-15 Eagle's integrated electronic warfare suite, replace the existing F-15 Tactical Electronic Warfare System, and improve the F-15"s reliability and warfare capabilities. Appx173.

On September 30, 2015, the Air Force awarded Boeing Delivery Order 0138 on contract number F33657-01-D-0026 to perform certain work on the EPAWSS program. Appx166. Just a little over a year later, on November 3, 2016, the Air

[6] Boeing's fact section is sprinkled with several unsupported and disputed assertions. *See* Br. at 9 (asserting without record cites that it marked its data as is customary in the industry); Br. at 9 & n.3, Br. at 10 (asserting that its right to commercialize its technology through direct sales to foreign allies is compromised absent its self-made legend, without record cites); Br. at 10-11 (asserting concerns about its rights, without record cites). We address these "facts" in our argument below.

[7] *See* https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104501/f-15-eagle/ (March 14, 2005).

Force awarded Boeing contract number FA8634-17-C-2650 for additional work under the EPAWSS program (the EMD contract). Appx4, Appx173.[8]

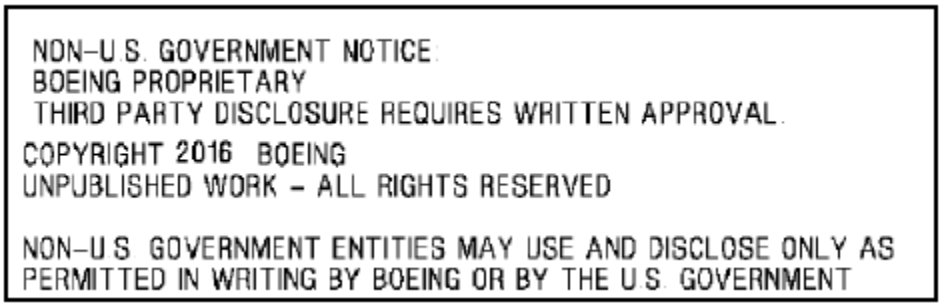
Because the EPAWSS effort would replace a critical system on the F-15 platform, both the delivery order and the contract require Boeing to provide the Air Force with sufficient data rights for the system's organic sustainment, *i.e.*, maintained directly by the Air Force. *Id*. The contracts each expressly provide that Boeing "hereby grants the US Government *full unlimited rights for all deliverable technical data* and computer software for the [EPAWSS] program." Appx167, Appx174.

As required by DFARS 227.7103-6(a), both contracts incorporated the -7013 clause.[9] Ultimately, however, the Air Force rejected or disapproved Boeing's data deliverables under the contracts because Boeing marked its technical data with a non-conforming legend. Appx166, Appx173. Specifically, although the Government had the "rights to use modify, reproduce, release, perform, display, or disclose, technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so," Boeing marked its technical

[8] We refer to the Delivery Order and the EMD contract collectively as "the contracts," except where distinguishing them is necessary.

[9] The Delivery Order incorporated the November 1995 version of the -7013 contract clause, and the EMD contract incorporated the 2014 version. Appx4. As the board explained, Appx7, there are no relevant differences between the two versions, and like the board, we cite to the 2014 version in this brief.

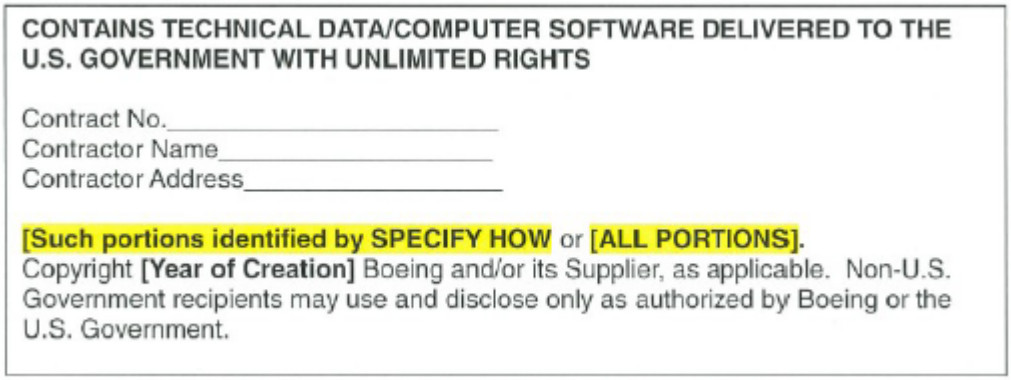
data with a legend dictating that either Boeing or the Government was *required* to approve in writing third-party use and disclosure of the data:


NON-U.S. GOVERNMENT NOTICE
BOEING PROPRIETARY
THIRD PARTY DISCLOSURE REQUIRES WRITTEN APPROVAL.
COPYRIGHT 2016 BOEING
UNPUBLISHED WORK – ALL RIGHTS RESERVED

NON-U.S. GOVERNMENT ENTITIES MAY USE AND DISCLOSE ONLY AS PERMITTED IN WRITING BY BOEING OR BY THE U.S. GOVERNMENT

Appx5. The Air Force rejected that legend. *Id.*

Boeing requested a contracting officer final decision about the propriety of its markings. Appx166, Appx173. While that request was pending with the Air Force, Boeing proposed another legend, which still required affirmative authorization by either Boeing or the Government:


CONTAINS TECHNICAL DATA/COMPUTER SOFTWARE DELIVERED TO THE U.S. GOVERNMENT WITH UNLIMITED RIGHTS

Contract No._____
Contractor Name_____
Contractor Address_____

[Such portions identified by SPECIFY HOW or **[ALL PORTIONS]**.
Copyright **[Year of Creation]** Boeing and/or its Supplier, as applicable. Non-U.S. Government recipients may use and disclose only as authorized by Boeing or the U.S. Government.

Appx5.

On July 31, 2017, the Air Force contracting officer issued final decisions denying Boeing's claims and concluding that Boeing's attempt to use a "proprietary marking/third party notice to data delivered to the Air Force [with]

Unlimited Rights was inconsistent with DFARS 252.227-7013(f)." Appx165, Appx168, Appx 172, Appx176. Specifically, Boeing's proposed legend "restrict[s] the Government's rights as it will restrict the distribution of the data and allows Boeing to be an authority for its further use and disclosure. This change to the contract will limit the USAF's ability to conduct organic sustainment." Appx168, Appx175.

B. Procedural History

Boeing appealed the contracting officer's final decisions to the board. Early in the board appeal, Boeing proposed that "there is an overarching legal issue that may be dispositive of these appeals and can be resolved on an early summary judgment motion." Appx225. The Air Force did not oppose that approach. *Id.*

In its summary judgment motion, Boeing first argued the -7013 clause does not apply to, or prohibit, its proposed markings because the second sentence of paragraph (f), in the context of the first sentence of the paragraph, only pertains to legends that restrict the Government's rights, and Boeing argued that its legends did not do so. Appx12. Additionally, Boeing claimed that the legends enumerated in paragraph (f) only restrict Government rights and thus the legends themselves demonstrate that paragraph (f) as a whole only addresses legends that restrict the Government's rights. *Id.* Second, Boeing argued that the Air Force's

interpretation of the -7013 clause conflicts with multiple statutes, most notably, 10 U.S.C. § 2320. Appx9.

Boeing's summary judgment motion relied on just ten proposed undisputed facts. In summary, those facts were:

- The effective dates of the contracts. Appx191 at A1, A3.
- The contracts incorporated the -7013 clause. Appx191 at A2, A4.
- Boeing has delivered technical data with unlimited rights that the Air Force rejected. Appx191 at B1.
- The date of, and conclusion in, the contracting officer's final decision. Appx192–Appx193 at B2, B3, B6.
- Copies of Boeing's proposed, disputed legends. Appx192–Appx193 at B4, B5.

The Air Force "concur[red] with Boeing's statement of undisputed material facts." Appx198. The Air Force did not concede, however, that Boeing's legends were necessary to preserve its intellectual property or left the Government's rights unaffected because although Boeing made those arguments in its summary judgment brief, Boeing proposed no undisputed facts relating to them. Appx191–Appx193. To the contrary, the Air Force's summary judgment opposition disagreed with those arguments, Appx204–Appx206, and argued that the -7013(f) clause set forth all restrictive legends for technical data, which did not include Boeing's legends. Appx206–208.

C. The Board's Decision

The board applied settled principles of contract interpretation and determined that Boeing's proposed legends were nonconforming under the contract terms. Appx11–Appx13. The board agreed with the Air Force that the second sentence of paragraph (f) means that the enumerated legends "are the only permissible legends for limiting data rights and no other legends are allowed." Appx12. The board reasoned that the second sentence of paragraph (f) "speaks not only of legends that limit the Government's rights, but also a notice of copyright that would, in fact, provide notice to or limit the actions of third parties." Appx12. The board concluded that DFARS 227.7103-12(a)(1) supported its interpretation, Appx12, because that regulation states, "[a]uthorized markings are identified in the [-7013 clause]" and specifically admonishes that "[a]ll other markings are nonconforming markings."

The board observed that there were "ample warning signs for Boeing" that it could not use a legend of its own making: (1) the contract language itself; (2) the DFARS regulation providing that "all other markings are nonconforming;" and (3) prominent commentators' articles "lament[ing]" that the -7013 contract clause prohibited contractor markings. Appx12–Appx13 (citing *Postscript: Protecting Unlimited Rights Data*, 22 No. 5 NASH & CIBINIC REP. ¶ 28 (May 2008);

Protecting Unlimited Rights Data: The Inadequate Clauses, 18 No. 5 NASH & CIBINIC REP ¶ 21 (May 2004)).

The board also addressed Boeing's argument that the Air Force's interpretation of the -7013 clause failed to protect its intellectual property rights as required by 10 U.S.C. § 2320. Appx9. The board ultimately determined that "this issue could not be resolved *based on the current briefs and record developed to date*." Appx13 (emphasis added). Specifically, the board explained that Boeing did not "dwell on" the "intellectual property rights" to which it was referring or how the proposed legends would protect those rights. Appx9. As best as the board could tell, Boeing's summary judgment argument was "focused on trade secrets." *Id.* The board concluded that given the broad scope of unlimited rights, the "government is under no obligation to protect the confidentiality of the data and can give it to whomever it chooses or even publish it on the Department's website." *Id*. The board considered Boeing's reliance on the Supreme Court's decision in *Ruckelhaus v. Monsanto, Co.*, 467 U.S. 986 (1984), but concluded, "*Monsanto* actually casts significant doubt on Boeing's trade secret theory." *Id.*

The board contemplated whether the Air Force's interpretation of the -7013 clause implicated any other intellectual property rights. Appx10. Ultimately, the board determined that it could not resolve that issue until "we identify with some

precision the nature of Boeing's property right (if any)," Appx10, and that the issue would "have to be resolved at a later time." *Id.*

Last, the board addressed whether the Air Force would be "harmed" by the proposed legends and whether requiring the Air Force to authorize third parties would be "burdensome on the Government" and thus inconsistent with the Air Force's unlimited rights. Appx11. In addressing those arguments, the board focused its analysis on the Government's right to "authorize others" to use, modify, etc., the data. *Id.* In concluding that the legend did not harm the Air Force, the board reasoned that it was no burden "to do what a government-drafted clause expressly contemplates." *Id.* The board did not explain, however, how requiring explicit authorization from the Government or Boeing squared with the other aspects of the Government's unlimited rights, such as the right to have others use the data.

Ultimately, the board "agree[d] with the Air Force that under the pertinent DFARS clauses . . . Boeing's marking legends are nonconforming." Appx13.

D. The Board's Judgment

Although the board determined that it could not resolve on summary judgment the question of whether the Air Force's interpretation conflicted with 10 U.S.C. § 2320, Boeing did not further pursue that issue. Appx2, Appx249. Instead, Boeing and the Air Force requested that the board enter final judgment

denying Boeing's appeals, explaining that the summary judgment decision had resolved the only issue presented in the contracting officer's final decision. Appx2, Appx249. The board thus denied the appeals. Appx2. This appeal followed.

SUMMARY OF THE ARGUMENT

Boeing's theory that Boeing may unilaterally apply an extra-contractual restrictive legend to the noncommercial data in which it granted the Government unlimited rights is inconsistent with the plain language of the -7013 clause, the corresponding regulations, the nature of an unlimited rights license, and the regulatory scheme as a whole. The board correctly held that Boeing's proposed legends are unauthorized under the contracts. The Court should affirm.

The technical data at issue here are *noncommercial* data — meaning they are data Boeing developed specifically for the Government. And in this instance, the Government alone paid for that data with taxpayer dollars. Under these circumstances, by the plain terms of Boeing's contracts, the Government obtained an "unlimited rights license" that broadly grants the Government the "rights to use modify, reproduce, perform, display, release, or disclose, [Boeing's] technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so." DFARS 252.227-7013(a)(16). Given the breadth of

this license, it is not surprising that the -7013 clause authorizes no restrictive markings on unlimited rights data.

Boeing, however, seeks to unilaterally mark these data with an extra-contractual legend that *requires* the Government or Boeing to authorize third parties to use the data. Boeing's theory is that must protect its residual rights — "retained" rights — with a legend and that nothing in its contracts precludes it from doing so because, according to Boeing, its proposed legends do not conflict with the Government's unlimited rights. Boeing erroneously asserts that we agree that the legends do not affect the Government's unlimited data rights, and the board erroneously agreed with Boeing that the legends did not harm the Government. Of course they did: they purported to bind the Government to do something that is necessarily incompatible with its unlimited data rights. If they did not affect the Government's unlimited data rights, or purport to bind the Government in some way, then Boeing would not have affixed them, and Boeing would not have filed an appeal to the board and a further appeal to this Court. There is no merit to these arguments, and the board, although incorrect on the harm to the Government, correctly rejected Boeing's attempt to mark the unlimited rights data with a restrictive legend.

First, the plain language of the -7013 clause does not authorize Boeing to mark unlimited rights data with a legend. Although the first sentence in paragraph

(f) of the -7013 clause addresses "marking" as the means by which a contractor may "assert restrictions on the Government's rights," the second sentence of paragraph (f) is not just about marking data or just about "assert[ing] restrictions on the Government's rights." Rather, it more broadly directs, without qualification, "only the following legends are authorized under this contract." Boeing's legends are not one of them. Thus, by the plain language of paragraph (f), Boeing's legends are unauthorized.

Second, the corresponding regulation, DFARS 227.7103-12, confirms that no legends other than those enumerated in paragraph (f) are allowed. That regulation, entitled "Government right to establish conformity of markings," specifies that the contractually authorized markings are those identified in the -7013 clause, and, significantly, directs that "all other markings are nonconforming markings." The -7013 clause, in conjunction with DFARS 227.7103-12(a)(1), could not be more clear — *no* other legends are allowed.

Third, the board astutely concluded that Boeing "had ample warning signs" that the contracts did not allow Boeing to apply a legend of its own making. Boeing cannot deny the plain language of the second sentence. Instead, Boeing asks the Court to ignore that plain language based on some theory that there is a "natural relationship" between the first and second sentences of paragraph (f), even though each contains distinct terminology and addresses different issues. This is

nothing but a request that the Court rewrite the second sentence. In any event, there is no "natural relationship" between the two sentences to justify rewriting the clause.

Indeed, given the regulatory scheme as a whole, it makes sense that DoD would not authorize other legends. The standard contractual legends address those instances where the Government obtains Government purpose rights data or limited rights data. These legends, in conjunction with detailed provisions for handling data delivered with less than unlimited rights, ordinarily will provide sufficient notice and protection for a contractor's retained rights. The legend for a bilaterally negotiated special license fills any gap. Thus, no other legends are necessary.

In fact, the whole approach in the -7013 clause and regulations would put Boeing on notice that it may not just come up with this own legend. Boeing's theory illogically assumes that DoD left it entirely up to each individual contractor to fashion its own legend, without any conformity or standards for those legends. If any protection for the retained rights in unlimited rights data were necessary, there would be provisions addressing that in the -7013 clause given the highly regulated approach of the -7013 clause. And nothing in the history cited by Boeing suggests that a contractor could apply its own legend notwithstanding the clear instruction in paragraph (f) of the -7013 clause that "only the [enumerated legends]

are authorized under the contract." What Boeing really dislikes is the scope of the unlimited rights license.

Fourth, in any event, even if Boeing's interpretation were correct, Boeing's legends would still be improper because they purport to limit the Government's rights. To be sure, the Air Force has the *option* to authorize others to use the unlimited rights data. The legends, however, would *require* the Government or Boeing to authorize third-party use. Boeing's legends would reduce the Government's broad license to the mere right to authorize others to use the data. For example, that would negate both the Government's right to disseminate the data without affirmatively authorizing others to use the disseminated data — in which case others could use the data without express authorization — and the Government's right to *have* others use the data without formal authorization to do so.

Finally, Boeing complains that the board's interpretation of the -7013 contract clause was inconsistent with the requirement in 10 U.S.C. § 2320 that DoD's regulations may not "impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law." At the same time, Boeing argues that the board did not decide that issue or that, at best, the board only addressed in dicta whether Boeing retained any trade secrets in unlimited rights data. Boeing

challenged the Air Force interpretation under section 2320, but then abandoned it, and as such, the board never had occasion to reach a final decision on the issue. It is thus not appropriate for review on appeal. In any event, Boeing cites no authority to support its view that it retains trade secret rights in data that it turns over to the Government fully knowing that there is no expectation or requirement that the Government maintain the confidentiality of the data. Confidentiality and the fundamental nature of "unlimited rights data" are wholly incongruent.

This Court should therefore affirm.

ARGUMENT

I. Standard Of Review

The interpretation of a Government contract, including interpretation of the Federal Acquisition Regulation incorporated into a contract, is a question of law, which the Court reviews *de novo* on appeal. *See Forman v. United States*, 329 F.3d 837, 841 (Fed. Cir. 2003); *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995). Although not binding on the Court, the views of the boards of contract appeals "are given careful consideration." *Textron Def. Sys. v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998); *see also United States v. Boeing Co.*, 802 F.2d 1390, 1393 (Fed. Cir. 1986) ("'[L]egal interpretations by tribunals having expertise are helpful to [this Court], even if not compelling.'") (citation omitted). Similarly, although the Court reviews the board's interpretation of a statute or regulation *de*

novo, the court "accord[s] respect to the board's interpretation of regulations that are within its field of expertise, federal procurement law." *Gen. Elec. Co. v. Delaney*, 251 F.3d 976, 978 (Fed. Cir. 2001).

II. The Plain Language Of Paragraph (f) Of The -7013 Clause Prohibits Boeing's Proposed Legends

Interpretation of a contract begins with the "plain language" of the agreement. *Forman*, 329 F.3d at 842. "When the contract's language is unambiguous it must be given its 'plain and ordinary' meaning." *Nw. Title Agency, Inc. v. United States*, 855 F.3d 1344, 1347 (Fed. Cir. 2017); *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (en banc). "A proper technique of contract interpretation is for the court to place itself into the shoes of a reasonable and prudent contractor and decide how such a contractor would act in interpreting the contract documents." *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998); *see also Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999) (Court must give contract language a "meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.") (quoting *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965)).

As explained below, the board applied these well-established contract interpretation principles to correctly interpret the -7013 clause as precluding all

legends other than those specified in paragraph (f). Appx12. And the board reasonably found support for its position in DFARS 227.7103-12, the regulation setting forth the "Government right to establish conformity of markings."

A. Paragraph (f) Of The -7013 Clause Authorizes Just Four Legends

Contrary to Boeing's argument, the plain language of the -7013(f) clause — entitled "Markings Requirements" — authorizes a contractor to use just four legends to mark its technical data and no others:

> (f) Marking requirements. The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (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.

DFARS 252.227-7013(f) (emphasis added).[10]

Here, the operative sentence in paragraph (f) is the *second sentence* because that is where the clause addresses which legends a contractor may apply to its noncommercial technical data. That sentence identifies four legends, provides *without qualification* that those four legends are the "only" authorized legends, and

[10] There is one exception that is not relevant here.

makes no distinction between legends that restrict the Government's rights and legends that do not. As such, under the plain language of the -7013(f) clause, Boeing's proposed legends are unauthorized because they are not among the legends enumerated in paragraph (f).

This plain language reading of paragraph (f) is supported by DoD's 1995 comments, published in the Federal Register, in promulgating revisions to the -7013 clause and the DFARS data rights regulations. 60 Fed. Reg. at 33,465. DoD addressed a comment about DFARS 252.227-7014, a contract clause delineating DoD's rights in noncommercial *software* that, although *not* at issue here, contains a paragraph that is substantively the same as paragraph (f) of the -7013 clause. *Id.*; *see also* DFARS 252.227-7014(f). DoD considered the scenario where "a contractor intends to satisfy a government requirement for noncommercial software with derivative software created by integrating commercial computer software with computer software developed with Government funds under a contract that contains the clause at 252.227-7014." 60 Fed. Reg. at 33,465. DoD explained that in such a situation, "the contractor might consider using a marking authorized by [the -7014 contract clause] *or a marking agreed to by the contracting officer, to protect its commercial interests in the derivative software.*" *Id.* (emphasis added).

Tellingly, DoD identified no option whereby a contractor may unilaterally impose its own legend on noncommercial data or software. DoD's comment demonstrates that a contractor's options under the similarly-worded paragraph (f) of the -7013 clause are either to use the standard legends or bilaterally negotiate a separate legend — Boeing did neither.

Thus, the board correctly concluded that under the -7013 clause in the contracts, Boeing may not unilaterally mark its noncommercial technical data with an extra-contractual, self-made legend.

B. DFARS 227.7103-12 Confirms The Plain Language Of Paragraph (f) That Four Legends, And Only Four Legends, Are Authorized

As the board also concluded, the regulation DFARS 227.7103-12 — entitled "Government right to establish conformity of markings" — supports the conclusion that the contract allows no legends other than those enumerated in paragraph (f) of the -7013 clause. As part of this right to establish conformity of markings, that regulation first directs that "[a]uthorized markings are identified in the [-7013 contract] clause."[11] DFARS 227.7103-12(a)(1). Next, without qualification or distinction between markings that do and do not restrict Government rights, DFARS 227.7103-12(a)(1) provides, "*All other* markings are nonconforming markings." *Id*. (emphasis added). The regulation also defines a

[11] In turn, as part of the Government's "right to establish conformity of markings," the -7013 clause identifies four authorized legends.

nonconforming mark as one that "is not in the form, or differs in substance, from the marking requirements" in the -7013 clause. *Id.*; *Cubic Def. Applications, Inc.*, 2018 ASBCA LEXIS 141, at **62 (citing DFARS 227.7103-12(a)(1) and explaining that markings not authorized by the -7013 contract are nonconforming). DFARS 227.7103-12(a)(1) thus demonstrates that DoD meant precisely what it said in paragraph (f) of the -7013 clause: the only contractually-authorized legends are those listed in paragraphs (f)(2)–(f)(5) of the clause.

Boeing argues that DFARS 227.7103-12(a)(1) and paragraph (h)(2) of the -7013 clause only speak to the *format* of markings, Br. at 39–42,[12] and that these provisions cannot mean that "any legend not specified in the contract is nonconforming." *Id.* at 40 (citing Appx12). Boeing's argument is without merit because it ignores DFARS 227.7103-12(a)(1) and is based on a misunderstanding of DoD's 1995 comments. Br. at 40.

Specifically, as demonstrated above, DFARS 227.7103-12(a)(1) expressly and in plain language states that a marking is nonconforming if it is not authorized in the -7013 clause. DFARS 227.7103-12(a)(1). The 1995 DoD comment that Boeing cites to support its flawed reading of DFARS 227.7103-12(a)(1), does not state otherwise. Br. at 40. Rather, that comment addressed a suggestion to modify DFARS 227.7103-12(a)(2), which pertains to the correction of nonconforming

[12] "Br." refers to appellant's brief.

markings. 60 Fed. Reg. at 33,466. DoD rejected the suggestion, explaining that "[t]he nonconforming marking *procedures* address only the proper format for a marking." *Id.* (emphasis added). This comment related only to the *procedures* in DFARS 227.7103-12(a)(2). The comment neither addressed, nor revised the *definition* of a non-conforming marking in DFARS 227.7103-12(a)(1). Like DFARS 227.7103-12(a)(1), the procedures in paragraph (h)(2) of the -7013 clause for removing a nonconforming mark do not change the definition of a nonconforming marking in DFARS 227.7103-12(a)(1). So, contrary to Boeing's argument, DFARS 227.7103-12(a)(1) is clear that a nonconforming marking is not just a marking in the wrong format, but is also one that is not authorized by DFARS 252.227-7013 or is substantively incorrect. *Cubic Def. Applications, Inc.*, 2018 ASBCA LEXIS 141, at **62.

The board correctly concluded that paragraph (f) of the -7013 clause, particularly when read in conjunction with the provisions for "nonconforming markings," does not permit other legends, to include Boeing's self-made legends.

III. Boeing's Interpretation Is Not The Meaning That A "Reasonable And Prudent Contractor" Would Ascribe To Paragraph (f) Of The -7013 Clause

As the board aptly explained, "there were ample warning signs for Boeing" that Boeing's interpretation was unfounded. Appx13. In addition to the plain language of the -7013 clause and the corresponding DFARS provisions, the

regulatory scheme, as demonstrated below, on the whole establishes that Boeing's interpretation is not reasonable. And contrary to Boeing's position, nothing about the history of the -7013 clause supports Boeing's interpretation. Simply put, Boeing's position is not how a reasonable and prudent contractor would interpret the -7013 clause. *E.g.*, *Postscript*, 22 No. 5 NASH & CIBINIC REP. ¶ 28; *Protecting Unlimited Rights Data*, 18 No. 5 NASH & CIBINIC REP ¶ 21.

A. Under The Guise Of A Purported "Natural Relationship" Between The First And Second Sentences Of Paragraph (f), Boeing Impermissibly Seeks To Rewrite The Contract

According to Boeing, "nothing" in the -7013(f) clause "pertains to markings relating to third party rights" because the second sentence in paragraph (f) should be read as identifying only the limited set of markings that restrict the Government's rights. Br. at 27. Boeing argues that so long as its legend (allegedly) does not impair the Government's rights, its legend is not unauthorized because the paragraph applies only to legends regarding the extent of the Government's rights. According to Boeing, paragraph (f) therefore affirmatively authorized Boeing to unilaterally devise and affix, without advance notice to the Government, an infinite range of extra-contractual legends regarding third-party rights to the same data. Boeing justifies this nonsensical reading based on what Boeing calls a "natural relationship" between the first and second sentences. Br. at

37; *id.* at 34 ("The second sentence follows logically from the first."). Boeing's attempts to rewrite paragraph (f) fail.

1. Boeing's Interpretation Impermissibly Rewrites Paragraph (f)

Boeing's attempt to overcome the plain language by arguing that the court must infer a "natural relationship" between the first and second sentences of paragraph (f) of the -7013 clause should not mask what Boeing really seeks — to have the Court read nonsensical limiting words into the plain, unqualified second sentence in paragraph (f). Specifically, Boeing seeks to ignore DoD's word choice by having the Court substitute the phrase "legends that restrict the Government's rights" for the word "legends." The Court ought to reject this interpretation because it "conflicts with the literal and plain meaning of the contract," *George Hyman Const. Co. v. United States*, 832 F.2d 574, 581 (Fed. Cir. 1987), and would impermissibly require the Court to rewrite the -7013 clause by inserting words into the clause, *id*.

Notably, the first sentence in paragraph (f) does not use the term "legend" at all; it more narrowly refers to "marking" (as a verb) as the means to "assert restrictions on the Government's rights." The second sentence, however, is not so limited. It does not use the terminology "marking" or "restrictions on the Government's rights." Instead, it refers more broadly to "legends" that are "authorized." If DoD intended to indicate a relationship between these two

sentences, DoD would have used the same language in both sentences. DoD chose not to. Thus, Boeing's interpretation would improperly have the Court rewrite paragraph (f).

2. There Is No Natural Relationship Between The First And Second Sentences Of Paragraph (f) To Justify Boeing's Proposed Rewrite Of Paragraph (f)

Comparing the approach for legends in paragraph (f) of the -7013 clause with the distinct, more liberal approach for *commercial* data legends in DFARS 252.227-7015 demonstrates the flaw in Boeing's theory that there is a "natural relationship" between the first and second sentences in paragraph (f). Unlike the express enumeration of four authorized legends in paragraph (f), the *commercial* data rights clause does not limit contractors to a specified set of authorized legends. DFARS 252.227-7015. The rules for *commercial* data legends are "more flexible, following best commercial practices. For commercial technical data, there is no prescribed legend," Office of the Under Secretary of Defense of Acquisition, Technology, and Logistics, *Intellectual Property: Navigating Through Commercial Waters*, 2–10 (Oct. 15, 2001),[13] although the commercial technical data clause does provide that unmarked data gives rise to "no liability for the release or disclosure of technical data," *id.*; DFARS 252.227-7015(d).

[13] *See* www.acq.osd.mil/dpap/specificpolicy/intelprop.pdf.

This flexible approach for *commercial* data is also seen in another contract clause, DFARS 252.227-7025, pertaining to when the Government furnishes data to contractors. That contract clause allows the contractor to use "commercial restrictive legends" for *commercial* data, but nowhere mentions similar legends for noncommercial data. *Compare* DFARS 252.227-7025(b)(1)-(3) *with* DFARS 252.227-7025(b)(4). The significant difference in the approach for commercial legends and noncommercial legends proves Boeing's "natural relationship" theory wrong.

Boeing's theory that the second sentence in paragraph (f) is naturally limited by the first sentence is also misplaced because the two sentences address two separate issues. As seen in the 1995 comments and by the changes in the 1995 regulations, the first sentence emphasizes the singular means by which a contractor may restrict the Government's rights — marking — and expresses the long-held rule that the Government obtains unlimited rights to data delivered without any markings. *See Bell Helicopter Textron*, 2018 ASBCA LEXIS 141, at **60; DFARS 227.7103-10. This was a point of debate before DoD adopted the final 1995 regulations.[14]

[14] Boeing thus misconstrues the DFARS when it states that "*[t]o effect the Government's license* to contractor data, contractors are required . . . to identify for the Government what (if any) restrictions will be asserted on the Government's rights." Br. at 22 (emphasis added). The contractor must affirmatively identify

In particular, commentors to the 1994 proposed regulations 1994 had objected to requiring contractors to mark their data. 60 Fed. Reg. at 33,465. DoD disagreed, explaining that contractors must mark their data *if* they want to restrict the "Government's rights to use, modify, reproduce, release, perform, display or disclose data or software." *Id*. DoD reasoned that this was not different from the commercial practice in which contractors use markings to protect their proprietary data or trade secrets. *Id.* Thus, the first sentence of paragraph (f) serves the distinct function of making clear the method for restricting the Government's rights.

The important and distinct purpose of the first sentence is also demonstrated by the change that the 1995 regulations made to the timing of when a contractor may assert restrictions. Before 1995, the DFARS permitted a contractor to notify the Government after award that it intended to deliver data with less than unlimited rights *if* its notice is "prior to [the contractor's] commit[ment] to the use of the . . . item." Simchak, *Protecting Rights in Technical Data and Computer Software*, 33 Pub. Cont. L.J. at 157. In contrast to that relatively lenient standard, the 1995 regulations narrowly defined the circumstances when a contractor may assert less than unlimited rights after contract award. *Id.* The first sentence in the 1995

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appropriate restrictions because unmarked data grants the Government unlimited rights in that data. DFARS 227.7103-11(a).

revision to paragraph (f) of the -7013 clause, therefore, serves an important, distinct function of making explicit the way a contractor may restrict the Government's rights in the data.

The second sentence, on the other hand, sets forth a limited universe of authorized legends and serves a different purpose. The 1995 comments are again informative. One commentor proposed using a simplified marking on just the first page of the technical data. 60 Fed. Reg. at 33,465. DoD rejected this suggestion as "not practicable because it would unnecessarily restrict release or disclosure of unrestricted information submitted with the restricted information." *Id*; *accord id*. at 33,468 (refusing to allow less than unlimited rights in data otherwise qualified for that broad license as it would lead to "unnecessary, burdensome, and costly data challenges"). The second sentence in paragraph (f) thus reflects DoD's concern that markings not create confusion about unrestricted Government's rights.

The regulation that grants the Government "the right to conformity of markings," DFARS 227.7103-12(a)(1), reinforces the conclusion that the second sentence has a distinct purpose because it demonstrates that "conformity" of markings is a significant concern to DoD. The second sentence of paragraph (f) meets the goal of having conformed legends — a single set of uniform legends that

leaves no room for confusion. And, again, that is in contrast to the leniency allowed commercial data legends.

Thus, no "natural relationship" between the two sentences justifies reading the second sentence to mean anything other than what it says: the four enumerated legends are the "only" authorized legends under the contracts between Boeing and the Air Force.

B. It Is Logical That DoD Limited The Authorized Legends To Those Identified In Paragraph (f) Of The -7013 Clause

The regulatory scheme and -7013 clause as a whole demonstrate that it makes sense that DoD would authorize no other noncommercial technical data rights legends than those identified in paragraph (f) of the -7013 clause. This is because the authorized legends for Government purpose rights and limited rights will ordinarily provide sufficient notice of the limitations on the use of the data and protections for the contractor's data, and the legend for a special rights license fills the gap when "the parties agree that the standard [license] rights are not appropriate for a particular procurement." 59 Fed. Reg. at 31,585. Thus, it is logical that the only authorized legends are those listed in paragraph (f) of the -7013 clause.

Specifically, when a contractor will deliver data to the Government with anything other than unlimited rights, paragraph (f) authorizes the specific wording of the legends that a contractor must use to identify that data. DFARS 252.227-

7013(f)(a)(2)–(3). In turn, those legends incorporate paragraphs (b)(2) and (b)(3) of the -7013 clause. *See* DFARS 252.227-7013(f)(2)–(3). Paragraphs (b)(2) and (b)(3) of the -7013 clause define the precise scope of the Government's rights under the Government purpose rights and limited rights licenses. DFARS 252.227-7013(b)(2)–(b)(3). Those paragraphs also establish procedures to protect the contractor's rights in its technical data when it delivers data to the Government with either of those two licenses. *Id*. For example, paragraphs (b)(2) and (b)(3) of the -7013 clause define the circumstances under which the Government may release or disclose Government purpose rights data and limited rights data, including (among others) when third-parties must execute non-disclosure agreements, the precise terms of those agreements, and any notice of disclosure that the contractor must receive. DFARS 252.227-7013(b)(2)(B)-(3)(B). Also, for data delivered to the Government with Government purpose rights or limited rights, the contractor releases the Government from liability for any release or disclosure that is consistent with the contract clause. DFARS 252.227-7013(b)(6).

Simply put, the legends for Government purpose rights and limited rights data, in addition to the authorized copyright notice, identify the only legends and procedures necessary to safeguard the standard universe of rights that a contractor retains under each license. When that standard set of rights is not adequate, the parties may negotiate a "specifically negotiated license rights," with paragraph (f)

authorizing a legend to identify that specially negotiated license. DFARS 252.227-7013(f)(4).

As such, no legend to identify unlimited rights data or procedures to protect the contractor's retained rights are necessary given the broad scope of rights that the Government obtains with an unlimited rights license. DFARS 252.227-7013(a)(16). For example, if the Government obtains unlimited rights, it would not violate the unlimited rights license to send a prototype to a competitor. *Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 381 (2005), *aff'd*, 469 F.3d 1369 (Fed. Cir. 2006) (unlimited rights license allowed Government to ship plaintiff's prototypes to a competitor). The broad scope of the Government's rights under an unlimited rights license, coupled with the option for a specifically negotiated license, explains why DoD would authorize only the four enumerated legends.

Thus, Boeing misses the point when it argues that the second sentence in paragraph (f) must be limited by the first sentence because each of the enumerated legends allegedly "is a method for restricting the Government's rights." Br. at 27, 36–37. It does not matter if the enumerated legends restrict only Government rights because those are the only legends logically necessary. Nonetheless, as the board concluded, the notice of copyright is not a restriction on Government rights, and so Boeing is incorrect that all four authorized legends address only restrictions on the Government's rights. Appx12. When the Government obtains any license

— unlimited rights, Government purpose rights, limited rights, or specially negotiated license rights, the Government also obtains a copyright license that is coextensive with the technical data rights license. *See* DFARS 227.7103-4(a); DFARS 227.7103-9(a)(1). Moreover, a copyright notice itself does not limit the ability of the Government to use or distribute data. *See Jennette v. United States*, 77 Fed. Cl. 126, 130 (2007) (holding that a copyright notice did not create any contractual obligations for the Government).

Therefore, contrary to Boeing's argument, Br. at 36–37, the copyright notice does not restrict the Government's rights. In a pre-litigation letter from Boeing to the Air Force, Boeing said as much. Appx223. In that letter, Boeing acknowledged that the copyright notice restricts third-party rights, not Government rights:

> The DFARS 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*. However, a copyright notice protects only Boeing's copyright in the technical data or computer software (prohibits anyone from making a verbatim copy without *Boeing or Government authorization*).

Id. (emphasis added).

Thus, Boeing is incorrect that "nothing" in the -7013(f) clause "pertains to markings relating to third party rights." Br. at 27; *see also id*. at 35–36 (arguing that the clause relates only to restrictions on the Government's rights). The Board

correctly rejected Boeing's theory that the enumerated list of authorized legends only restricts Government rights and that the parties impliedly intended to allow contractors to unilaterally impose an unlimited range of extra-contractual markings concerning third parties, without advance notice or consent of the Government. In any event, even if the notice of copyright only restricted Government rights, that would not lead to a different interpretation because DoD logically authorized no other legends.

C. Boeing's Theory That It May Include Other Legends Is Inconsistent With The Regulatory Scheme In DFARS 227.7103 And The -7013 Clause As A Whole

Boeing's theory that paragraph (f) is not intended to identify *all possible* restrictive legends, just those that restrict *the Government's rights*, is also illogical as it assumes that DoD (inexplicably) left it completely up to each contractor to decide individually and unilaterally how to address a contractor's retained rights (whatever those rights might be) when conveying unlimited rights to the Government. This is entirely inconsistent with numerous aspects of the DFARS.

First, as explained above, there are standardized legends and procedures in DFARS 227.7103 and the -7013 clause for protecting the contractor's retained rights when the Government obtains Government purpose rights or limited rights licenses. DFARS 252.227-7013(b)(2)–(3); DFARS 252.227-7013(f)(a)(2)–(3). Given the detailed provisions relating to those categories of data, it is

inconceivable that DoD would not have similarly addressed the use of unlimited rights data were it necessary to control third-party use of unlimited rights data (beyond the copyright notice).

For example, under Boeing's theory, the "general marking instructions" in the -7013(f)(1) clause would not apply to Boeing's self-made legend because -7013(f)(1) pertains only to "authorized legends," and Boeing says the "authorized legends" are not directed to non-Government entities. Boeing's theory would mean that DoD left it entirely up to contractors to determine whether a legend affects the Government and to use self-created legends, without any guidance or input from DoD and without any consistency as to these markings. Given the detailed scheme DoD put in place, Boeing's theory makes no sense.

By way of another example, for Government purpose rights and limited rights, there is a specified non-disclosure agreement that third parties must use. DFARS 252.227-7013(b)(2)–(3); DFARS 252.227-7025. Boeing's theory means that DoD left it up to each contractor to decide what form the third-party authorization should take and the terms of the authorization. This makes no sense given that the contract clause so precisely defines the terms of the non-disclosure agreement for the other licenses.

Yet another example is paragraph (e) in the -7013 clause, which requires "[i]dentification and delivery of data to be furnished with restrictions on use,

release, or disclosure." DFARS 252.227-7013(e). There are detailed requirements for identifying the data and the restrictions. *Id.* Under Boeing's theory, the contractor has no obligation to disclose other restrictions on the data, and the Government has no ability to assess the need for the legend.

Finally, Boeing fails to square its position with the contract provision that allowed it to seek a special license before entering into the contracts, which Boeing concedes it did not do. Br. at 50–51n.21. Boeing tries to excuse this by arguing in a footnote (which fails to preserve the argument)[15] that it was not "a viable solution." *Id*. Boeing's speculation about what might have happened if it had sought a special license is beside the point. The point is that the contract provides for the negotiation of special license rights and a corresponding legend. Boeing's belief that this contract provision was not a "viable solution" did not entitle Boeing to make a unilateral change to the contract terms by deciding to impose an extra-contractual legend.

Simply put, given the plain language of the second sentence of -7013, the nature of unlimited rights, the overall regulatory scheme in DFARS 227.7103 and approach in the -7013 clause, the Court should reject Boeing's position that the

[15] *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("[A]rguments raised in footnotes are not preserved.").

contract allows it to come up with its own legend because that is no the interpretation of a reasonable, prudent contractor.

D. The "Purpose And History" Of The -7013 Clause Do Not Support Boeing's Interpretation

Boeing suggests that in light of the history of the current regulations and -7013 clause, the 1995 regulations were intended to preserve some pre-existing right of contractors to mark their data however they want. Br. at 45 (arguing that the "1995 rewrite of the DFARS data rights provisions" was an "overhaul intended ***to expand*** contractor rights in intellectual property, ***not to constrict*** them" (emphasis in original); Br. at 46 ("Nothing in the regulatory history of the 1995 rewrite suggests that this change was intended to prevent contractors from using propriety notices to third parties."). Br. at 45–48. Boeing, however, only relies on broad policy statements pertaining to the overarching goal of balancing contractor and Government rights and a mischaracterization of DoD's 1995 comments in the Federal Register. Nothing in the history of the -7013 clause, however, would lead a reasonable contractor to believe it may unilaterally apply its own extra-contractual legend to unlimited rights data without the Government's knowledge and consent.

First, Boeing devotes a significant number of pages in its brief to discussing a non-controversial point — the long-recognized need to balance Government rights and contractor rights in technical data. *See* Br. at 14–20, 44–48. None 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, particularly not with respect to such data delivered with unlimited rights. To the contrary, one of the major changes from the 1988 interim DFARS to the 1995 regulations was "[s]eparate treatment for technical data related to commercial and noncommercial items." Ralph C. Nash Jr. & Leonard Rawicz, Intellectual Property in Government Contracts, 483 (6th ed. 2008). The distinct treatment of legends for commercial data, discussed above, reveals the flaw in Boeing's position.

Second, Boeing's theory hinges on a mischaracterization of DoD's comments in 1995. Br. at 46. What Boeing cites is a DoD remark in response to a commentor's concern that it would be a burden to require Government contractors to use markings. 60 Fed. Reg. 33,465. DoD disagreed: "Marking is not mandatory but contractors must mark when they desire to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose data or software. Such markings are commonly used in commercial practice to protect proprietary data or trade secrets." *Id*. Stated differently, DoD simply concluded that it is reasonable to require contractors to use the same

procedures (*i.e.*, marking) to restrict the Government's rights that contractors use in the commercial setting. *Id.*[16]

DoD's comment in no way suggests that in 1995, DoD was 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. To the contrary, numerous aspects of DoD's 1995 comments demonstrate the opposite, especially with respect to unlimited rights data.

For example, addressing whether a contractor should only have to mark the first page of its deliverables, DoD concluded that it would not be "practicable because it would unnecessarily restrict release or disclosure of unrestricted information submitted with the restricted information." 60 Fed. Reg. at 33,465. This reveals DoD's concern that "unrestricted information" could be encumbered by unclear markings that make it difficult for the Government to exercise its license rights and inhibit the Government's use of unrestricted information.

Similarly, DoD rejected a proposal to allow a contractor to assert limited rights in data that otherwise qualifies for unlimited rights because such an approach would be inconsistent with 10 U.S.C. § 2320 and "would result in

[16] Thus, Boeing's assertion that it marked its data "as is customary," Br. at 9, is irrelevant, as well as unsupported by any record cites.

unnecessary, burdensome, and costly data challenges." *Id.* at 33,468. This too demonstrates that DoD was concerned about burdening the Government's unlimited rights.

In addition, one commenter was concerned that if contractors have to mark pages that have "less than unlimited rights" it "will reduce the amount of useful information that might be displayed on each page." *Id.* at 33465. This reflects a general understanding that contractors only mark the pages when there is "less than unlimited rights." That is consistent with the entire structure of the -7013 clause and DFARS 227.7103 — neither of which suggest in any way that there is any need for a contractor to mark its data when it delivers data with unlimited rights. The intent, purpose, and history of the -7013 clause do not support Boeing's position. Rather, they confirm that DoD never contemplated any legends for unlimited rights data.

* * *

The Court should reject Boeing's interpretation as unreasonable in light of the plain language of the -7013 clause, the corresponding DFARS provisions, and the regulatory scheme as a whole.

IV. In Any Event, Boeing's Proposed Legends Would Impermissibly Restrict The Government's Unlimited Rights

Regardless of whether paragraph (f) of the -7013 clause limits only legends that restrict Government rights, Boeing's legends are unauthorized because they do

exactly that. The board's decision that the Government was not "harmed" by Boeing's legends improperly focused too narrowly on just one aspect of the Government's rights.

As a preliminary matter, contrary to Boeing's assertion, Br. at 3, 28, 60, the Government has *not* conceded that Boeing's proposed legend leaves the Government's unlimited rights unimpaired. Boeing's proposed undisputed facts in its summary judgment motion presented no such facts, so it is of no import that the "[t]he facts supporting Boeing's motion were undisputed by the Air Force." Br. at 24. Moreover, in its opposition to Boeing's summary judgment motion, the Air Force disputed Boeing's argument that the proposed legends did not impair the Government's rights. *See* Appx201-Appx208.

Furthermore, Boeing is wrong as a matter of law that its proposed legends do not restrict the Government's rights. The unlimited rights license is broad. Br. at 21. As Boeing acknowledges, Br. at 22, when a contractor grants the Government unlimited rights, "[c]ontractors may not restrict the Government's use and disclosure of technical data." Br. at 22. With the unlimited rights license, Boeing granted the Government an *unqualified* right to "use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purposes whatsoever, and to have or authorize others to do so." DFARS 252.227-7013(a)(16). These are intentionally broad rights. As the

comments to the 1995 regulations explained: "[w]hen the taxpayer exclusively funds development of an item or process . . . [i]t is difficult to appreciate the suggested adverse affect [sic] on data or software creators." 60 Fed. Reg. at 33,468.

The unlimited data rights license allows the Government to "disseminate freely unlimited rights data to the public" and "any party may use the data for 'any purpose whatsoever,' even if there are no connections to government business." Matthew S. Simchak & David A. Vogel, *A Few Words Of Advice: Protecting Intellectual Property When Contracting With The Department Of Defense According To The October 1988 Regulations*, 23 Pub. Cont. L.J. 141, 148–49 (1994). In other words, "[p]ractically speaking, the submitter will have no ability to protect data that it has given to the government with unlimited rights." *Id*.

Instead of allowing the Government its unfettered ability to choose how to exercise its own broad rights, Boeing's legends impermissibly *demand* that the Government exercise its rights in only one way — Boeing's way. For example, it is within the Government's right to "have" others use, modify, reproduce, perform, display, release, or disclose the unlimited rights technical data. Nothing in the DFARS or -7013 clause places any pre-conditions on the Government's exercise of its right to have others use, modify, reproduce, perform, display, release, or disclose the data. Boeing's legends nullify the "to have" provision in unlimited

rights license. That is not the extent of the Government's rights. Worse yet, the original legend Boeing proposed would require the Government or *Boeing's* authorization to be in *writing*. There is nothing in the definition of unlimited rights that requires the authorization to be in any particular form, much less delegating the form of that authorization to the *contractor*. Boeing's original proposed legend is plainly inconsistent with the Government's right for the *Government* to authorize use in *whatever* form the Government wishes.

Boeing argues that its legend is "especially critical in cases where Boeing's drawings can be repurposed on contracts where Boeing is not a prime contractor," and wants to use the legends to impose "potential limitations on distribution" "throughout the contractual chain." Br. at 11. This is troubling. Boeing wants to restrict third-party contractors with whom the Government has contracted, which flies in the face of the unlimited rights license. A restriction on what third parties can do with the unlimited rights data "throughout the contractual chain" is also a restriction on the Government's rights. "Repurposing" unlimited rights is well within the Government's rights to "use . . . data . . . for any purpose whatsoever." DFARS 252.227-7013(a)(16).

Both legends are also inconsistent with the way in which the Government might allow secondary use or distribution. With an unlimited rights license, the Government could freely release the technical data to the world. With such a

public release, under the unlimited rights license, the Government would not be required to grant authorization to downstream recipients. Yet, Boeing's legends would require Boeing or the Government to grant permission to every member of the public who receives this freely released data. Similarly, with an unlimited rights license, the Government might have (without providing explicit authorization) a support contractor further distribute technical data to various subcontractors for use in the performance of a Government contract. According to both of Boeing's legends, the subcontractor's use of this technical data — even in the performance of a Government contract — would be improper because the subcontractors never received authorization from the Government.

Accordingly, the board erred in finding that the legends would not restrict the Government's rights. The board reasoned that there is no burden to the Government in "do[ing] what a government-drafted clause expressly contemplates." Appx11. The board missed the point. True, the Government has the *right* to authorize others to use — but that right to authorize is only one stick in the bundle of rights that the Government obtains with an unlimited rights license. The board's reasoning would turn one *option* — the option to authorize others — into a *requirement* to authorize others, thus impermissibly negating, and rendering inoperable, the other aspects of the Government's rights. *See Arizona v. United States*, 575 F.2d 855, 863 (Fed. Cir. 1978) (a contract must be construed so as not

to render its provisions "useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieve[] a weird and whimsical result."). Through its proposed legends, Boeing impermissibly seeks to change the parties' obligations, but here the parties contracted "the limits of their confidential relationship," which Boeing may not do unilaterally. *Convolve, Inc. v. Compaq Computer Corp.*, 527 F. App'x 910, 925 (Fed. Cir. 2013) (nonprecedential), *cert. denied*, 134 S. Ct. 801 (2013).

Thus, the Court should conclude that Boeing's legends are unauthorized even under Boeing's own interpretation of paragraph (f) of the -7013 clause.

V. Boeing Abandoned Its Argument Under 10 U.S.C. § 2320, Which In Any Event Is Wrong On The Merits

On appeal, Boeing argues that the board's interpretation is inconsistent with the mandate in 10 U.S.C. § 2320 that DoD's regulations may not impair a contractor's "patent or copyrights or any other rights in technical data otherwise established by law." Br. at 6, 49. Yet Boeing also acknowledges that the board did *not* decide that issue, Br. at 49. According to Boeing, the board was not presented with the question of whether Boeing had any remaining rights in unlimited rights data, and anything the board said about that issue was just dicta. *Id.* at 52, 54. So, ultimately, Boeing argues that the court need not reach the question of what rights, including any trade secret rights, Boeing retains when it delivers data to the Government with unlimited rights. *Id.* It is unclear, then, why

Boeing believes it is appropriate for the Court to review a dicta on an issue that Boeing contends was not before the board.

What *is* clear, however, is that Boeing squarely presented this issue to the board, but abandoned it before the board could reach a decision. For that reason, the court should decline to review the question of whether the board's decision is consistent with section 2320. In any event, none of Boeing's arguments or cases (which Boeing mostly buries in footnotes) support its position.

A. Before The Board Could Rule On Boeing's Section 2320 Challenge, Boeing Requested Entry Of Judgment

Boeing's summary judgment motion argued that the Air Force's interpretation conflicts with multiple statutes, including 10 U.S.C. § 2320, "provid[ing] another basis to reject the Air Force's position and grant summary judgment to Boeing." Appx243–Appx244. A threshold question in determining that issue is defining the rights (if any) that Boeing retains. Boeing's summary judgment motion obliquely referenced unspecified trade secret rights, patents, and trademarks that would be purportedly impaired if Boeing could not mark the data with its proposed legend. *Id.* As the board described it, Boeing's motion did not "dwell on what those rights are or how they would be protected by [the proposed] legends." Appx9. Boeing's proposed statement of undisputed facts included no facts about trade secrets, patents, or trademarks implicated with the data it delivered to the Air Force.

Although the board was unpersuaded that Boeing would have any trade secrets remaining after delivering data with unlimited rights — an unsurprising conclusion given the nature of the unlimited rights license — the board nonetheless never reached the merits of whether the Air Force's interpretation impaired Boeing's rights. That is because the board gave Boeing the benefit of the doubt (as it must on summary judgment) that Boeing might have other legally cognizable rights that, absent the proposed legends, would be impaired. Appx9–Appx10, Appx13. The board concluded, however, that how Boeing's conjecture about its rights "translates into a legally cognizable property right is unclear" and "[u]ntil we identify with some precision the nature of Boeing's property right (if any) we cannot determine if the Air Force is complying with the congressional mandate . . . ." Appx10.

Thus, Boeing did raise the question of whether the Air Force's position was consistent with section 2320, but after having its summary judgment motion denied and with the board finding that it would have to resolve the issue later, Appx12, Boeing declined to pursue the issue. Instead, Boeing acceded to the entry of judgment and dismissal of its appeal. This issue is therefore not appropriate for appellate review. *Golden Bridge Technology, Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1322 (Fed. Cir. 2008) (citing the general rule "that a federal appellate court does

not consider an issue not passed upon below," and quoting *Singleton v. Wuff*, 428 U.S. 106, 120 (1976)).

B. Even If This Court Were To Consider The Question Of Section 2320, Boeing Failed Again To Support Its Position

Boeing alternatively argues that the board's dicta incorrectly concluded that Boeing does not have trade secret rights in data delivered to the Government with unlimited rights. Br. at 52. Like its approach at the board, however, Boeing again points to no facts or case law demonstrating that it has trade secret rights in the unlimited rights data. If the Court reach this question, the Court should reject Boeing's position.

First, Boeing suggests that the board failed to acknowledge the full scope of its interests. Br. at 51–52; *see also id*. at 54. Boeing is confused. It was up to Boeing — not the *board* — to develop a factual and legal basis for Boeing's argument that its retained rights would be undermined in the absence of its proposed legends, and Boeing did not do so. Perhaps realizing that failure, Boeing now tries to augment the record with arguments about hypothetical harms, citing only purported conversations with its suppliers. Br. at 58. This is not evidence, however; it is mere attorney argument raised for the first time on appeal and noticeably not supported by a single record cite. *Gemtron Corp. v. Saint-Gobain Corp*., 572 F.3d 1371, 1380 (Fed. Cir. 2009).

Second, contrary to Boeing's suggestion, DoD has not acknowledged that these legends are appropriate. Br. at 51. As explained above, Boeing's reliance on DoD's comments about commercial marking practices is misplaced. Br. at 51 (citing 60 Fed. Reg. at 33,465). Nor does DoD's publication, Navigating Through Commercial Waters, demonstrate that DoD considers a contractor to have the right to use its own legend for unlimited rights data. Br. at 51. Boeing quotes a statement from that publication discussing "privately funded background" intellectual property that is "modified at Government expense," which "results in the Government receiving a *broad GPR license* that does not adequately account for the significant private investment made previously." *See* https://www.acq.osd.mil/dpap/specificpolicy/intelprop.pdf (emphasis added).[17] That is not the case here, where Boeing granted unlimited rights, which means that the entire development has been paid exclusively with public money.

Third, Boeing is mistaken when it argues that the trade secret status of unlimited rights data "is not lost until such time as the Government exercises its license and publicly discloses information." Br. at 52. Boeing's theory on its face makes no sense. For example, what would happen if the data were to be marked

[17] That publication also acknowledges that for noncommercial data, there are only certain legends authorized under the contract, and "any alterations of the prescribed content or format results in the marking being considered nonconforming." *Id.* at 2–10.

with Boeing's legend, only to have the Government exercise its contractual right to publicly release the data? That release would extinguish Boeing'trade secret, and yet the data would have a restrictive legend seeking to enforce a trade secret that does not exist. Boeing may not use a restrictive legend that is inconsistent with the Government's rights based on the hope that the Government does not exercise its rights.

Moreover, none of the authorities Boeing cites is on point. Br. at 52–53 n.22.[18] Rather, they stand only for the inapposite proposition that a party does not lose its trade secrets by disclosing data to a third party who is expected to maintain the confidentiality of the data or where the party takes reasonable efforts to maintain the confidentiality of its data — which is not the case here. For example, Boeing references the statement in the Restatement (Third) of Unfair Competition that even a "limited non-confidential disclosure" may not defeat a trade secret. Br. at 52–53. That is beside the point because here, Boeing voluntarily made the disclosure with no expectation of confidentiality, limited or otherwise — and the Government did not agree to maintain any confidentiality.

The lack of any obligation for the Government to keep the unlimited rights data confidential also demonstrates the flaw in Boeing's argument. Br. at 52–53

[18] Notably, Boeing buries most of its authorities in a string cite in a footnote and in some instances without a pinpoint cite or parenthetical.

nn.22–23. In *GlobeRanger Corporation v. Software AG*, the question was whether "GlobeRanger delivered the Navy Solution to the Navy *with adequate precautions to ensure the secrecy of its proprietary information*" given that the "Navy *did not* have the undisputed right to disclose" the information to a third party. 27 F. Supp. 3d 723, 749 (N.D. Tex. 2014) (emphasis added). In *Taco Cabana International, Inc. v. Two Pesos, Inc.*, the court explained that the owner of trade secret will lose "his secret by its disclosure unless it is done in some manner by *which he creates a duty and places it on the other party not to further disclose or use it in violation of that duty*." 932 F.2d 1113, 1123 (5th Cir. 1991) (emphasis added), *aff'd*, 505 U.S. 763 (1992). In turn, *Wellogix, Inc. v. Accenture*, relies on the same inapposite proposition stated in *Taco Cabana.* 823 F. Supp. 2d 555, 563–64 (S.D. Tex. 2011), *aff'd* 716 F.3d 867 (5th Cir. 2013) (quoting *Taco Cabana*). Similarly in *Vianet Grp. PLC v. Tap Acquisition, Inc*., the court emphasized that the disclosures there did not vitiate the trade secret because they "would not *ordinarily* occasion public exposure." No. 3:14-CV-3601-B, 2016 WL 4368302, at *21 (N.D. Tex. Aug. 16, 2016) (emphasis added).

These cases do not support Boeing's position here because, to be clear, Boeing knowingly delivered the unlimited rights data to a third party (the Government) without any expectation or requirement that the Government would maintain the information as confidential and with full knowledge of the

Government's undisputed and unfettered right to disclose and disseminate the data. *Accord Cubic Def. Applications*, 2018 ASBCA LEXIS 141, at **60 (only an authorized marking indicates that data is submitted in confidence; otherwise, the data is delivered with unlimited rights).

Thus, Boeing's attempt to distinguish *Monsanto*, 467 U.S. 986, and *Conax Florida Corporation v. United States*, 824 F.2d 1124 (D.C. Cir. 1987), misses the key point of those cases. *Monsanto* stands for the proposition that — like here — "if an individual discloses his trade secret to others *who are under no obligation to protect the confidentiality of the information* . . . his property right is extinguished." *Monsanto*, 467 U.S. at 1002; *see also L-3 Comms. Westwood Corp. v. Robichaux*, No. 06-279, 2008 WL 577560, at *6-7 (E.D. La. Feb. 29, 2008) (explaining that data delivered with unlimited rights is not subject to trade secret protection).

Boeing proves *our* point when it argues that *Conax* "stands only for the unremarkable proposition that, if the Navy possessed unlimited rights, it had the right to disclose Conax's data." Br. at 56. That proposition is why Boeing has no expectation that the Government will maintain the confidentiality of its data — and that is why the unlimited rights license extinguishes Boeing's trade secrets. Likewise, Boeing's citation to *United States v. Liew*, contradicts its argument because there, the Ninth Circuit concluded that in a criminal prosecution under the

Economic Espionage Act, "the government was not required to prove that no disclosures of DuPont's TiO2 technology occurred. Instead, it needed to establish that DuPont took *reasonable* measures to *guard* that technology." 856 F.3d 585, 601 (9th Cir. 2017) (emphasis added). Yet in delivering the unlimited rights data to the Government, Boeing has no contractual right to require the Government to handle the unlimited rights data with any level of confidentiality — that would simply defy the definition of the unlimited rights license.

Finally, Boeing's reliance on the patent application process is without merit. Br. at 53 n.23. When a patent application is submitted, it is with the express expectation enshrined in a statute that the application will remain secret until an appropriate time. 35 U.S.C. § 122. The delivery of data with unlimited rights under the -7013 clause is the exact opposite of a patent application.

Just as it failed to do before the board, Boeing again fails to present any facts or authority to suggest that there is a conflict between the Government's and the board's interpretation of the -7013 clause and Boeing's rights in violation of section 2320.

C. Nothing About The Board's Decision Would Negate The Balance Of Rights That The 1995 Clause And Regulations Struck

Finally, Boeing contends that applying the twenty-five year-old, plain language of paragraph (f) of the -7013 clause would "distort the incentive for contractors to participate in government procurement, in contravention of the

legislative and regulatory purpose and history." Br. at 57; *see also* Br. at 6 (the board's decision will make technology innovators "disinclined to license their valuable intellectual property to DoD"); *id.* at 10–11. Given that Boeing cannot establish that the Government's interpretation of the -7013 clause conflicts with any rights Boeing retains in unlimited rights data, Boeing reveals that what it really dislikes is the scope of the unlimited rights license. The time to object to DoD's regulations has long since passed, however.

In fact, this is reminiscent of a 1995 complaint to DoD that unlimited rights would have a negative impact on businesses that are data or software creators. 60 Fed. Reg. at 33,468. In response to that timely comment, DoD explained that "[w]hen the taxpayer exclusively funds development of an item or process" — as Boeing concedes is the situation here — "[i]t is difficult to appreciate the suggested adverse affect [sic] on data or software creators." *Id*.

Boeing also argues it needs the legend in order to commercialize its data through "direct commercial sales to foreign allies," Br. at 9 & n3, 10-11, but DoD rejected a similar complaint in 1995 that "data or software may be lost to foreign competition." 60 Fed Reg. 33,468. DoD observed that contrary to that argument, other commentors took the position that "opportunities to commercialize federally funded technologies are maximized when the Government has unlimited rights in technical data." *Id*. DoD concluded that "[t]he fact that data or software might be

available, if otherwise properly releasable, to foreign governments, foreign nationals, or international organizations does not diminish domestic commercialization opportunities." *Id*.

In any event, this argument is without merit. Commercialization requires a sale, offer for sale, lease, or license to the "general public or by non-government entities." *See* 48 C.F.R. § 2.101 (defining "commercial item" and distinguishing between the Federal Government and governments in general). A sale to a foreign government would not permit an F-15 component to be characterized as a commercial item.

Last, Boeing argues that the board's decision would apply to limited rights data too, implying that the decision would somehow impair a contractor's rights in limited rights data because it is developed exclusively at the contractor's expense. Br. at 59. Boeing fails to develop this argument in any meaningful way. Moreover, Boeing ignores, or at least fails to square its argument with, the safeguards in the -7013 clause and DFARS for data delivered with less than unlimited rights.

Ultimately, nothing about the Air Force's interpretation of the -7013 clause upsets the balance that DoD struck through the 1995 regulations and contract clause or conflicts with 10 U.S.C. § 2320.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the board's decision that Boeing's legends are not authorized under the -7013 clause in Boeing's contracts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Circuit Rule 32(a), appellee's counsel certifies that this brief complies with the Court's type-volume limitation rules. According to the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 13,679 words.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 30th day of March, 2020, a copy of the foregoing "BRIEF FOR APPELLEE":

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/s/Corinne A. Niosi
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