

# U.S. Government Software Acquisition Policies – DFARS and Data Rights

*Vicki E. Allums, Office of the General Counsel  
Defense Information Systems Agency (DISA)  
Department of Defense  
(703) 681-0378  
[vicki.allums@disa.mil](mailto:vicki.allums@disa.mil)  
July 26, 2010*

# OVERVIEW

- **Basics**
- **Software Acquisition – What are the Issues for DoD?**
- **Copyright v. DFARS**
- **DoD Policy Framework**
- **DoD Regulations (DFARS)**
- **Data Rights for Commercial Software**
- **Data Rights for Noncommercial Software**
- **Special Agreements**

# BASICS

- **Regulations/Statutory Authority**
  - **DOD – DFARS “Data Rights Clauses”**
  - **U.S. Copyright Act, Title 17 United States Code**

# **BASICS -- COPYRIGHT AUTHORITIES**

- **U.S. Constitution**
- **U.S. Copyright Act**
- **28 U.S.C. 1498 (b)**
- **Executive Order 13103**

# BASICS -- COPYRIGHT PROTECTION

- literary works (e.g. computer programs)
- musical works
- dramatic works
- choreographic works
- pictorial, graphic, and sculptural works
- motion pictures
- sound recordings
- architectural works

*(17 U.S.C. Section 102)*

# BASICS -- COPYRIGHT PROTECTION

- Protects a Method of Expression
- Copyright Owner Acquires Exclusive Rights to
  - reproduce the software
  - prepare derivative works based upon the original software
  - distribute copies of the software
  - publicly perform
  - publicly display the software

*(17 U.S.C. Section 106)*

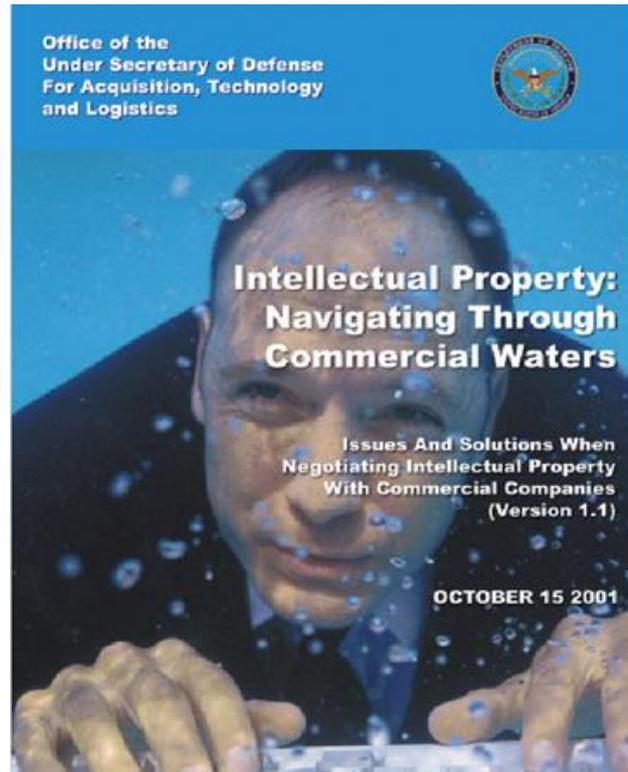
# SOFTWARE ACQUISITION -- WHAT ARE THE ISSUES?

- Identify the project objectives
- What are DoD's goals?
  - Commercial-off-the shelf (COTS)
  - Government-off-the shelf (GOTS)
  - Open Source solution
  - Long v. short-term
- Is DoD funding the project?
- License Grant
  - What can the Government do with the computer software and computer software documentation?
  - What are the restrictions?

# COPYRIGHT V. DFARS

- **WHAT'S THE DIFFERENCE?**
- **DOES IT MATTER WHEN ACQUIRING SOFTWARE?**

# DoD GUIDANCE



# USD (AT&L) GUIDEBOOK

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

(Ver 1.1, 15 Oct 2001)

*[www.acq.osd.mil/dpap/Docs/intelprop.pdf](http://www.acq.osd.mil/dpap/Docs/intelprop.pdf)*

# DoD POLICY FRAMEWORK

- **Contractors are generally permitted to retain ownership of the IP rights governing the technologies/information that they develop or deliver under DoD contracts**
- **DoD receives a (nonexclusive) license to use the IP**
- **The scope of the license depends upon the nature of the data, the source of funding, and negotiation between the parties.**

# WHAT ARE DATA RIGHTS?

- **Data rights are license rights in either computer software or technical data and computer software documentation.**
- **DoD Regulations**
  - **DFARS 227.72 (Rights in Computer Software/Documentation)**
  - **DFARS 227.71 (Technical Data)**

# COMMERCIAL V. NONCOMMERCIAL

- **DOD's right to commercial software is determined by standard commercial license**
- **DoD's right to noncommercial software is determined by project funding (private v. public)**

# DFARS CLAUSES -- COMMERCIAL SOFTWARE

## DFARS 227.7202 Commercial computer software and commercial computer software documentation

- DFARS 227.7202-1 Policy
- DFARS 227.7202-3 Rights in Commercial Computer Software or Commercial Computer Software Documentation
- DFARS 227.7202-4 Contract Clause

# DATA RIGHTS -- COMMERCIAL SOFTWARE

*Commercial software and commercial software documentation shall be acquired under licenses customarily provided to the Public unless such licenses are inconsistent with Federal procurement law or do not satisfy user needs. DFARS 227.7202*

# LICENSING AGREEMENTS – KEY CONCERNS & QUESTIONS

- Does the license satisfy DoD's needs?
- Does DoD greater rights?
- Will the project require COTS and GOTS?
- Does the software include OSS or other third-party proprietary software?
  - What are the Terms and Conditions?

# LICENSING AGREEMENTS – KEY CONCERNS & QUESTIONS

- Vendor's v. the Government's rights and obligations
- Other Issues
  - Services
    - Upgrades
    - Patches
    - Technical Support
    - Maintenance
- Is the Licensing Agreement attached?

***“READ THE AGREEMENT”***

- Are the terms consistent with the contract terms & DFARS clauses?

# DATA RIGHTS -- NONCOMMERCIAL SOFTWARE

- **DFARS 227.7203 Noncommercial Computer Software and Noncommercial Computer Software Documentation**
  - 227.7203-1 Policy
  - 227.7203-2 Acquisition of noncommercial computer software and computer software documentation
- **DFARS 252.227-7014**

## DFARS 252.227-7014

***Computer Software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.***

## DFARS 252.227-7014

***Computer Software documentation*** means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar terms, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

# DATA RIGHTS -- NONCOMMERCIAL SOFTWARE

- **Types of Rights**
  - **Unlimited**
  - **Government Purpose**
  - **Restricted**
  - **Limited**
  - **Specifically Negotiated**
  - **SBIR**
- **Deliverable Software (source code and object code)**
  - **Establish content, format and delivery medium for software deliverables**

# DATA RIGHTS -- NONCOMMERCIAL SOFTWARE

- **Source of Funding**
  - **Government Funded**
  - **Mixed (Government and Private) Funded**
  - **Privately Funded**

# UNLIMITED RIGHTS

- **Rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.**

# OWNERSHIP VS. UNLIMITED RIGHTS

- **Ownership of software belongs to author**
- **Unlimited rights license confers a license but not ownership**
- **Does Unlimited rights = ownership?**
  - **Allows free use and distribution**

# GOVERNMENT PURPOSE RIGHTS

- Use of software limited to within DoD for “Government Purpose”
- May release to Government Contractor
- Reverts to “unlimited rights” after 5 years

# GOVERNMENT PURPOSE

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

# RESTRICTED RIGHTS

- **Developed exclusively at private expense**
- **Not required to provide Government additional rights**

# OTHER LICENSING RIGHTS

- **Specifically Negotiated Rights**
- **SBIR**
- **Special Works**

# MARKING REQUIREMENTS

- **Marking the deliverable software**
  - **Notice of Copyright ©**
  - **Government Purpose**
  - **Restricted rights**
  - **Special license rights**
  - **Pre-existing markings (previous Government contract)**
- **Review markings before acceptance**

# ACQUIRING SOFTWARE DO'S and DON'TS

- Know the Government's needs
- Understand the contractor's interests and rights in the computer software
- Determine whether additional rights are needed
  - Immediate and long-term view
- If GOTS – Ask about COTS integration
- Include the proper DFARS clause in the contract or incorporate by reference
- Review Contract for inconsistent terms and conditions
- Deliverables – source and object code, identify COTS, Open Source
- Integrate IP into acquisition strategy
- Negotiate!!!

QUESTIONS?

---