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# Boeing Case Boosts Contractor Ability To Guard Trade Secrets

By **Jay Carey and Evan Sherwood** (January 7, 2021, 5:31 PM EST)

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If your company delivers technical data to the U.S. Department of Defense, you should take a close look at the U.S. Court of Appeals for the Federal Circuit's decision in The Boeing Co. v. Secretary of the Air Force.[1]

The court found that contractors retain ownership and other interests in unlimited rights data, and it held that they may take steps to put third parties on notice of those interests. In particular, the court held that contractors may mark their data with a legend notifying third parties of their retained rights, in addition to the standard legends required by the Defense Federal Acquisition Regulation Supplement.

However, the court clarified that such a third-party legend would be inappropriate if it was written in a way that restricted the government's lawful data rights.

The court's decision is an important addition to the existing set of court decisions discussing whether unlimited rights data can qualify for trade secret protection. For decades, courts have split over whether and when unlimited rights data can qualify as a trade secret. While the Federal Circuit did not directly address trade secrecy, restrictive legends are one of the key ways that a contractor can put others on notice that it asserts rights — such as trade secret protections — in data.

Contractors would be well-served to evaluate whether their data protection policies can be enhanced in light of the court's decision.

**Background on the Decision**

The appeal was based on a U.S. Air Force contract for development of the F-15 fighter jet's electronic warfare system.[2] Boeing was required to deliver certain data with unlimited rights, and it did so under DFARS 252.227-7013.[3] As a result, the government received the right to use the data for any purpose or disclose it to anyone, including other contractors.[4]

However, under long-standing DFARS regulations, contractors generally retain ownership of and rights in data delivered to the government.[5] Contractors often seek to protect their retained rights from misuse by third parties.

One way of doing so is to add a legend to the data that warns third parties of a contractor's rights. Boeing used just such a notice, advising non-U.S. government parties of its assertion that the information was proprietary to Boeing and could not be used without permission from Boeing or the government.[6]

In response, the Air Force's contracting officer challenged the marking and directed Boeing to resubmit the data deliverables without the proprietary notice.[7] According to the Air Force, DFARS 252.227-7013(f) forbid Boeing's marking, because the clause states that only DFARS-prescribed legends can be used, and Boeing's legend was not one of those.

**The Court's Holding**

In a detailed 22-page opinion, the Federal Circuit rejected the Air Force's interpretation, holding instead that DFARS 252.227-7013's marking procedures apply "only in situations when a contractor seeks to assert restrictions on the government's rights."[8] The clause "is silent on any legends that a contractor may mark on its data when it seeks to restrict only the rights of non-government third parties."[9]

Thus, the court held that Boeing's third-party legend was not prohibited as a matter of law by the DFARS.

The court also held, however, that there was still a question about whether the specific language of Boeing's legend did — as a matter of fact — assert a restriction on the government's unlimited rights.[10] The court characterized this as a factual dispute for the Armed Services Board of Contract Appeals to resolve at trial. So although legends directed at third parties are allowed, they must not be written in a way that burdens the government's lawful rights in data.

**Potential Impact on Trade Secrecy**

The court's opinion did not mention trade secrecy, but it will likely have consequences in that area for government contractors. Trade secret law allows contractors to assert proprietary rights in information, giving them a basis to exclude others from using it.

To claim trade secret protection over data, however, the claimant must take steps to treat it as confidential. The precise standards for confidentiality are fact-intensive and vary by jurisdiction.[11] One common step is to place a legend on data to warn third parties that it is proprietary.

Because of the varying requirements for confidentiality, courts have split over whether unlimited rights data can qualify as a trade secret. Some courts have taken the position that unlimited rights data cannot be a secret, since the government has the right to disclose it to anyone under DFARS 252.227-7013.[12]

Other courts have held that, depending on the facts, contractors can continue to assert trade secret protection against third parties even for data provided to the government with unlimited rights.[13] Indeed, although the government has the option to disclose unlimited rights data to anyone for any reason, it normally guards its data and discloses it only for narrow purposes, much like any other holder of intellectual property.

By permitting contractors to place a proprietary legend on their data, the Federal Circuit's decision allows contractors to use one of the common tools for asserting trade secrecy, which may bolster their

ability to successfully protect the data against use by third parties. The court expressly acknowledged that contractors "maintain[] ownership of the data and at least some rights in the data."[14]

The court also noted that, were the DFARS to prohibit third-party legends, it could result in contractors "de facto losing all rights in any technical data" delivered to the government.[15] Thus, the decision is likely to be helpful to contractors in the continuing debate over whether unlimited rights data can be a trade secret.

**Takeaways**

The Federal Circuit's decision confirms that contractors may mark data delivered to the government — even data delivered with unlimited rights — with a legend putting third parties on notice of the contractor's retained rights in that data.

Contractors who do not currently use such a legend may want to consider adopting that practice, but they should carefully assess the language of their legend to ensure that it does not restrict the government's data rights.

The decision is likely to be helpful to contractors seeking to assert trade secret protection for data that has been delivered to the government with unlimited rights. Markings are often important when asserting trade secret protections and, while the Federal Circuit did not directly address the issue of trade secrecy, its decision acknowledges that the markings will help contractors to assert otherwise legally viable rights in data.

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[1] The Boeing Co. v. Secretary of the Air Force (Fed. Cir. Dec. 21, 2020).

[2] Slip Op. at 5-6.

[3] Id.

[4] See id. (citing DFARS 252.227-7013(a)(16)).

[5] See, e.g., DFARS 252.227-7013(c) ("All rights not granted to the Government are retained by the Contractor.").

[6] Slip Op. at 6.

[7] Id. at 7.

[8] Slip Op. at 13.

[9] Id. at 11.

[10] Id. at 22.

[11] In 2016, Congress enacted the Defend Trade Secrets Act, which provides for a federal cause of action to enforce trade secret protections. However, states continue to have their own trade secret laws. See 18 U.S.C. §1838 (explaining that the Act would generally not preempt state law regarding the misappropriation of a trade secret).

[12] See, e.g., L-3 Comm'cns Westwood Corp. v. Robichaux, 2008 WL 577560, at *8 (E.D. La. Feb. 29, 2008).

[13] See Lockheed Martin Corp. v. L-3 Comm'cns Corp., 2008 WL 4791804, at *8 (N.D. Ga. Sept. 30, 2008); Pacific Sky Supply, Inc. v. Dep't of the Air Force, 1987 WL 28485, at *1 (D.D.C. Dec. 16, 1987); see also Advanced Fluid Sys. Inc. v. Huber, 958 F.3d 168, 179-80 (3d Cir. 2020) (holding that an inventor could claim trade secret protection under Pennsylvania law, even though the data had become the "exclusive property" of its customer).

[14] Slip Op., at 18.

[15] Id. The court's approach to this issue was thus consistent with the Department of Defense's data rights statute, which explains that the DFARS is not intended to impair a contractor's "right in technical data otherwise established by law." 10 U.S.C. §2320(a)(1).