University of California
Systemwide Administration

Office of the
Associate Vice President--
Business and Finance

Contracts and Grants Office

Memo
Operating
Guidance

No. 84-31
November 19, 1984

VICE CHANCELLORS — BUSINESS AND FINANCE/ADMINISTRATION*
CONTRACTS AND GRANTS OFFICERS (NON-LAB)
SYSTEMWIDE ADMINISTRATION FUNCTIONAL MANAGERS

Subject: Rights in Data Issues and Clauses / University Copyright Policy

Copyright issues and other issues related to rights in data under extramural awards are becoming increasingly important to the University. It is critical that all Contracts and Grants Officers understand rights in data issues, including the potential obligations and benefits to the University.

WHAT IS COPYRIGHT?

Circular R1 issued by the U.S. Copyright Office states:

> Copyright is a form of protection provided by the laws of the United States (title 17, U.S. Code) to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:
>
> *To reproduce the copyrighted work in copies of phonorecords;
>
> *To prepare derivative works based upon the copyrighted work;
>
> *To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> *To perform the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, and
>
> *To display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of motion picture or other audiovisual work.
>
> It is illegal for anyone to violate any of the rights provided to the owner of copyright by the Act.

These rights, however, are not unlimited and Sections 107 through 118 of the Copyright Act should be consulted by anyone interested in the limitations on these rights under the Act.

*Note: The addressees above represent the standard distribution of Contracts and Grants Office Memos. Additional addressees, if any, may be added based on the subject of the Memo. See cc's.

RIGHT TO PUBLISH

The publication rights of University authors is and will remain a major issue in this area. Contracts and Grants Officers must scrutinize extramural award provisions, to insure that the University author has the right to publish the results of his/her efforts. Publication, however, is only one of the rights in data issues that C&G Officers must take into account when reviewing extramural awards.

OTHER RIGHTS IN DATA ISSUES

In addition to publication rights, there are other significant issues which must be addressed concerning how University rights under copyright law (as itemized under "What is Copyright?", above) will be assigned or affected by rights in data clauses of extramural awards. What Exclusive rights, under the copyright law, are left with the University? Does the University have the right to license commercially valuable results of University research? Have data clauses precluded any advantage the University may want in dissemination of research results?

All decisions related to rights in data issues and transfer of such rights under the terms of an extramural award, must be made in light of the ownership provisions of the University Copyright Policy. Therefore, Contracts and Grants Officer must be familiar with the terms and ramifications of the University Copyright Policy (Enclosure 1), with particular focus on Section III of the Policy, "Ownership of and Other Rights Related to Copyrightable Materials".

PRINCIPAL INVESTIGATOR OWNERSHIP OF COPYRIGHTABLE MATERIALS

Paragraph A of Section III of the Policy presents the basic University Copyright Policy: The University ownes all intellectual property developed by employees except for materials itemized in the following list. These materials are the property of the author [principal investigator or other authors within a research group].

1. Books ("published works as fiction, nonfiction, poems, compilations, composite works, directories, catalogues, annual publications, information in tabular form, and similar text matter, with or without illustrations, as books, either bound or in loose-leaf form, pamphlets, leaflets, cards, single pages, or the like")

2. Musical or dramatic compositions

3. Architectual designs

4. Paintings

5. Sculptures

6. Other works of comparable type

Exceptions are made if the work is a specific part of the author's University assignment or is prepared pursuant to a special contractual arrangement, in which case ownership rests with the University.

The vast majority of copyrightable material related to extramural sponsorship will be reports and publications of the variety that, under this Section III (A) of the University Copyright Policy, belongs to the author. While the University allows authors to do as they wish with their own material, authors may not be familiar with the consequences of rights in data provisions of an extramural agreements into which the University enters. Such provisions could preempt the authors' rights to their material and/or their rights to publish. In those situations, and before entering into such an agreement, Contracts and Grants Officers should consult with ALL potential authors to be funded under the proposed extramural award about the possibility that they may not have control over their work and about any potential loss of rights under the proposed agreement. This consultation should be not only with the principal investigator who controls the project, but with other "authors" within the research group.

Additionally, there is the question of potential restrictions placed on materials not developed by the specific research group, but used by them as tools in the course of their research effort, i.e. a computer data base developed by other researchers to be used to collect or generate data under the terms of an extramural award. Such materials when offered for use by third parties to University researchers, may contain restrictions on releasing the materials to others, including the extramural sponsor. If such a situation exists, accepting an extramural award which contains an "UNLIMITED RIGHTS" clause would set up a unacceptable conflict in rights situation. Where such a provision cannot be removed through negotiation, and is included in an extramural award, Contracts and Grants Officers should advise the principal investigator and other researchers that they may not have the right to use certain materials which contain third party rights and restrictions.

UNIVERSITY OWNERSHIP OF COPYRIGHTABLE MATERIAL / COMMERCIAL VALUE

Beyond the question of "publishing" rights and conflicting rights as discussed above, Contracts and Grants Officers must be aware that often during the course of research there is developed intellectual property that has commercial value. Such intellectual property is the property of the University if it falls within the definition given at Section III(B) of the University Copyright Policy.

Section III(B) covers all copyrightable material other than that specifically presented as "traditional forms" in Paragraph III(A). Section III(B) material would include, for example, video tape, computer programs , audio records or tape, and photographic slides. Paragraph III(B) provides that the University will retain ownership of and thus will have the option to copyright such resulting material if University funds (including extramural support) or University production facilities are utilized by an employee.

Extramural agreements that Contracts and Grants Officers execute on behalf of the University should allow the University the greatest possible freedom to exploit valuable intellectual property. Therefore, the Contracts and Grants Officer should try to anticipate, with the help of the researchers involved and others, the potential value of the intellectual property that may be created under an extramurally funded project. Where there is potential commercial value, C&G Officers should avoid preempting University's rights by negotiating rights in data clauses which limit or restrict the sponsor's ability to diminish such potential commercial value.

The University Copyright Policy states that the University may agree to allow the employee to share any royalties resulting from such commercially valuable research efforts. The disposition of funds generated from commercialization of such material is a question of campus and University policy and any decision should be made on a case-by-case basis.

If, after careful consideration of publication issues, of potential conflicting rights of third parties, and of commercial value issues, it is determined to be in the best interest of the University, ownership or other rights in resulting materials may be granted to the sponsor. The Principal Investigator and other researchers, however, should be informed whenever such an arrangement is to be negotiated into a support agreement.

Campus procedures under the University Copyright Policy should be reviewed to determine if consultation with the Directors of any media centers involved in production, or other campus officers, is also required prior to granting rights in such copyrightable materials to an extramural sponsor. Directors of media centers normally hold the delegated authority to secure a waiver from the employee (author) establishing that such resulting materials are the property of the University and establishing the extent of any rights to be granted to an extramural sponsor.

RIGHTS-IN-DATA CLAUSES

When considering extramural awards, clauses and schedules will establish the form and type of technical data to be furnished and the rights to be obtained by the sponsor and the rights to use or publish such technical data.

Enclosure 2 and future Enclosures to this Memo will discuss individual Agency rights in data clauses and policies. These discussions should be considered by Contracts and Grants Officers in judging the conditions under which such clauses are acceptable to the University in individual extramural awards.

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Subject Index: 11
Organization Index: U-115
F-005
F-175

Cancel: C&G Memo 5-71, Item I-2
10-76, Item I-1
13-80

Roger G. Ditzel
Director, Patent, Trademark &
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Acting University Contracts
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Enclosures

Enclosure 1 to
CoG Memo# 84-31

UNIVERSITY COPYRIGHT POLICY

I. Purpose and Scope

This statement sets forth the policy of the University governing the administration of copyright matters. It supersedes the University Copyright Regulation issued on November 5, 1962, and it is effective immediately.

II. Definitions

For the purposes of this policy, the following definitions shall apply:

Assignment of Rights:	An assignment of rights is a transfer of rights under copyright by the owner.
Author:	An author is one or more individuals, singly or as a group, who produces copyrightable material.
Book:	The word "book" includes such published works as fiction, nonfiction, poems, compilations, composite works, directories, catalogues, annual publications, information in tabular form, and similar text matter, with or without illustrations, as books, either bound or in loose-leaf form, pamphlets, leaflets, cards, single pages, or the like.
Contractual Agreement:	A contractual agreement is any enforceable agreement between the University and other individuals or parties.
Copyright:	A copyright is the right of the owners not to have material resulting from creative or intellectual labor copied or commercially used without their consent.
Fair Use:	Fair use is a use of copyrighted material which is permitted by law even though no express authorization is granted by the copyright owner.

Infringement: An infringement occurs when any of the rights granted by law to the copyright owner are exercised without permission, for example, when a material portion of a copyrighted work is copied or is commercially exploited without such permission.

License: A license creates a contractual relationship in which the owner under a copyright grants permission for use of the copyrighted material.

Material: The term "material" refers to all copyrightable works, including but not limited to, writings, lectures, musical or dramatic compositions, sound recordings, films, videotapes and other pictorial reproductions, computer programs, listings, flow charts, manuals, codes, instructions, and software.

Owner: The term "owner" refers to the party who owns or controls rights to copyrightable material, whether under copyright or otherwise, and who has the right to sell, assign, distribute, or license the use of such material.

Public Domain: Material is said to be in the public domain if it is not protected by common law or statutory copyright and, therefore, is available for copying without infringement.

Publication: Publication occurs when by consent of the copyright owner the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public or when an authorized offer is made to dispose of the work in any such manner, even if a sale or other disposition does not, in fact, occur.

University Funds: University funds are those funds, regardless of the source, that are administered under the control, responsibility, or authority of the University.

III. Ownership of and Other Rights Related to Copyrightable Material

A. It shall be the policy of the University that copyrightable material in the form of books, musical or dramatic compositions, architectural designs, paintings, sculptures, or other works of comparable type developed by employees either in conjunction with or aside from their University employment shall be the property of the author unless the material is prepared by means of special contractual arrangements or as a specific part of their University assignment. A faculty member's general obligation to produce scholarly works does not constitute such a specific University assignment.

B. Copyrightable material, other than that mentioned in A. above, developed by employees either in conjunction with or aside from their University employment utilizing University funds, or the staff, equipment, and facilities of the Learning Resources, Media, and Computer Centers or other University production facilities shall be the property of the University and shall, at the University's option, be copyrighted in the name of The Regents. However, the University shall provide for the disclosure of appropriate credits and shall consider the comments of participating employees regarding subsequent presentation of the material. The University may allow employees who develop copyrightable material, other than that mentioned in A. above, using University resources, to share in any royalties which accrue from the sale or lease of such material outside the University, provided an appropriate agreement is entered into prior to the beginning of a project. ~~Any such agreement shall provide for the University to recover its full development costs for the project before an employee may be allowed a share in the royalties.~~ Any such agreement shall take into account the employee's effort and contribution as well as the extent of the University's development costs (and any conditions on the recoupment of such costs imposed by extramural funding sources) in setting the employee's royalty, the University's income share, and the recoupment of the University's costs.

In all other cases, when the above facilities are utilized on a reimbursable basis to develop copyrightable material, an agreement shall be executed in advance setting forth the understanding regarding the use of facilities, ownership rights, and financial arrangements.

C. Copyrightable material, other than that mentioned in A. above, prepared without the use of University funds and facilities by employees in conjunction with their University employment shall be the property of the author unless the material was prepared through special contractual arrangements. However, the University shall reserve the right to receive a free and irrevocable license to use such material in connection with its educational, research, and public service functions. It shall be the policy of the University to acquire only such license right, leaving authors free to establish copyrights in their own names if they wish. The University shall not profit from the use of such material, and authors shall have the right to periodically comment on the material as provided in B. above.

D. In all cases in which persons or organizations other than University employees prepare copyrightable material with the support of University resources or facilities, exclusive of libraries, an agreement shall be executed in advance setting forth the understanding regarding the use of facilities, ownership rights, and financial arrangements.

E. In instances when the copyright is in the name of the author, the name of the University shall not be used in connection with publication, production, or distribution of the material, except in such form as approved by Chancellors, Vice Presidents, and Laboratory Directors. Such approval must be in accordance with the University Policy to Permit Use of the University's Name. (Attachment I.)

IV. University Copyright Authority

Chancellors, Vice Presidents, and Laboratory Directors are authorized to enter into agreements with respect to ownership and other rights related to copyrightable material, to obtain copyrights, and to grant licenses in the ~~name~~ of The Regents for all copyrightable material under their jurisdiction. The attached standard form (see Attachment II.) shall be utilized as the license agreement, except for those instances that shall be referred to General Counsel as noted in Section IX. Chancellors, Vice Presidents, and Laboratory Directors shall assure for their respective jurisdictions establishment and maintenance of a central file of all non-University Press book and film copyrights secured in the name of the University and licenses granted by the University, and shall provide for renewal of such copyrights as necessary. The Vice President--University and Student Relations shall be provided with notification of each such copyright obtained.

V. Required Copyright Notice

Property rights in copyrightable material may be secured for a published work by publishing the work in printed or otherwise processed form bearing a proper copyright notice. The right to secure copyright is lost if an adequate notice of copyright is not on the work at the time of publication. Therefore, the copyright notice must include either the word "copyright", the abbreviation "Copr.", or the symbol "©", accompanied by the name of the copyright owner and the year of first publication. Both the word "copyright" and the symbol "©", i.e., "Copyright © 1973 by [copyright owner]" are recommended. For printed material, this notice must appear on the title page or on the page immediately following. For motion pictures, this notice must be included in the title frames or as near to them as possible. For other types of material except sound recordings, any location that is reasonably calculated to give notice to the public is sufficient.

For sound recordings, the notice must be indicated on the label by the designation (P), the year of first performance of the sound recording, and the name of the owner of the copyright in the sound recording.

Copyright law also provides for the registration of the copyright with the copyright office of the Library of Congress. The forms for registering copyrightable material may be obtained from the Register of Copyrights, U. S. Copyright Office, Washington, D. C. 20025.

VI. Obtaining Licenses Without Charge for Use of Non-University Copyrighted Material

The following guidelines should be observed when making University requests for free licenses to use non-University copyrighted material:

A. the request should be for no greater rights than are actually needed;

B. the request should fully identify the material for which permission to publish or use is requested; and

C. the request should be submitted to the copyright owner in duplicate so that the owner may retain one copy and return the other copy indicating consent.

Attached is a copy of a sample letter for use in requesting permission to use non-University copyrighted material without charge. (Attachment III.)

VII. Purchase of Licenses for Use of Non-University Copyrighted Material

Licenses for the use of non-University copyrighted material may be purchased by the University in the event the copyright owner refuses to grant a free license and if it is determined that the official use of the copyrighted material is either essential or desirable.

If it is determined that a license should be purchased, General Counsel shall be consulted when there are questions with respect to the material involving considerations of public domain and of the applicability of the fair use doctrine. (Note also Section IX. concerning requirements for obtaining advice from General Counsel.)

Attached is a copy of a sample license for use of non-University copyrighted material where a license fee or charge is requested by the non-University copyright owner. (Attachment IV.)

VIII. Grant of Permission for Use of University Copyrighted Material

Prior to granting a license for the use of University copyrighted material, Chancellors, Vice Presidents, and Laboratory Directors shall determine that the form, use, and distribution of material do not constitute adverse competition with programs of the University and shall determine the monetary consideration to be asked in exchange for a license.

Attached is a copy of the standard license agreement for use for granting permission to use University copyrighted material. (Attachment II.)

IX. Necessity for General Counsel Approval

General Counsel has prepared the attached standard forms. One form is to be used in conjunction with Section VI. (Permission to Use Non-University Copyrighted Material Without Charge, Attachment III.) Another form is to be used for situations arising under Section VII. (License Fee or Charge is Requested by Non-University Copyright Owner, Attachment IV.) The final form is to be used when permission is granted for use of University copyrighted material in accordance with Section VIII. (Attachment II.) Use of the standard license forms will relieve those who are authorized to grant or seek licenses of the necessity of seeking advice or informing General Counsel each time a license is issued or obtained. However, when there is a question regarding the necessity for a license or when there is a deviation from the standard forms, General Counsel shall be consulted.

X. Implementing Procedures

Chancellors, Vice Presidents, and Laboratory Directors may issue supplementary regulations and implementing procedures consistent with this policy. All such proposed regulations and procedures shall be submitted to the President prior to issuance for review as to consistency with University-wide policy.

Enclosure 2 to
C&G Memo No. 84-31

RIGHTS IN DATA CLAUSES

Department of Defense

Reference: DFARS 52.227-7013

Title (Date): Rights in Technical Data and Computer Software (MAY 1981)

Purpose: This clause serves as the basic DOD "data rights" clause. It establishes the rights of the Government and the contractor in the use, release and distribution of technical data and computer software. Generally, the Government will have unlimited rights to all technical data and computer software unless the contractor takes specific actions and includes prescribed legends in the proposal, contract, and/or data products to limit or restrict such Government rights for particular identified items. Technical data means recorded information and includes (but is not limited to) research and engineering data and drawings, specifications, standards, process sheets, manuals, technical reports and computer software documentation. It does not include computer software or financial, cost/pricing or other contract and grant administrative data.

Applicability: This clause should be included in DOD contracts in accordance with DFARS 27-412 (a)(1). Generally, this clause is appropriate when technical data is to be delivered or computer software may be originated, developed or delivered under the contract. This would include the overwhelming number of our DOD research contracts.

Special Actions or Concerns: The Contracts and Grants Officer must identify any technical data or computer software for which the University may want to assert limited or restricted Government rights and mark such items in accordance with the prescribed legends set forth within the text of the clause. Under this clause, the Government will have certain rights to unpublished technical data and computer software documentation used in the course of a contract (not necessarily generated pursuant to performance of the contract), even that where there is ownership by or obligation to third parties. The Principal Investigator must, therefore, develop a list of those items which are free and clear of such third party interest or restriction and agree to use in the proposed work only the listed items whenever this clause is accepted.

Materiel Managers must be informed of flowdown requirements.

Reference:	DFARS 52.227-7013 (Alternate I)
Title (Date):	Rights in Technical Data and Computer Software, Alternate I (MAY, 1981)
Purpose:	This provision requires the contractor to give the contracting officer notice of the use of certain unpublished technical data and computer software documentation for which the Government would have only limited rights pursuant to DFARS 52.227-7013 (b) (2).
Applicability:	The Government would usually include this clause in any contract which incorporated the basic data rights clause DFARS 52.227-7013.
Special Actions or Concerns:	Contracts and Grants Officers would be responsible to identify and properly mark "limited rights" items with the appropriate legend under DFARS 52.227-7013. Then, when the PI intends to use such items, C&G Officers must promptly notify the Contracting Officer of such intended use.

Reference:	DFARS 52.227-7013 (Alternate II)
Title (Date):	Rights in Technical Data and Computer Software, Alternate II (MAY 1981)
Purpose:	This Clause would prevent the Government from publishing data specifically identified or deliverable under the contract for a prescribed period of time, not to exceed 24 months after delivery of such data. This would allow the University to publish such data commercially for profit without competition from the Government or its designee.
Applicability:	This clause, if included in a contract, would apply only when the University decides to publish designated data commercially for profit.
Special Actions or Concerns:	Contracts and Grants Officers bear the burden of working with the Principal Investigator and the Patent, Trademark and Copyright Office, to identify at the proposal/contract negotiation stage any potential product or by-product of the research effort which might have commercial value to the University. Where such items are identified, Contracts and Grants Officers should insist that this clause be included in the contract with a designation of the covered products and by-products.

Reference:	DFARS 52.227-7018
Title (Date):	Restrictive Markings on Technical Data (MAR 1975)
Purpose:	This clause is intended to assure administrative integrity in the contractor's identification and markings (under DFARS 52.227-7013) of data produced or delivered under the contract as having restricted or limited Government rights. It requires naming the person marking such data; having written procedures for determining which data is to be marked; and maintaining records to support data identification and marking decisions. There are flowdown provisions in subcontracts where technical data is required to be delivered.
Applicability:	This clause is to be inserted by the Government whenever the basic data rights clause, DFARS 52.227-7013, is included.
Special Actions or Concerns:	The Contracts and Grants Officer must assure that the required identification of a responsible person, written procedures and necessary record keeping are accomplished by the responsible person. On most campuses the responsible person would be the Contracts and Grants Officer, him or herself. Materiel Managers must be informed of flowdown requirements.

Reference: DFARS 52.227-7020

Title (Date): Rights in Technical Data - Special Works (MAR 1979)

Purpose: The intent of this clause if to give the Government ownership of and control over all works first produced under the contract. This would prevent the University from asserting any rights or claim to copyright for such items.

Applicability: This clause is imposed by the Government where it desires ownership or control of special works, including technical data and computer software. Examples of the types of data for which the Government usually desires such control are itemized at DFARS 27-405.

Special Actions or Concerns: The Principal Investigator and all those who plan to participate in the proposed effort must be apprised of and given an opportunity to object to the fact that under this clause, the University and its employees will have no ownership rights.

The assertion in this clause that the Government shall be considered the person for whom the work was prepared for the purpose of determining authorship in copyrightable works differs from paragraph (c) (3) in the basic data rights clause DFARS 52.227-7013, which states the contractor shall be considered the person for whom the work was prepared for the purposes of determining authorship. Therefore, in the rare event of incorporation of both DFARS 52.227-7013 and DFARS 52.227-7020, the Contracts and Grants Officer must assign applicability of each clause to separately identified portions of the work by clearly indicating such separation in the contract.

Additionally, in granting ownership to the Government, the ownership assignments under the University Copyright Policy must be carefully considered.

Finally, this clause includes as paragraph (e) an indemnity provision protecting the Government from liability related to works furnished under the contract. Acceptance of an indemnity provision in any contract is subject to specific Regental authorization (under Standing Order 100.4 (dd) (11)) if the University would, under the contract, assume liability for the conduct of persons other than University officers, agents, employees, students, invitees and guests. Because this indemnity clause falls under the Standing Order's restriction, Regents approval must first be obtained. All proposals to make this clause applicable to a contract must be referred to this office for review and for submission to The Regents of a request for specific authorization as required under the Standing Order.

Reference:	DFARS 52.227-7029
Title (Date):	Identification of Technical Data (MAR 1975)
Purpose:	This clause simply requires that technical data delivered under the contract be marked with the contract number, the name of the contractor and the name of any subcontractor who generated the data.
Applicability:	This clause is to be inserted in all contracts where technical data is to be delivered.
Special Actions or Concerns:	Contracts and Grants Officers should insure that those who will be submitting technical data under the contract to the Government are aware of the marking requirements.

Reference:	DFARS 52.227-7031
Title (Date):	Data Requirements (APR 1972)
Purpose:	This clause requires that the contractor deliver data items as listed on DD Form 1423, "Contract Data Requirements List."
Applicability:	Because this clause is <u>not</u> to be included "in any research or exploratory development contract when reports are the only deliverable item(s) under the contract" (DFARS 27.410-6), most University contracts should not include this clause.
Special Actions or Concerns:	In rare cases where this clause is included, Contracts and Grants Officers should assure that deliverable data items listed on DD Form 1423 are properly described in consultation with the Principal Investigator.

University of California
Office of the President

Office of the
Associate Vice President —
Business and Finance

Contracts and Grants Office

Memo
Operating Guidance

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VICE CHANCELLORS — BUSINESS AND FINANCE/ADMINISTRATION*
CONTRACTS AND GRANTS OFFICERS (NON-LAB)
OFFICE OF THE PRESIDENT FUNCTIONAL MANAGERS

Subject: Rights in Data Clauses (NASA) and Related Publication Issues

This Memo transmits a copy of the University Publication Policy. It is to be included with Contract and Grant Memo No. 84-31 concerning "Rights in Data Issues and Clauses" because consideration of publication issues is an integral part of the review of agency rights in data clauses. The Publication Policy should be filed as Enclosure 1a to C&G Memo 84-31.

In addition, this Memo transmits discussions of NASA rights in data clauses. These discussions should be considered by Contracts and Grants Officers in judging the conditions under which such clauses are acceptable to the University in individual extramural awards.

Please note that the basic NASA Rights in Data Clauses, NASA/FAR Supplement 18-52.227-74, contains language which is unacceptable to the University and which has been widely protested by the University community. Guidance is provided on this clause language in the enclosed materials.

The enclosed discussions of NASA rights in data clauses supplement Contract and Grant Memo No. 84-31 issued November 15, 1984. The enclosed NASA related materials should be physically filed as Enclosure 3 to C&G Memo No. 84-31. This Supplement should be filed with Contract and Grant Memo No. 84-31.

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Subject Index: 01, 11
Organization Index: F-650

David F. Mears
University Contracts and
Grants Coordinator

Enclosures: Publication Policy (File as Enclosure 1a to C&G Memo No. 84-31)
NASA Clauses (File as Enclosure 3 to C&G Memo No. 84-31)

cc: Director Ditzel

*Note: The addressees above represent the standard distribution of Contract and Grant Memos. Additional addressees, if any, may be added based on the subject of the Memo. See cc's.

PUBLICATION POLICY

Enclosure 1a to
C&G Memo 84-31

Rights to Results of Extramural Projects or Programs. It is long-standing University policy that freedom to publish or disseminate results is a major criterion of the appropriateness of a sponsored project, and particularly of a research project.

(1) Normally a contract or grant is unacceptable if it limits this freedom. Examples of limitations a sponsor may attempt to impose are:

(a) assigning ownership of results to the extramural fund source;

(b) assigning the final decision as to what may be published to the extramural fund source;

(c) placing an unreasonably long or unlimited delay period on the publication or dissemination of the information resulting from the work under the project.

(2) Chancellors may make exceptions to this policy, or recommend exceptions in cases where contract or grant authority has not been delegated to the Chancellor, when one or more of the following conditions is met:

(a) security considerations in the national interest are involved;

(b) the sponsor reserves first right of publication, but only if there is a provision surrendering this right to the University after a reasonable interval of time, in the event the extramural fund source has not published within that time;

(c) the statement of work is so written that the work to be done under the project or program comprises the production of a manual, book, film, videotape, or the like, and it is clear that this product is what the sponsor is "buying" from the University;

(d) special or extraordinary circumstances prevail which do not involve censorship of the results of the project. AID programs in foreign countries may, for example, require restrictions on the timing or character of publications, to protect the national interest. Such projects or programs should be judged on their merits in light of the reasons given by the sponsor for any restriction on publication.

(3) If there is any doubt concerning an exception in a particular case, it should be resolved either by refusing to accept an award containing a restrictive clause, or by referring the problem to the President for resolution.

RIGHTS IN DATA CLAUSES

National Aeronautics and Space Administration
(NASA)

Reference: NASA/FAR Supplement 18-52.227-74

Title (Date): Rights in Data -- General (APRIL 1985)

Purpose: This clause serves as the basic NASA "data rights" clause. It establishes the rights of the Government and the contractor in the use, release, distribution and copyright of technical data, including computer software. Generally, the Government will have unlimited rights to all technical data unless the contractor takes specific action:

a) to withhold such data from delivery to NASA pursuant to paragraph (g) of this clause, or

b) to deliver such data with a prescribed legend as set forth in Alternates II and III to this clause (coverage on these Alternates follows this discussion of the basic NASA clause.)

In addition, under paragraph (c)(2) of this clause, the "express, written permission of the Contracting Officer" IS REQUIRED for the University to establish claim to copyright subsisting in all data first produced under the contract with the exception of that subsisting in scientific and technical articles or presented in academic, technical and professional journals or conference papers.

Further, paragraph (d)(3) of this clause states:

> The Contractor agrees not to establish claim to copyright, publish or release to others computer software first produced in the performance of this contract without written prior permission of the Contracting Officer.

Applicability: This clause would be included in NASA contracts in accordance with NASA FAR Supplement 18-27.475-1(a)(1). Generally, this clause is included in all contracts where data will be produced, furnished, or acquired (with some limited exceptions).

Special Actions or Concerns: The Contracts and Grants Officer in consultation with the Principal Investigator must determine whether there will be any limited rights data or restricted computer software produced which the University wants to withhold from NASA pursuant to paragraph (g)(1) of this clause. If so, the Contracts and Grants Officer should

assure that the University furnishes "form, fit, and function data" in its place.

Secondly, where such limited-rights data or restricted computer software must be submitted to NASA pursuant to the contract, Alternates II and/or III to the basic clause would be included in the contract (as discussed later). Contracts and Grants Officers must then assure the appropriate prescribed legends are included with the submitted items (as discussed later).

UNACCEPTABLE RESTRICTIONS

Thirdly, Contracts and Grants Officers must carefully consider the restrictions included in paragraphs (c)(1) and (d)(3) as follows.

Paragraph (c)(1) -- This paragraph requires written permission of the contracting officer to establish claim to copyright subsisting in all data first produced under the contract with the exception of that subsisting in scientific and technical articles or presented in academic, technical, and professional journals or conference papers. However, such permission may be routinely granted at the time of contracting or during contract performance pursuant to NASA FAR Supplement 1827.473-2(g):

(g) *Copyrighted data.*—(1) *Data first produced in the performance of a contract.* (i) In order to enhance the transfer or dissemination of information produced at Government expense, contractors may be granted permission to establish claim to copyright subsisting in data first produced in the performance of work under a contract containing the clause at 1852.227-74, Rights in Data—General. This permission is normally granted in paragraph (c)(1) of the clause for scientific and technical articles based on the work performed under the contract and published or presented in academic, professional and technical journals or conference papers. For all other data, such permission may be granted by the contracting officer, in consultation with installation Intellectual Property or Patent Counsel, in accordance with the procedures in paragraph (g)(1)(ii) below.

(ii) Usually, permission for a contractor to establish claim to copyright for data first produced under the contract will be granted under subparagraph (c)(1) of the clause at 1852.227-74, Rights in Data—General, when copyright protection will enhance the appropriate transfer or dissemination of such data. The request for permission must be in writing, and may be made either at the time of contracting or subsequently during contract performance. It should identify the data involved or furnish a copy of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which copyright is desired. The request normally will be granted unless: (A) The data consists of a report that represents the official views of the agency or that the agency is required by statute to prepare, (B) the data is intended primarily for internal use by the Government, (C) the data is of the type that the agency itself distributes to the public under an established program, or (D) the data is of a type that is subject to limited distribution due to Government Policy.

(iii) Whenever a contractor establishes claim to copyright subsisting in data first produced in the performance of a contract, the Government normally is granted a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, perform publicly and display publicly, by or on behalf of the Government, for all such data, as set forth in subparagraph (c)(1) of the clause at 1852.227-74, Rights in Data—General. However, NASA may on a case-by-case basis obtain on equitable terms a license of lesser scope than set forth in subparagraph (c)(1) of the clause if the contracting officer determines, with concurrence of installation Intellectual Property or Patent Counsel, that such lesser license will substantially enhance the transfer or dissemination of any data first produced under the contract.

Paragraph (d)(3) --This paragraph reads,

> The Contractor agrees not to establish claim to copyright, publish or release to others computer software first produced in the performance of this contract without written prior permission of the Contracting Officer.

The University community, including the Council on Governmental Relations, has strongly protested this provision and some NASA installations have agreed to provide blanket approval to copyright and publish such computer software or have deleted paragraph (d)(3) entirely. Other installations, including NASA, Washington, D.C., however, have only agreed to such a deletion on a case-by-case basis where software is incidental to contract activity and is not a deliverable item under the contract. COGR has stated that because of NASA's "apparent willingness to negotiate terms acceptable to universities where software is incidental to contract activity and not considered a deliverable item, the usual contract negotiation activity of universities should be able to resolve most individual problems on this issue."

Where software is to be first produced in the performance of the contract and is indeed central to the contract activity and/or a deliverable item, Contracts and Grants Officers may run into great resistance from NASA in their attempt to have paragraph (d)(3) deleted or to obtain a blanket approval. In such cases, the publication restrictions of paragraph (d)(3) would violate the University's Publication Policy. It is the responsibility of Contracts and Grants Officers to determine whether to reject the NASA contract based on this violation of University policy or to seek a Chancellor's exception based on the Publication Policy's exception criteria (See Enclosure 1a to this Memo.) In addition, the Principal Investigator and all those who will participate in the research effort must be apprised of and given an opportunity to object to the fact that under paragraph (d)(3), the University and its employees will have no rights to copyright or publish without prior written permission of the contracting officer.

Finally, Materiel Management must assure that the terms of any subcontract written under a contract containing this clause allow the University to deliver all necessary data and rights as required by the contract.

Reference: NASA/FAR Supplement 18-52.227-74, Alternate I

Title (Date): Alternate I (APRIL 1984)

Purpose: The purpose of Alternate I is to change the definition of "limited-rights data" in the "basic" NASA data rights clause, 18-52.227-74. The change removes from the definition the requirement that limited-rights data (which means data that embodies trade secrets or is commercial or financial and confidential or privileged) must "pertain to items components, or processes."

Applicability: In accordance with NASA FAR Supplement 18-27.473-2(b), Alternate I would be used in contracts where limited-rights data does not involve the development, use, or delivery of items, components, or processes that are intended to be acquired for use by or for the Government, but instead involves market research and surveys, economic forecasts, socio-economic reports, educational materials, health and safety information, management analysis and related matters.

Special Actions or Concerns: The Contracts and Grants Officer must ascertain that Alternate I is negotiated into the contract where the University intends to assert "limited" Government rights for data which meets the Alternate I definition rather than the definition provided in the basic clause 18-52.227-74, as discussed on the previous page.

Reference: NASA/FAR Supplement 18-52.227-74, Alternate II

Title (Date): Alternate II (APRIL 1985)

Purpose: The purpose of Alternate II is to provide a mechanism whereby NASA can request and the contractor can protect limited-rights data. Under Subparagraph (g)(1) of the basic data rights clause at 18-52.227-74, the contractor is allowed to withhold limited-rights data and in lieu thereof, to provide "form, fit, and function data." However, this Alternate II adds Subparagraph (g)(2) which enables NASA to selectively request delivery of such data. This Subparagraph, however, prescribes a legend which the contractor must use to restrict the Government use and distribution of such data.

Applicability: NASA would insert this Alternate II in a contract containing the basic data clause 18-52.227-74, where NASA wished to receive otherwise withholdable limited-rights data.

Special Actions or Concerns: The Contracts and Grants Officer must be certain that the University's right to limit Government use of limited-rights data supplied by the University or by its subcontractors is exercised, when necessary, through the proper use of the "LIMITED RIGHTS NOTICE (APRIL 1985)" included as part of the Alternate II clause.

Reference: NASA/FAR Supplement 18-52.227-74, Alternate III

Title: Alternate III (APRIL 1984)

Purpose: The purpose of Alternate III is to provide a mechanism whereby NASA can request and the contractor can protect restricted computer software. Under Subparagraph (g)(1) of the basic data rights clause at 18-52.227-74, the contractor is allowed to withhold restricted computer software, and in lieu thereof, to provide "form, fit, and function data." However, this Alternate III adds Subparagraph (g)(3) which enables NASA to identify and specify delivery of restricted computer software. This Subparagraph, however, prescribes a legend which the contractor may use to restrict the Governments use and distribution of such restricted software.

Applicability: NASA would insert this Alternate III in a contract containing the basic data clause 18-52.227-74 where NASA wished to receive otherwise withholdable computer software.

Special Actions or Concerns: The Contracts and Grants Officer must be certain that the University's right to restrict the Government's use of restricted computer software supplied by the University or by its subcontractors is exercised, when necessary, through the proper use of the "RESTRICTED RIGHTS NOTICE (APRIL 1984)" included as part of this Alternate III clause.

Reference: NASA/FAR Supplement 18-52.227-75

Title (Date): Representation of Limited-Rights Data and Restricted Computer Software (APRIL 1985)

Purpose: This notification provision is not a contract clause but is placed in solicitations to alert potential contractors to their rights and obligations in data and computer software under the basic data clause, 18-52.227-74 and its Alternates II and III. In addition, this solicitation provision requests that offerers identify any limited-rights data or restricted computer software in their offers.

Applicability: This provision would be included by NASA in solicitations in accordance with NASA FAR Supplement 18-27.475-2. Generally, the provision would be included in any solicitation which contains Clause 18-52.227-74 and where the NASA contracting officer desires to know whether there will be limited-rights data or restricted computer software involved. This would then indicate to the contracting officer whether to use Alternates II and/or III in any resulting contract.

Special Actions or Concerns: The Contracts and Grants Officer must work closely with the Principal Investigator and his/her associates to determine at the proposal state whether or not researchers will be developing and potentially delivering to NASA limited-rights data and/or restricted computer software. Where such items will be developed and potentially delivered, they must be appropriately identified in the offer.

Similar concerns and precautions apply to subcontractors.

Reference: NASA/FAR Supplement 18-52.227-76

Title (Date): Additional Data Requirements (APRIL 1984)

Purpose: Under this clause, NASA could order additional data requirements beyond those set forth in the contract which were "first produced or specifically used" in the performance of the contract. (Note: Pursuant to 18-27.475-3(b), the contracting officer may alter this clause by deleting the term "or specifically used", if delivery of such data is not necessary to meet the Government's requirements for data.) A NASA order for additional data could occur at any time during contract performance or within a 3 year period after acceptance of all deliverable items under the contract. The contractor would receive some compensation for submission of such additional data. All of the data rights and obligations set forth in the NASA basic data clause, 18-52.227-74, would apply to such additional data.

Applicability: Pursuant to NASA FAR Supplement 18-27.475-3, this clause would be included in experimental, developmental, research, or demonstration contracts, or other situations where it may not be possible to determine all the data requirement at the time of contract negotiation. Therefore, it would be applicable to the majority of the University's NASA research contracts.

Special Action or Concerns: Contracts and Grants Officers should be aware that all rights and responsibilities related to limited-rights data and restricted computer software as set forth in NASA basic data clause 18-52.227-74 also apply to the "additional data" discussed in this clause. Further, Contracts and Grants Officers should advise Principal Investigators and associates of the potential for additional data requests up to three (3) years after acceptance of the contract deliverable items.

Reference: NASA/FAR Supplement 18-52.227-77

Title (Date): Rights in Data - Special Works (APRIL 1984)

Purpose: The intent of this clause is to give the Government ownership of and control over all works first produced under the contract. This would prevent the University from asserting any rights or claim to copyright or to publish such items without express prior written permission of the contracting officer. Further it provides that the University will indemnify the Government against any liability to works furnished under the contract.

Applicability: This clause is imposed by the Government pursuant to 18-27.475-4, where it desires ownership or control of special works, including technical data and computer software. Examples of the types of data for which the Government usually desires such control are itemized at 18-27.473-3.

Special Actions or Concerns: The Principal Investigator and all those who plan to participate in the proposed effort must be apprised of and given an opportunity to object to the fact that under this clause, the University and its employees will have no rights to copyright without express prior written permission of the contracting officer. In addition, the Contracts and Grants Officer must determine whether to reject the NASA contract based on this violation of University Publication Policy or to seek a Chancellor's exception based on the Policy's exception criteria (see Enclosure 1a to this Memo).

Finally, this clause includes as paragraph (e) an indemnity provision protecting the Government from liability related to works furnished under the contract. Acceptance of such an indemnity provision in any contract is subject to specific Regental authorization (under Standing Order 100.4(dd) (11)) if the University would, under the contract, assume liability for the conduct of persons other than University officers, agents, employees, students, invitees and guests. Because this indemnity clause falls under the Standing Order's restriction, Regents' approval must first be obtained. All proposals to make this clause applicable to a contract must be referred to this office for review and for submission to The Regents of a request for specific authorization as required under the Standing Order.

Reference: NASA/FAR Supplement 18-52.227-78

Title (Date): Rights in Data--Existing Works (APRIL 1984)

Purpose: This clause is intended to give to the Government (and others acting of its behalf) full authority to use, perform and display all existing material or subject matter identified in the contract as covered by the clause. Further it provides that the University will indemnify the Government against any liability resulting from the use of such material or subject matter.

Applicability: Pursuant to 18-27.475-5(a), this clause applies to NASA solicitations and contracts exclusively for the acquisition, without modification, of existing works of the type set forth in 18-27.473-(4)(a). Generally, these works would be existing audio, video, and related musical and literary works.

Special Actions or Concerns: The Government will have unlimited rights to the use and disposition of identified existing works delivered under this contract. The Contracts and Grants Officer must, therefore, assure that the Principal Investigator and associates agree to deliver only works which are free and clear of third party interests or restriction and which the University itself does not object to delivering to the Government without restriction.

In addition, this clause includes as paragraph (b) an indemnity provision protecting the Government from liability related to works furnished under the contract. Acceptance of such an indemnity provision in any contract is subject to specific Regental authorization (under the Standing Order 100.4 (dd) (11)) if the University would, under the contract, assume liability for the conduct of persons other than University officers, agents, employees, students, invitees and guests. Because this indemnity clause falls under the Standing Order's restriction, Regents approval must first be obtained. All proposals to make this clause applicable to a contract must be referred to this office for review and for submission to The Regents of a request for specific authorization as required under the Standing Order.

Reference: NASA/FAR Supplement 18-52.227-81

Title (Date): Rights to Proposal Data (Technical) (APRIL 1985)

Purpose: This clause is used by the Government to obtain unlimited rights to technical data contained in the proposal upon which the contract award is based.

Applicability: Pursuant to 18-27.475-9, this clause applies to NASA solicitations and contracts where the contracting officer desires to obtain unlimited rights to technical data contained in the proposal upon which the contract award is based. The clause is not to be used to obtain rights to any commercial or financial information in the proposal.

Special Actions or Concerns: NASA contracting officers must specifically afford the University the opportunity to exclude technical data contained in the proposal from the unlimited rights to the Government provisions of this clause and the NASA contract file must reflect that fact. Contracts and Grants Officers should ascertain this opportunity is granted and should limit Government rights to technical data contained in proposals by excluding data from the provisions of this clause, as appropriate, in consultation with the Principal Investigator.

Such technical data may be excluded from the provisions of this clause by advising the contracting officer that the technical data (or portions thereof as identified) are covered by the prescribed RESTRICTION ON USE AND DISCLOSURE OF PROPOSAL AND QUOTATION INFORMATION (DATA) (DECEMBER 1984) at 18-52.215-72 for solicited proposals and at 18-15.509-70 for unsolicited proposals.

Reference: NASA/FAR Supplement 18-52.227-82

Title (Date): Reports of Work (APRIL 1985)

Purpose: This clause is used to establish a data delivery and reporting mechanism. It requires monthly, quarterly and final reporting and prescribes the scope of such reports.

Applicability: Pursuant to 18-27.475-10, the NASA contracting officer may use this clause for all research and development contracts unless it is determined "that it is not needed because the reporting requirements thereof are adequately addressed in a section of the contract schedule relating to data delivery requirements." Section 18-27.474(b)(2) states that, "Normally in contracts with non-profit organizations, the clause [18-52.227-82] should be modified to eliminate the requirement for monthly progress reports."

Special Actions or Concerns: Contracts and Grants Officers should be aware that pursuant to 18-27.474, NASA contracting officers have complete flexibility to modify or not use this clause, as appropriate. Because the clause imposes frequent reporting cycles, Contracts and Grants Officers should consider proposing deletion of this clause and creation of a separate data delivery section in the contract schedule hand-tailored to the needs of NASA and the University (as is allowed by 18-27.474).

Section 18-27.474 (b)(5) serves as a reminder that, "In no event should any data delivery requirements be construed to require that a contractor provide the Government as a condition of the procurement, unlimited rights in, or reprocurement rights to any data that qualifies as limited-rights data or restricted computer software." (See NASA FAR Supplement 18-52.227-74 with Alternates II and III).

Reference: NASA/FAR Supplement 18-52.227-82, Alternate I

Title (Date): Alternate I (APRIL 1985)

Purpose: The purpose of Alternate I is to require that a reproductible and a printed or reproduced copy of all reports additionally be sent to:

NASA Scientific and Technical Information Facility,
ATTN: Accessioning Department
P.O. Box 8757
Baltimore/Washington International Airport
Maryland 21240

Applicability: Alternate I may be used by contracting officers where clause 18-52.227-82 is included in a contract and where there is a blanket authorization in accordance with NASA Management Instruction (NMI) 2230.1, "NASA Scientific and Technical Document Availability Authorization," to have reports furnished under the clause disseminated by the NASA Scientific and Technical Information Facility without restriction.

Special Actions or Concerns: The Alternate, of course, is not appropriate where data is submitted to the Government with limited or restricted rights.