UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Productivity, Technology and Innovation
Washington, D.C. 20230
(202) 377-1984

17 APR 1986

Mr. Lawrence J. Rizzi
Director, GSA FAR Project
General Services Administration
4040 North Fairfax Drive, Suite 700
Arlington, Virginia 22203

Re: CAAC Case 85-49 Rights in Data and Copyrights,
DAR Case 85-87, FAR Case 85-39 (MM)

Dear Larry,

This is to amplify the Commerce comments presented at the April 9, 1986, Civilian Agency Acquisition Council (CAAC) meeting on the subject case. As we noted, the draft technical data regulations do not permit contractors, other than participants in the Small Business Innovation Research (SBIR) Program and educational institutions (under specified conditions), to copyright data first produced under a contract unless: a. it is a scientific journal article based on or containing such data or; b. the contracting officer approves.

The restriction and contractor rights is stated on page 44 in the basic data clause as follows:

> "The prior, express written permission of the contracting officer is required to establish claim to copyright subsisting in all other data first produced in the performance of this contract."

We consider this to be an unauthorized departure from the practice of most agencies and object to its implementation without statutory or express Administration policy guidance. The Department of Defense (DOD) regulations which permit all contractors to copyright data subject to an appropriate license in the Government illustrates the conventional treatment.

At the April 9, CAAC meeting the chairman of the drafting committee made clear that the driving force for this departure is to provide publication materials for dissemination by the National Aeronautics and Space Administration and the Department of Energy contractors hired for this purpose. We believe you should note the following:

a. This objective is inconsistent with OMB Circular A-130, which requires an agency to ascertain whether the private sector is able to undertake contemplated agency information and

dissemination activities prior to undertaking them itself. (See sections 7e, 8a(1), 8a(9)(b), and 8a(11)(b)). The draft regulations are the reverse of this requirement and presume agency dissemination unless persuaded otherwise by the contractor who originated the information;

b. The draft regulations are diametrically opposed to the January 8, Economic Policy Council recommendation that the Office of Management and Budget develop a technical data policy permitting contractors to retain ownership of all technical data generated in performance of contract subject to appropriate license rights in the Government to enable it to utilize the data for the purpose it was generated. The Economic Policy Council recommendation is consistent with the President's Memorandum on Government patent policy which requires that all contractors, to the extent not otherwise provided by law, be permitted the first right of ownership to the patentable results of their research;

c. The draft regulations are the opposite of DOD treatment of copyright in their Defense Federal Acquisition Regulations (DFARs). As noted, the DFARs permit all contractors to copyright data subject to appropriate license in the Government. This has been the traditional treatment of copyright for over 40 years rather than the proposed case-by-case petition procedure;

d. The draft regulations are inconsistent with special provisions that have been provided to educational institutions and small businesses engaged in the SBIR programs. These provisions permit contractors to copyright data resulting in performance of their contracts. There are no compelling reasons for this dichotomy of treatment.

In light of the foregoing, we believe it is important to revise the basic data clause to permit contractor ownership of copyrightable data subject to an appropriate license in the Government. This would provide for all Government needs for procurement of goods and services, while being consistent with evolving policies related to the private sector. To do otherwise would destroy the incentive to disseminate and further develop copyrightable data. For example, computer programs must be continuously managed and debugged to make them useful in the commercial marketplace. Government ownership acts as a disincentive to the critical involvement of the originating contractor or marketing distributor if their market position cannot be protected.

In addition to the above, we take strong issue with the draft subcommittee chairman's attempt to modify the draft regulations to permit agencies that believe they have established dissemination functions to withhold copyright rights from educational institutions. Virtually every university comment protested the reversal of traditional policy as discussed above. This protest led to the special provision drafted for universities. The chairman's proposed language, which was not

developed or discussed in subcommittee, substantially modifies the subcommittee's recommendation to the council and ignores the overwhelming preponderance of the proposed comments. Further, the proposed language directly conflicts with the sections of OMB Circular A-130 cited above.

D. Bruce Merrifield

cc: Honorable Wendy Lee Gramm, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Honorable Stephen J. Entin, Acting Assistant
Secretary, Economic Policy
U. S. Department of the Treasury

Honorable John P. McTague, Acting Director
Office of Science and Technology Policy