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**The Office of Acquisition and Logistics  
Management Newsletter**



**2012 FISCAL YEAR END COMMUNICATIONS.**

Any questions or comments you may have about the Year End Close may be addressed to the Year End Communications Mailbox [atYearEndCommunications@mail.nih.gov](mailto:atYearEndCommunications@mail.nih.gov).

The Year End Communications SharePoint site can be accessed at the following link <http://www.od.nih.gov/OSPA/YECommunications/default.aspx>.

**GUIDANCE FOR ISSUING 2012 END OF FISCAL YEAR RESTRICTED AWARDS FOR GRANTS OR CONTRACTS INVOLVING ANIMALS.**

The Office of Laboratory Animal Welfare (OLAW) has provided guidance for end of year restricted awards involving animals. This guidance, a memorandum issued on June 22, 2012 can be found on the OLAW website at the following link:

[http://nih-extramural-intranet.od.nih.gov/nih/topics/animal\\_main.html](http://nih-extramural-intranet.od.nih.gov/nih/topics/animal_main.html).

This memorandum provides guidance to NIH Institute and Center (IC) extramural staff about end of fiscal year restricted awards with terms and conditions involving the use of animals.

As in previous years, a dedicated e-mail address ([olawra@od.nih.gov](mailto:olawra@od.nih.gov)) is active for requests or questions concerning restricted awards. **Please use the [olawra@od.nih.gov](mailto:olawra@od.nih.gov) e-mail address exclusively for restricted award issues.** When requests or duplicate messages are sent to individual members of the Division of Assurances or to other OLAW e-mail address tracking is more complex and it may result in a delayed response.

For additional information, please refer to the memorandum at the above mentioned link.

**NITAAC ANNOUNCES COMPLETION OF ITS CIO-SP3 GWAC AWARDS, ALONG WITH THE FIRST TWO PHASES OF ITS CIO-SP3 SMALL BUSINESS AWARDS.**

The National Institutes of Health Information Technology Acquisition and Assessment Center (NITAAC) is pleased to announce that awards are complete for the \$20 Billion CIO-SP3 (Chief Information Officers - Solutions and Partners 3). Fifty-four (54) firms received awards under the full and open GWAC. Additionally, ten (10) Service Disabled Veteran Owned firms and thirty-five (35) 8(a) firms have already received awards on the \$20 Billion CIO-SP3 Small Business GWAC, and awards are in process for the HUBZone and general Small Business categories.

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Once the awards are finalized, Women Owned businesses will be flagged in NITAAC's secure, web-based ordering systems, so customers may set-aside task orders for this category, as well. For a complete list of awardees, and to keep pace with new awards as they are released, visit the NITAAC website at <http://nitaac.nih.gov/nitaac/>.

Both of the new CIO-SP3 GWACs are 10-year, multiple award indefinite-delivery, indefinite-quantity (IDIQ) vehicles open to all federal civilian and DoD agencies who require information technology (IT) services and solutions, providing them with a mechanism to quickly and efficiently satisfy new and emerging IT requirements.

According to Mary Armstead, NITAAC Program Director, "The advent of CIO-SP3 and CIO-SP3 Small Business mark the beginning of a new era for NITAAC as we further our mission of delivering innovative contracting vehicles that leverage the power of government-wide purchasing. Customers will find these GWACs offer an unprecedented breadth of IT in support of the most urgent needs facing federal agencies today, including Data Center Consolidation, Cloud Computing, Health IT, Mobility and Cybersecurity. The speed, efficiency, and cost-competitiveness of these vehicles will help the government deliver higher quality, lower cost services to its citizens."

Robert Coen, NITAAC Deputy Program Director, added, "CIO-SP3 Small Business is the first GWAC ever awarded to so many small business socioeconomic categories. For the first time, Federal agencies will be able to fulfill all of their small business goals using one GWAC."

NITAAC contract holders were selected from a diverse pool of industry leaders and innovators, vetted for their rates/prices, technical capabilities and expertise through a rigorous source selection process at the master contract level. This enables CO's to use simplified evaluations at the task and delivery order level, resulting in significant savings in time, money and resources.

CIO-SP3 and CIO-SP3 Small Business labor rates were pre-competed at the master contract level to assure customers receive the best available ceiling rates, and competition at the task order level can drive rates even lower.

The highly anticipated CIO-SP3 and CIO-SP3 Small Business GWAC awards is the product of a collaborative effort between the Office of Management and Budget, The Small Business Administration and the National Institutes of Health (NIH).

NIH has been an OMB executive agent for over a decade, and is the only Agency to hold three GWACs for IT products, services and solutions. Their ECS III GWAC for products and related services is an HHS Strategic Source. The DoD has named CIO-SP3 Small Business as a preferred source for small business acquisitions, and the Navy has named NIH-NITAAC GWACs as a mandatory acquisition source. In addition to the streamlined ordering and procedures available through Federal Acquisition Regulation (FAR) Subpart 16.505, NITAAC has further streamlined the task and delivery order process through its secure, web-based ordering systems, which can be used by the procuring CO to manage and control every phase of the procurement process.

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While both CIO-SP3 and CIO-SP3 Small Business offer 137 pre-competed labor categories, additional labor categories and unique terms and conditions can be easily added at the task order level. The speed, agility and flexibility of these GWACs support modular contracting, which will help the federal government to achieve cost-efficiencies by enabling them to revisit cost, schedule and technical assumptions as necessary, and make informed decisions based on factual information rather than projections and estimates.

NITAAC provides free training on its GWACs and ordering systems. Attendees earn 2 continuous learning points (CLPs) for attending. For more information, visit the NITAAC website at <http://nitaac.nih.gov/nitaac/>, or contact the NITAAC Customer Support Center at [NITAACSupport@nih.gov](mailto:NITAACSupport@nih.gov).

### GREEN PRODUCTS COMPILATION (GPC).

The Green Products Compilation (GPC) is designated to facilitate the procurement of green/sustainable products and services. The products listed are those for which the U.S. Environmental Protection Agency, U.S. Department of Energy, or U.S. Department of Agriculture has issued designations or otherwise provided guidance for environmental or energy attributes.

This interactive tool consolidates and organizes information from the federal green purchasing programs in one place, saving you from researching multiple websites. The designated green products are separated into 18 categories.

The General Services Administration (GSA) announced that Release 3 of the web-based Green Products Compilation (GPC) is now live! Release 3 is a product of the Sustainable Acquisition Tool development initiatives designed to facilitate the procurement of green/sustainable products and services.

Release 3 includes the following updates:

- GPC search results integrated with SFTool results.
- Inclusion of pre-populated search links for compliant items in GSA Advantage! (When compliant products are available).
- Links to FSSI sources of supply, as applicable.
- Capability to add “Additional Guidance” and “Sample Contract Language” fields for each product.
- Product footnotes that highlight required environmental programs.
- New Tooltip for the “Related Requirements” field.
- Update “About the GPC” page.
- New Personal Care product category.

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For additional information please visit the following link, <http://sftool.gov/GreenProcurement>.

### **HHS SMALL BUSINESS 8(A) PROGRAM REMINDER.**

*Submit Offering Letters for single source procurements over \$100k under the 8(a) program to:*

- SBA District Office servicing the nominated firm;
- SBA District Office where the work will be performed for construction related requirements.

*Need help in determining where to submit SBA Offering Letters?*

*Hallot E. Watkins, Jr, Assistant District Director, 8(a) Business Development*

*[Hallot.watkins@sba.gov](mailto:Hallot.watkins@sba.gov) 410-962-6195, ext. 322. **How to Locate SBA Regional Offices?**  
<http://www.sba.gov/about-offices-list/2>*

### **THE NIH SUPPLY CENTER FIRST PRODUCT SHOWCASE.**

The NIH Supply Center sponsored its first product showcase in the Building 10 South Lobby on the NIH Campus on May 30, 2012. Its mission was to continue to bring together the vendors that supply the NIH Supply Center with products at lower prices so NIH customers can make the most out of the allocated money within their department budgets. By continuing to have these NIH Supply Center Sponsored showcases, we are ensuring our NIH Customers that we have a close relationship with vendors that make and distribute important products that are used in all portions of their work day. The showcases also serve the purpose of directing more businesses towards the NIH Supply Center by reminding the NIH Community that we are not only a part of the NIH but also the FAR approved first source for supplies. Our next Product Showcase is scheduled for September 19, 2012 in the Building 10 South Lobby.

#### **Participating Vendors**

- Agilent
- Bio-Cision
- Bip-Express
- Bio-Nexus
- Bio-Rad
- Clontech Laboratories
- Corning
- Embi Tec
- Eppendorf
- Lonza
- Fisher Scientific
- Frank Parsons
- GA International
- GE Health Care Life Sciences
- Greiner Bio-Onelife Technologies
- Mo Bio Laboratories
- McConnell Group
- Nalgene-Nunc-Hyclone
- New England Bio Labs
- Qiagen
- Quality Biological
- Rainin Instruments
- Roche Applied Science
- Saf-T-Pak
- Sarstedt
- Teknova
- Thermo Fisher Scientific
- Thomas Scientific
- Westnet
- VWR

**USING THE NIH BLANKET PURCHASE AGREEMENT PROGRAM TO  
ACHIEVE YOUR SMALL BUSINESS GOALS.**

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When it comes to spending federal acquisition dollars, the Government is to provide maximum practicable opportunities in its acquisitions to small business. This is very important when it comes to purchases that fall under the simplified acquisition threshold (SAT). Acquisitions that fall under the SAT (<\$150,000) are reserved exclusively for small businesses. This is not only Federal Acquisition Policy, but is a good way to support our small businesses within the United States.

As a way to save NIH dollars and meet the Government's small business goals, consider use of the NIH- Wide Blanket Purchase Agreements (BPA). The BPA Program has over 65 percent of its BPAs with small businesses. BPAs are reviewed by the BPA Program and contain price discounts that are passed on to the customer. In addition, the program provides a BPA vendor listing to all buyers, which can assist the buyer and requestor in its small business market research.

Use of the BPA Program can not only save your organization money, but also time and effort in meeting NIH's small business goals. Meeting the Government's goals are not only good policy, but a way to strengthen and preserve America's small businesses.

### **FINANCIAL CAPABILITY REVIEW TRAINING SESSION.**

The Federal Acquisition Regulation (FAR) states that contracts shall be awarded to responsible prospective contractors only and the contractors must have adequate financial resources to perform the contract or have the ability to obtain them.

DFAS created a financial capability review checklist to assist the contract and grant community in their assessment of financial capability: [http://oamp.od.nih.gov/dfas/dfas\\_links.asp](http://oamp.od.nih.gov/dfas/dfas_links.asp) (click on Financial Capability Review Form). DFAS is available to provide further assistance in completing the financial capability review form if necessary for complex and/or unusual cases.

In addition, DFAS can perform an in-house training session if requested, to increase your staff's knowledge of financial capability testing. The training provides a step-by-step tour of the financial capability review process to reduce the risk of awarding NIH contracts to organizations with financial difficulties.

If you are interested in scheduling this presentation for your acquisition staff (approved for 2 CLPs), please contact Lorraine Trexler, Director of DFAS at 301-496-4401 ([TrexlerL@od.nih.gov](mailto:TrexlerL@od.nih.gov)) or Hruta Virkar, Chief, Special Reviews Branch, DFAS at 301-496-4137 ([Hruta.Virkar@nih.gov](mailto:Hruta.Virkar@nih.gov)).

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**FROM COPYRIGHT LAW TO CONTRACT LAW.**

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**National Contract Management Journal  
From Copyright Law  
To Contract Law**

BY DENNIS E. BLACK, PH.D., CPCM

**How to negotiate licenses when acquiring  
copyrighted information in electronic format.**

The advent of the Information Age ushered in significant changes to our nation's copyright law. These changes were compelled by technological advances that enable copyrighted information to be disseminated in electronic format.<sup>1</sup> More specially, advances in computer and telecommunications technologies dramatically increased the ease with which copyrighted information could be disseminated, accessed, and copied in our society. With this ready availability came the potential for incidents of copyright violation in spite of change in copyright law.

In an effort to extend the proprietary rights beyond those afforded under copyright law, information providers (i.e., copyright holders and distributors) have increasingly turned to licenses to define and control the use of their information products in the marketplace. For purposes of this paper, copyrighted information in electronic format is defined as any information product containing copyrighted data that is distributed under license in an electronic format (e.g., electronic journals, indices, compilations, and databases; digitized images and sound recordings; and software applications).

The recent shift from copyright law to contract law as a legal means of defining the rights of the parties in an acquisition creates new challenges for acquisition officials who must negotiate such licenses. The subject of negotiating licenses when acquiring copyrighted information in electronic format has received attention in the law and library science literature but has received little treatment to date in the field of acquisitions.<sup>2</sup> This article surveys the rights and interests of information providers and users under U.S. copyright law and identifies issues that acquisition officials should address when negotiating licenses for copyrighted information being acquired in electronic format.

**Balancing Proprietary Rights and Fair Use**

Copyrights arise out of the Constitution. Under Article I, Section 8[8], Congress has been granted the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>3</sup>

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By law, the author of an "original work of authorship" receives copyright protection at the moment of creation; that is, when the work "is fixed in a tangible medium of expression." The product can be written on paper, recorded on a tape, keystroked on a screen, even painted on a canvas.<sup>4</sup> Copyright law protects ownership of a creative work in any field, including literature; music; drama; pantomime; choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; architecture; and software source code. The law gives the owner of the copyright the exclusive right to reproduce copies of the work, prepare derivative works, distribute the work, and perform or display it. Anyone else needs the owner's permission to do any of these things. The law provides copyright protection throughout the author's life plus 70 years.<sup>5</sup> In essence; copyright law establishes proprietary rights to an author's intellectual property.

There are limits, however, under copyright law to a copyright holder's proprietary rights. Works that are in the public domain (for example, works created by the U.S. government or by its employees as part of their official duties) are not protected. Works that are past the copyright protection period also reside in the public domain. For archival preservation and normal operations, public libraries may reproduce and distribute limited copies of copyrighted materials for internal use and for use by their patrons. Finally, central to the interests of a free society, the "fair use" provision of copyright law, as defined by case law, permits users to reproduce limited copies for purposes of research, teaching, journalism, criticism, parody, and home use (e.g., off-air taping and audiotaping in the home).

Historically, our nation's copyright law has reflected a balance between competing claims that affect the public interest.<sup>6</sup> Creative works have been encouraged and rewarded while public access to information has been assured. How we continue to protect an author's proprietary rights and society's right to fair use under the law is at the heart of the current debate.

### **Extending Proprietary Rights under Contract Law**

Recent technological advances have increased the ease and speed of widespread electronic exchanges of information in our society while reducing the cost to both provider and user. Electronic access to copyrighted information often leads to violations (infringements) of copyright law. Notwithstanding the protections afforded to information providers under copyright law, advances in technology effectively make the problem one of enforcement. In response, providers of copyrighted information disseminated in electronic format have resorted to using a new construct (licenses) in the marketplace to protect against widespread unauthorized transmission and copying.

**Providers of copyrighted information in electronic format have resorted to using licenses in order to enhance their proprietary rights not afforded under current copyright law. Often, such licenses include restrictions that abrogate user's rights already granted under the law.**

Acquisition officials are increasingly involved in acquiring copyrighted information in electronic format for dissemination and use within their organizations. They must be cognizant of several issues under copyright laws that currently are being debated. Section 107 of the Copyright Act of 1976 (Public Law 94-553,90 stat.2541) grants the public fair use of copyrighted works for purposes of research, teaching, journalism, criticism, parody, and home use. However, the statute

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is ambiguous in the application of the fair-use provision. This has led to confusion resulting from technological advances in disseminating and copying information in electronic format.<sup>7</sup> The number of copies made, the length of the quotation cited, and the purpose of the use have been matters of litigation involving Section 107.<sup>8</sup>

Section 108 of the Copyright Act of 1976 provides for copying rights that are of particular significance to libraries. This section of the act provides standards that permit libraries to copy materials for purposes of preservation, security, replacement, and for a patron's private study, scholarship, or research. Libraries on the frontline in the battle between having to protect the interests of copyright holders and providing maximum access to their collections.<sup>9</sup>

Providers of copyrighted information in electronic format have resorted to using licenses in order to enhance their proprietary rights not afforded under current copyright law.<sup>10</sup> Often, such licenses include restrictions that abrogate a user's rights already granted under the law. A user's acceptance of such restrictions effectively privatizes information that would otherwise be accessible to the public. Whether such license restrictions can legally preempt user's rights granted under federal copyright law is a matter of current debate.<sup>11</sup> Acquisition officials should seek advice from technical and legal staff before agreeing to any provision that may impede their organization's mission or abrogate its legal rights under copyright law.

The use of licenses as a mechanism for acquiring copyrighted information in electronic format effects a shift from copyright law to contract law.<sup>12</sup> The basic elements of contract formation (offer, acceptance, consideration, mutuality of understanding, and enforceability) come into play. Licensing also raises issues of performance, warranties, liabilities, and indemnification. Due to the proliferation of licensing of digital information, efforts have been underway to develop a legal framework that would uniformly govern such transactions in the marketplace.<sup>13</sup>

Negotiating Licensing Provisions Numerous standard provisions have appeared in the library science literature as guides for negotiating licenses when acquiring copyrighted information in electronic format.<sup>14</sup> They are summarized below in checklist form to assist acquisition officials when negotiating such licenses.

### Conclusion

Historically, revisions to our nation's copyright law have been technology driven.<sup>15</sup> Enforcement under current copyright law has become problematic because technological advances have enabled copyrighted information to transfer easily from print to digital form. While copyright law provides specific protections to the creator of the original work and against unlawful copying by users, contract law governs the terms and conditions contained in a license. The debate continues over whether copyright law preempts any license provision that abrogates one's rights under the law.<sup>16</sup> As information providers seek to protect their proprietary interests through licenses, acquisition officials need to understand the technical, as well as business, issues germane to their customers' interests when acquiring copyrighted information in electronic format.<sup>cm</sup>

### Technical Issues Checklist

- The purpose of the license should be clearly stated.



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- The parties to the license should be clearly defined.
- Those authorized to use the information (i.e., definition of user) should be clearly stated. (For example, should the definition include employees, contractors, consultants, and other off-site personnel?)
- Any limitation on the number of users should be clearly stated.
- Any limitation on fair use of the information otherwise provided under copyright law should be clearly stated.
- Any restriction on the rights of users should be clearly stated.
- Any restriction on interlibrary loans should be clearly stated.
- Any restriction on preservation rights should be clearly stated.
- Any limitation affecting online access should be clearly stated.
- Any limitation on accessing the information should be clearly stated.
- Any limitation on the locations where the information can be accessed should be clearly stated.
- For site licenses, a definition of site should be included. (For example, should the definition include on-site facilities as well as off-site locations?)
- Any limitation on downloading and copying the information should be clearly stated.
- Any limitation on archiving should be clearly stated.
- Receipt of any revisions (updates) to the information should be addressed.
- Any limitation on the user's right to enhance or reformat the copyrighted data should be clearly stated.
- Any action required to be taken to preclude unauthorized access should be clearly stated.
- Any requirement for safeguarding the information should be clearly stated.
- Any provision that includes a claim to copyright of information that cannot be copyrighted under the law (e.g., materials created by the U.S. government or by its employees as part of their official duties) should not be accepted.
- Any requirement to safeguard the confidentiality of a user's identity and the materials the person accessed should be clearly stated.
- The disposition of copyrighted information after expiration of the license should be addressed.

### Business Issues Checklist

- Any provision that imposes a liability upon the user should be avoided.

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- The terms and conditions of a mass market license (“click-on” and “shrink-wrap”) should be reviewed prior to acceptance.
- Any provision that raises an issue involving potential legal problems should be reviewed by the organization’s legal counsel.
- Any warranty should be carefully reviewed.
- Any indemnification provision should be carefully reviewed.
- The term of the license should be clearly stated.
- A termination provision should be included and clearly stated.
- A payment provision should be included.
- A determination must be made that the price is fair and reasonable.

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### Additional Business Issues for Federal Acquisition Officials

Provisions that violate the Antideficiency Act: Any provision that obligates the government to pay amounts in addition to the stated contract price violates the Antideficiency Act, since it commits the government to a future expenditure of funds for which no appropriations have been made.

Examples of such impermissible provisions include the following:

- Any requirement that the government pay taxes not included in the license price.
- Any requirement that automatically renews a license for which the government has to pay.
- Any requirement whereby the government agrees to indemnify or hold the licensor harmless, thereby exposing the government to contingent liability in the future for which no appropriations are available to pay for a final judgment or settlement.
- Any requirement whereby the government agrees to represent the licensor, or pay attorney fees and expenses, in litigation.
- Entire agreement provisions: Any provision essentially stating that the license agreement constitutes the entire agreement between the licensee and licensor, that the license agreement is a final expression of the agreement between the parties, or that the license agreement supersedes all prior agreements between the parties (including all oral and written proposals) is unacceptable. The terms and conditions and Federal Acquisition Regulation (FAR) clauses of the acquisition govern and cannot be superseded by a licensing agreement.
- Provisions permitting licensor's termination of agreement: Any provision that allows the licensor to unilaterally terminate the agreement without regard to Contract Disputes Act procedures, including any provision limiting the government's rights under a termination, is unacceptable since it conflicts with the FAR disputes and termination clauses of the acquisition. Examples of such impermissible provisions include the following:
  - Any provision allowing the licensor to terminate the agreement should the government fail to pay the license fees or other amounts when due.
  - Any provision stating that termination for any reason would not affect the amount due or paid to the licensor.
  - Any provision limiting the government's remedy should the government be dissatisfied with the licensed information.
- State law provisions: Any provision stating that the license agreement will be interpreted in accordance with the laws of a particular state should be amended by adding "to the extent that they do not conflict with federal law."
- Provision affecting sovereign immunity: Any provision that permits the licensor the

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right to seek injunctive relief against the government's breach of an agreement is unacceptable since it could result in the government waiving its sovereign immunity. Such provisions should be deleted or made subject to the disputes clause of the acquisition.

- Provisions limiting the user's rights under U.S. copyright law: Any provision that limits the user's rights provided under U.S. copyright law (e.g. fair use, reproduction, and archiving) should be rejected.
- Provision that conflict with the FAR: Any provision that conflicts with the FAR should be rejected. Examples of unacceptable provisions are as follows:
  - Any provisions that unduly limits the government's rights in data.
  - Any provision limiting the government's warranties thereby conflicting with the FAR warranty clause of the acquisition.
  - Any provision making delivery contingent upon some future date or event conflicting with the delivery requirements of the acquisition.
- Mass market licenses ("click-on" and "shrink-wrap"): It is recognized that nearly all mass market licenses include provisions customarily found in the commercial sector but which a federal agency will find invalid and unenforceable. To the extent practicable, a licensor should be informed that the agency considers any provision in a mass market license to be invalid and unenforceable if it (1) contravenes a right granted the licensee under U.S. copyright law, (2) violates the FAR or other federal law, (3) departs from reasonable consumer expectations and was not disclosed by the licensor prior to agreement, or (4) violates fundamental public policy.
- Other considerations: (1) Include a clause to protect the agency from civil and criminal liabilities should a contractor or subcontractor reproduce copyrighted or proprietary information without proper authorization in the performance of the acquisition, (2) The agency's rights specified in FAR 52.227-19, Commercial Computer Software-Restricted Rights, normally should be obtained when acquiring computer software [see FAR 27.405(b)(2)].

### Endnotes

1. The genesis of our nation's copyright law dates back to England in 1710 when the British Parliament enacted the "Statute of Anne," which for the first time, granted legal protection to users of copyrighted works. The statute placed restrictions on the term of a copyright, thereby preventing monopolies by authors and booksellers. The statute also created the concept of a public domain by requiring one to create a new work in order to be considered for a copyright. Following the ratification of the Constitution, the U.S. Congress enacted the Copyright Act of 1790. Major revisions were enacted in 1831, 1870, 1909, and 1976. The Copyright Amendments Act of 1992(Public Law (P.L) 102-307, 106 Stat. 264,272), Digital Performance Right in Sound Recordings Act of 1995 (P.L 104-39, 109 Stat. 336), and

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Digital Millennium Copyright Act of 1998 (P. L. 105-304, 112 Stat. 2860) have since followed.

2. See Allen, Barbara Mcfadden, "Negotiating Digital Information System Licenses Without Losing Your Shirt or Your Soul," *Journal of Library Administration* 24, No.4 (1997): 15-26; Buchanan, Nancy L, "Navigating the Electronic River: Electronic Product Licensing and Contracts," *The Serials Librarian* 30, Nos. 3/4 (1 997): 171 - 182; Crews, Kenneth D., "Copyright Law, Libraries, and Universities," Prepared for presentation to the Association of Research Libraries, October 1992; Davis, Trisha L, "License Agreements in Lieu of Copyrights: Are We Signing Away Our Right s?" *Library Acquisitions: Practice & Theory* 21, No. 1 (1997): 19-27; Duranceau, Ellen F., "Electronic Journal Forum: Why You Can't Learn License Negotiation in Three Easy Lessons: A conversation With Georgia Harper, Office of General Counsel, University of Texas," *Serials Review* 23, No.3 (1997): 69-71; Failing, Patricia, "Scholars Face Hefty Fees and Elaborate Contracts When They Use Digital Images," *The Chronicle of Higher Education*, May 29, 1998, B4-B5; Goldstein, Paul, *Copyright's Highway. The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox*. New York: Hill and Wang, 1996; Hardy, I. Trotter, "contracts, Copyright and Preemption in a Digital World," *Richmond Journal of Law & Technology* 2 (1995):1-11; Jacobson, Robert L., "Checking the Fine Print on Superhighway Licenses," *The Chronicle of Higher Education*, July 5, 1996, A 15, A 19-A20; "Licensing Electronic Resources. Strategic and Practical Considerations for Signing Electronic Information Delivery Agreements," Association of Research Libraries (January 1997); Okerson, Ann, "Buy or Lease? Two Models for Scholarly Information at the End (or the Beginning) of an Era," *Daedalus* 125, No. 4 (1996): 55-76; Okerson, Ann, "Copyright or Contract?" *Library Journal*, September 1, 1997: 136-139; Okerson, Ann, "what Academic Libraries Need in Electronic Content Licenses," *Serials Review* 22, No. 4 (1996): 65-69; Olivieri, Rene, "publishing Economics. The Site License Effect," *Journal of Scholarly Publishing* 28 (January 1997): 81-91; Olivieri, Rene, "Site Licenses: A New Economic Paradigm," *The Serials Librarian* 30, Nos. 3/4 (1997): 183-190; Peters, Paul E., "Making the Market for Networked Information: An Introduction to a Proposed Program for Licensing Electronic Uses," *H Serials Review* 18, Nos. 1-2 (1992): 19-24; Samuelson, Pamela, "Copyright, Digital Data, and Fair Use in Digital Networked Environments," Prepared for presentation at the conference "The Electronic Superhighway. The Shape of Technology and Law to Come." University of Montreal, May 13, 1994; Soete, George, "Licensing Electronic Resources: State of the Evolving Art," *H ARL: A Bimonthly Newsletter of Research Library Issues and Actions*, No. 190 (February 1997): 6-7; Thibodeaux, Lynette M., "What Everyone Should Know About Copyright, Patent, and Trademarks," *Contract Management* (March 1996): 12-15; Ubell, Robert and Mark Tesoriero, " Negotiating Networked Information Contracts and Licenses," *Coalition for Networked Information*, 15 (November 1994).
3. In the Federalist Papers, No. 43, Madison stated "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals."

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4. See Okerson, *Library Journal*, September 1, 1997, at 136.
5. The length of time for copyright protection after the death of an author was increased from 50 to 70 years under the Sonny Bono Copyright Term Extension Act of 1998 (P.L 105-298, 112 Stat. 2827). It has been noted that Elvis Presley has earned more royalties from copyrighted works since his death than before.
6. See Karjala, Dennis S., "Copyright Owners' Rights and Users' Privileges on the Internet Federal Preemption of Shrink-wrap and On-line Licenses," 22 *Dayton L. Rev.* (Spring, 1997): 515.
7. See Crews, at 2.
8. An important test of the fair use provision of the copyright law occurred in the U.S. Supreme Court case *Williams and Wilkins Co. v. National Library of Medicine*, (420 U.S. 376 (1975)). The plaintiff in this case, a publisher of medical journals, charged that the federal library had violated copyright law by making unauthorized photocopies of articles from the publisher's copyrighted medical journals. As a result of a split vote of 4-4 (Justice Blackmun abstaining), a lower court of claims decision was left standing which found the government free of any liability (re. *Williams and Wilkins v. The United States*, 487 F.2d 1345 (Ct. Cl. 1973)). The lower court concluded that (1) no substantial harm to the plaintiff was shown as a result of the library's photocopying, (2) Medical research would be Harmed by concluding that the library's photocopying practices represented an infringement and (3) the court should not make a ruling that might place a risk upon science and medicine while Congress was considering revisions to copyright law that would address the issues being litigated in the case. Two other notable cases involving the fair use provision were *Basic Books, Inc. v. Kinko's Graphics Corp.*, (758 F.Supp. 1522 (S.D.N.Y. 1991)) and *American Geophysical Union v. Texaco, Inc.*, (802 F.Supp. 1(S.D.N.Y. 1992)). In *Kinko's*, the Federal District Court of New York City ruled that *Kinko's* had violated the fair use provision of copyright law based upon its findings that the copying (1) was conducted for profit; (2) was not for educational purposes, although the copies were of chapters in a textbook for use by a local university; and (3) was of a substantial amount. In *Texaco*, the same district court ruled that a *Texaco* employee who had made copies from a published journal for other *Texaco* employees had infringed the copyright of a publisher based upon its findings that the copying (1) was ultimately intended to promote *Texaco's* commercial interests; (2) were of the full works, and not merely excerpts; and (3) had a harmful effect upon the market value of the published work.
9. See Crews, at 2.
10. In addition to written licenses, information providers use two types of mass market licenses to protect their proprietary interests in electronic commerce. Click-on licenses are those where the user accepts the terms and conditions of a license by clicking a button on a computer screen that reads "I agree" or words to that effect. Shrink-wrap licenses are those where the user accepts the terms and conditions of a license by breaking the seal on the package. These two types are also referred to as contracts of adhesion and passive licenses since no formal or informal negotiations transpire between the licensee and licensor. See

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Karjala, Dennis S., "Copyright Owners' Rights and Users' Privileges on the Internet Federal Preemption of Shrinkwrap and On-line Licenses," 22 Dayton L. Rev. (Spring 1997): 511-545. Hudgins-Bonafie Id, Christy. "UCC 28: The New Law of Shrink-Wrap," Network Computing Online. The Technology Solutions Center (April 19, 1999). Note that in 1996 the Seventh Circuit Court determined in *ProCD v. Zeidenberg* (86 F. 3d 1447) that shrink-wrap licenses, in which the terms and conditions can be read by the licensee only after the digital Product (in this case, software) is Acquired, constituted an enforceable sales agreement.

11. See Karjala.
12. See Hardy, at 2, who points out that copyright ownership protection can occur in four forms: (1) under copyright law, (2) under contract law (i.e. license), (3) technological limitations upon reproducing quality print versions (e.g., inability to readily reproduce the high-quality photography in the National Geographic magazine), and (4) use of special technical devices to limit reproduction.
13. Article 2, Sales, of the Uniform Commercial Code (UCC) contains the rules that govern the commercial sale of tangible goods in nearly all 50 states. Article 2A, Leases, was subsequently added to cover the leasing of personal property. However, the UCC does not contain rules that specifically govern the commercial sale of intangible goods, such as the licensing of digital information and software applications. To address the problem, a special drafting committee of the National Conference of Commissioners on Uniform State Laws recently completed its preparation of a proposed Article 28, Licenses, to the UCC. [See Jamtgaard, Laurel, Censes and Information Policy: An Update on UCC Article 28," ARL: A Bimonthly Newsletter of Research Library Issues and Actions, No.198 {June 1998}: 1-4; Oakley, Robert L,"UCC Article 28: Some Preliminary Comments on a New Issue for the Library Community," Prepared for presentation at the annual meeting of the Association of Research Libraries, October 16, 1997; "The 28 Guide (Official page for the Proposed Law on Software Transactions; Draft U.C.C. Article 2B-Software Contracts and Licenses of Information," Cyberspace Law, at [www.ll.georgetown.edu](http://www.ll.georgetown.edu)); Nimmer, Raymond T. "Breaking Barriers: The Relation Between Contract and Intellectual Property Law," 13 Berkeley Tech. LJ. 827 (Fall 1 998): 828-a89; Nimmer, David "The Metamorphosis of Contract into Expand," 87 Calif. L Rev. 17 (January 1999): 19-74.] At the time of this writing, the draft Article 2B has failed amid industry objections that the new article would conflict with existing law and industry practice (see Sandburg, Brenda, "UCC2B is Dead-Long Live UCITA," Tech Law Center (May 27, 1999]; [www.lawnewnet.com](http://www.lawnewnet.com)). In its place, supporters of a uniform digital commerce law are currently drafting a Computer Information Transaction Act, or UCITA, which they plan to present to the state Legislatures during the fall of 1999.
14. See Brennan, Patricia, Karen Hersey, an Georgia Harper, "Licensing Electronic Resources: Strategic and Practical considerations f or Signing Electronic Information Delivery Agreements," Association of Research Libraries (1997: Case, Mary M., "Library Associations Endorse Principles for Licensing Electro Resources," ARL: A Bimonthly Newsletter of Research Library Issues and Actions, 194 (October 1997): 1-3; "Statement of

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current Perspectives and Preferred Practices for the Selection and Purch (IS(Electronic Information, International Coalition of Library Consortia (not date principles for Licensing Electronic Resources, Association of Research Libraries (July 15, 1997); "Principles for Acquiring and Licensing Information in Digital Formats," University of California Libraries (May 22, 1996).

15. See Samuelson, at 2.
16. See Hardy and Karjala.

### *About the Author*

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Dennis E. Black, PH.D., CPCM, is the chief, Office of Acquisitions Management, National Library of Medicine. Dr. Black is an NCMA Fellow and charter member of the NCMA Bethesda/Medical Chapter. He is also a certified acquisition manager (level IV) in the Department of Health and Human Services and holds a certification in contract management from the Department of Defense (Ft. Lee). No official support or endorsement of this manuscript by any other person or organization is intended or should be inferred. Any errors remain the author's sole responsibility.

National Contract Management Journal articles are peer reviewed. Submissions should be provided on disk in Microsoft Word along with double-spaced hard copy. They should be sent to NCMA, NCM Journal, 1912 Woodford Rd, Vienna VA 22182.

**The National Contract Management Association provided permission to the Office of Acquisition and Logistics Management to include the article by Dennis E. Black in the OALM Newsletter - 2012 July/August Edition**

### *NATIONAL CONTRACT MANAGEMENT JOURNAL*

*Copyrights arise out of the Constitution. Under Article I, Section 8[8],*

*Congress has been granted the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and discoveries."*

### **ACQUISITION TRAINING SCHEDULE.**

Acquisition Training Classes can be accessed at the following link:

<http://trainingcenter.nih.gov/list.aspx?catId=1>

### **GREEN PURCHASING TRAINING.**

As a reminder, per HHS policy, all contracting officers, contract specialists, purchase cardholders, card approving officials, CORs and acquisition staff in job series 1102, 1105 and 1106 are required to take Green Purchasing training every two calendar years. The training includes online training modules for your convenience.



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Please visit the Green Purchasing webpage for further information including an application form and searchable database. It may be accessed at:

<http://oamp.od.nih.gov/Division/acp/GreenPurchasing/GreenPurchasingForWebsite.asp>

Questions? Please send to: [GreenPurchasing@mail.nih.gov](mailto:GreenPurchasing@mail.nih.gov)

### DCIS TRAINING.

In an effort to support the requirement for DCIS FPDS-NG Data Verification and Validation (DCIS V&V), the Contracts Data Management Program (CDMP) in the Office of Acquisition and Logistics Management (OALM) will offer training to ensure that all acquisition staff involved are in compliance with the Office of Federal Procurement Policy (OFPP) March 9, 2007 Memorandum *Federal Procurement Data Verification and Validation*

[http://www.whitehouse.gov/sites/default/files/omb/assets/omb/procurement/pro\\_data/fpds\\_030907.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/procurement/pro_data/fpds_030907.pdf) requiring accurate and timely input of contract information.

#### EACH TRAINING SESSION WILL INCLUDE THE FOLLOWING:

New Reporting Requirements Including TAS  
Code Requirements;

Top 12 FPDS-NG “Critical Field” errors;  
DCIS Version 1.4 changes

Each training session will be customized to support the needs of the individual Office of Acquisition or Delegated Acquisition Office. As part of the training, the CDMP trainer will cover all problem areas and fields identified in a sample review by HHS. In order to facilitate this training, your office must provide the training location and ensure that it is equipped with a computer and the appropriate Internet access to allow the live entry of DCIS data. Additionally, the live data entry portion of the training session will require that official actions be brought to the training session.

DCIS training will count towards an attendee’s skills currency training requirement. As with all training, attendees are responsible for tracking and reporting their CLPs according to instructions from the Acquisition Career Program: <http://oamp.od.nih.gov/Division/acp/acp.asp>

The Offices of Acquisition and Delegated Acquisition Offices should submit their Request for training to the Contracts Data Management Program (CDMP), via email to List NIH-DCIS-HELP.

Training will be provided in Building 6100 in conference room 6D01.

FY2013 DCIS Training:

- NO CLASSES SCHEDULED AT THIS TIME

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**NIH BLANKET PURCHASE AGREEMENT (BPA) LISTS AVAILABLE ONLINE!**

Lists of all NIH Blanket Purchase Agreements (BPA's) can be found at the following URL: <http://oamp.od.nih.gov/Division/SAPS/Acq/PCard/BPAProgram.asp>

This location contains three BPA lists:

1. Complete vendor alphabetical list;
2. Vendor list sorted by commodity; and
3. A listing of the preferred HHS Strategic Sourcing vendors.

If you have questions or need further clarification, please contact the BPA helpline at 301-496-5212 or e-mail [BPAProgramBranch@od.nih.gov](mailto:BPAProgramBranch@od.nih.gov)

**GRACIAS**

*“Thank You” in Spanish*

**SPECIAL THANKS.**

*We'd like to thank all those who contributed to this issue and to future editions of the OALM Newsletter.*

*The OALM Newsletter will be published six (6) times in 2012. OALM invites your comments and suggestions for future articles. We encourage staff to submit articles that would be of interest to our readers. We will do our best to include such articles in future editions of the OALM Newsletter.*

*Please address all correspondence to the editors: Alfreda Mire, [MireA@od.nih.gov](mailto:MireA@od.nih.gov), Milton Nicholas, [NicholaM@od.nih.gov](mailto:NicholaM@od.nih.gov), Annette Romanesk, [RomanesA@od.nih.gov](mailto:RomanesA@od.nih.gov) or Barry Solomon, [SolomonBJ@od.nih.gov](mailto:SolomonBJ@od.nih.gov).*

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