Navigating Intellectual Property and Data Rights in DoD Acquisitions: Issues and Challenges

DAU West Region
Annual Acquisition Training Day

Vicki Allums, Learning Director
Intellectual Property
Phone: 703-805-4594
Email: vicki.allums@dau.edu
Agenda

• Intellectual Property (IP) & Data Rights Basics
• IP versus Data Rights -- What’s the difference?
• Government’s licensing rights in Data – The Funding Test
• NDAA 2016 IP Provisions (Section 813 Panel)
• DoD Policy Initiatives (e.g. Policy guidance, IP Cadres)
• DAU – Current and Future Learning Assets
The Basics – IP v. Data Rights

• Intellectual Property – expression of a new and useful concept (“Intangible assets”)
• “Data Rights” – Government’s license rights in two major categories of valuable intellectual property
  – **Technical data (TD):** recorded information of a scientific or technical nature (including computer software documentation).
  – **Computer software (CS):** computer programs, source code, source code listing, object code listings, design details, algorithms, processes, flow charts, formulae and related material; enables software to be reproduce, recreated or recompiled.
  – **Computer software documentation:** owner's manuals, user's manuals, installation instructions, operating instructions; explains capabilities of the computer software or provides instruction for using the software.
• FAR – civilian agencies & DFARS -DoD
# The Basics: IP – Common Types

<table>
<thead>
<tr>
<th>IP</th>
<th>Subject</th>
<th>Published</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patents</td>
<td>New technology know-how</td>
<td>Yes</td>
<td>a drug formula, Blackberry® server method</td>
</tr>
<tr>
<td>Copyrights</td>
<td>Artistic expression in tangible form</td>
<td>Yes</td>
<td>music, paintings, novel, blueprint of a house or machine, software</td>
</tr>
<tr>
<td>Trade Secrets</td>
<td>Any information more valuable for business due to its secrecy</td>
<td>No</td>
<td>blueprint of a machine, Coke® formula, a customer list</td>
</tr>
<tr>
<td>Trademarks</td>
<td>A name, mark, color, pattern, sound indicating a source of goods or services</td>
<td>Yes</td>
<td>KFC®, General Mills®, Ownings-Corning® pink, Intel,® sound, milCloud,® DCS, Defense Collaboration Services</td>
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# The Global Funding Test

## Development Funding Source

<table>
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<tr>
<th>Private</th>
<th>Mixed</th>
<th>Government</th>
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**Limited (TD) or Restricted (CS)**  
Gov't can share data with other government for unlimited use except manufacture, but not third parties

**Government Purpose**  
Gov't can share data with third parties, but data can't be used for commercial purposes

**Unlimited**  
No restrictions on use of data

**Specifically Negotiated Rights**  
(In between Limited & Unlimited, but never less than Limited)  
Unlimited Rights always apply to Form, Fit, Function (FFF) data; Operations, Installation, Maintenance, & Training (OMIT) data; and Computer Software Documentation.

A more detailed data rights chart is in the backup slides for reference.
DoD IP/Data Rights Challenges

- Identifying IP/Data Rights needs (Process & Participation)
- Obtaining Sufficient IP and Data Rights Data Provided with Disputed Assertion of Rights
- Lack of IP Expertise/Training
- IP/Data Rights and Acquisition Planning

Weapon Systems Sustainment -- IP/Data Rights Challenges

- The Problem for Government …
  - Failure to acquire “weapon-related IP” needed to repair and maintain weapon systems;
  - Lack of access to IP data with appropriate rights; no competitive contracting for repair parts, maintenance, follow-on production = Higher long-term sustainment costs
  - Ambiguous and poorly defined contract terms

The Problem for Industry …

- IP overreach
  - GPR in everything (regardless of need)
  - Unlimited Rights for depot work (Limited Rights may be sufficient)
- Failure to account for industry investment and business model
  - Change sustainment model
- Failure to negotiate and inform industry
  - Forces industry to investment decisions without knowing customer IP plans creating disconnect
- Ambiguous and poorly defined contract terms
• Section 4.1 – IP Strategy

• Identify and manage full spectrum of IP and related matters – product life cycle
  – How program management will assess long-term program requirements, and total ownership costs of IP deliverables and associated license rights for competitive and affordable operation, maintenance, modernization, and sustainment (entire product life cycle)
  – How IP and related matters necessary to support the program’s use of modular open systems approaches; guidance on how solicitations and contracts will
    • Identify and require all major systems interfaces to be based on widely supported and consensus-based standards
    • Requirements to include acquire appropriate IP rights in major systems interfaces
    • Appropriate requirements for other non-major systems interfaces (e.g. interfaces necessary to segregation and reintegration activities)
• Section 4.1 – IP Strategy

– Customize IP strategies based on common, shared and unique characteristics of the system and components
– Consider use of specially negotiated licenses to acquire customized IP deliverables (e.g. technical data, computer software) and associated license rights
Addressing the Government’s Challenges – Developing an IP Strategy

• Phases
  – Pre-planning
  – Solicitation & Source Selection; Negotiation
  – Contract Performance
  – Delivery: Inspection & Acceptance
  – The Payoff: Retention and Reuse (and Recordkeeping)


The Key is Strategic Thinking!
Addressing the Government’s Challenges – Developing an IP Strategy

- Identify the Need – Strategic Thinking and Planning
  - What type of data or technology do you need (GOTS, COTS or hybrid)?
  - How will you use it (short and long-term throughout program life cycle)?
  - What data rights do you need?
  - Will the vendor need to reconfigure or integrate into a Govt. platform or system?

- Contract Considerations
  - Are all the stakeholders (e.g. KO, PM, Technical SMEs, Contracting & IP attorneys) at the table during all contract phases?
  - Program Budget
  - Are requirements specific and ambiguities addressed in the contract?
  - Data delivery and rights assertions
  - Data management
Government-Industry Collaboration

• Establish a dialog early and often!!
• Clearly communicate requirements and specifications in all contract documents
• Identify whether capabilities, proposed contract terms meet program needs (i.e. Is there a meeting of the minds?)
• Determine whether negotiation is possible

**GOAL:** ACQUIRE DATA RIGHTS TO MEET SHORT AND LONG-TERM PROGRAM NEEDS AND RESPECT VENDOR’S IP
Section 813 Review -- Congressional Mandate

• FY 2016 NDAA – establishes Government-industry advisory panel
• Scope of Review
  – DoD doesn’t pay more than once for same work
  – DoD contractors are appropriately rewarded for their innovation and invention
  – Provide for cost-effective-re-procurement, sustainment, modification and upgrades to DoD systems
  – Encourage private sector investment in new products, technologies, and processes relevant to DoD mission
  – Ensure DoD has appropriate access to innovative products, technologies, and processes developed for commercial use
  – Encourage use of Modular Open System Architecture (MOSA)
Section 813 Panel Report -- Recommendations

- Tension Point Issues
- Statutory and Legislative Recommendations
- Regulatory, Policy, and Practical Recommendations
- Cross-cutting Principles and Threads
  - Long-term IP Planning early in acquisition process
  - MOSA
  - Specially Negotiated Licenses
  - IP Strategies
  - Education and Training
DoD Policy Initiatives

• IPWG
• Policy Documents
  – Intellectual Property Policy Guidance
  – Intellectual Property Strategy
• Other Resources
  – Army’s IP Policy
• Section 3: The IP Cadre
  – Facilitates development and use of competent and consistent
    approach to acquiring, licensing, and managing IP
  – Provide timely expert advice, assistance, and resources to the
    acquisition workforce on IP matters
  – Advise, assist, and provide resources to DoD Components on IP
    matters at various stages of life cycle
DoD Instruction 5010.44, Intellectual Property (IP)
Acquisition and Licensing

• Director
  – Provide oversight and coordination on acquisition and licensing policy and procedures
  – Coordinates actions and exchange information with DoD organizations that have collateral or related functions
  – Identify and distribute best practices
  – Interface on assigned functions with Congress, industry, academia and other DoD organizations
  – Support development of requirements for training and credentialing the acquisition workforce
DoD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing

• Members of the IP Cadre
  – Issue and interpret policies relating to acquisition, licensing, and management of IP
  – Advise and assist in development of acquisition strategy, product support strategy and IP strategy
  – Conduct or assist with the financial analysis and valuation of IP
  – Assist program offices in drafting relevant IP provisions in solicitations, contracts, other transaction agreements and licenses
  – Assist contracting officers in interactions with contractors
  – Coordinate with DAU, academia, and industry to develop and update IP curricula and reference materials (e.g. guidance, training courses, and case studies)
DAU – Strategic IP/Data Rights Education Plan

• IP Learning Asset Review
  – Delete, Modify & Add
• What do our customers need?
• Complying with DoD policy (IPWG)
• Addressing new technologies and IP (e.g. Cybersecurity, AI, 3D Printing, MOSA, Cloud Computing)
• Collaborating with industry (e.g. Industry-sector series)
• Delivery Formats (e.g. online, in-class, Ted-Talk, short videos, site visits, “Job aide,” Lunch & Learn, Brown bag, articles, scenario exercises)
QUESTIONS?