



Changing the Rules:
Understanding Government Impacts on IP Rights

Overview: The “Why” of Government-Sponsored IP

- Why this Presentation
- Why Government is Different
- Why Protecting IP is Critical
- Why Protecting IP is Difficult
- Take-Aways

Why This Presentation?

Experience is the best teacher, but the tuition is high.

– Norwegian Proverb

Take-Aways

1. Government contracts are a blessing*.
2. Protecting your IP *up-front* is critical.
3. IP mistakes are *bet-the-company* costly.

Why This Presentation?

A few statements we've heard on the subject of IP . . .

- “I’ve *heard* protecting IP is important – *show* me.”
- “I don’t need a patent, so why should I care about IP?”
- “Government contracts are *bad* news: They *own* you!”
- “IP is confusing and doesn’t add to my bottom line.”
- “Making money *now* is the most important thing.”

What is “Intellectual Property” (IP)?

- Patents
- Copyrights
- Trademarks
- Trade Secrets

Why should I care?

IP Train Wrecks

- Unwitting disclosures and loss of patentability
- Who-Owns-It suits (e.g. *Winklevoss v. Facebook*)
- Logo/branding ownership & dilution
- Customer lists & information/business processes

Myths

- “Protecting IP is futile or irrelevant when dealing with the government. It is a waste of time and money.”
- “Commercializing IP derived from government contracts is either impossible or else an exercise in commoditization.”

Fears

- “The government will take my IP and give it to someone else.”
- “The prime contractor will take my IP and underbid me using my own technology.”

Why Government is Different

- Government R&D spending: \$150 *Billion/year*
- Government is not just different; it's different from *all* other customers:
 - Motivation
 - Competition
 - Capital
 - Rules

A few examples of government-sponsored IP . . .

- Google's search engine ("BackRub")
- Mars Lander shroud lines (radial tires)
- GPS
- The computer – *all* of them
- Speech Recognition Software ("Siri")
- ARPANET (a.k.a. the internet)
- Fracking
- Magnetic Resonance Imaging (MRI)
- Lactose-free milk
- Carbon fiber
- Rifle manufacturing process (a.k.a. mass production line)

“Innovation without protection is philanthropy.”

– Mark Blaxill and Ralph Eckardt, *The Invisible Edge*

- *Ninety* percent of most startups’ net worth is in IP
- After you sign on *any* dotted line, “It is what it is”
- No crystal ball exists for the future use of your IP
- IP strategies are like snowflakes: No two are alike

The federal government plays by a different set of rules:

- It can't be sued without its consent (“Sovereign Immunity”)
- *Agency Law* rules are different
- The “playbook” is different: Fed. Acq. Reg. (FAR)
- Every Department/Agency has its own supplement (20+)
- Contract types vary widely (e.g., R&D vs procurement, etc.)
- IP rights are “implied into” *all* contracts as a matter of *law*

Government Contracting 101

- Contracting officer motives and priorities
- Contractual language and sophistication of players
- “Deliverables” vs. IP rights apart from deliverables
- “Draconian” penalties for FAR noncompliance
- “Prime” vs. “Sub”-contractor relationships (privity)
- “Flow-down” provisions
- Ability of small innovators to retain IP ownership

Government Impacts on Patents

- Unique reporting rules (and penalties)
- Unique timing impacts on invention ownership
- Commercialization issues

Government Impacts on Copyrights

- “Data”, “Technical Data” and “Software” distinctions
- “Rights” accorded by IP type and contract terms
- Ownership (defaults to “creator” *but . . .*)
- “Marking” requirements
- Commercialization issues

Government Impacts on Trademarks

- The government doesn't "trademark" products
- Trademark infringement *is* possible by government
- Trademarks are more prevalent than you think
- *You* can also infringe while working on a contract!

Government Impacts on Trade Secrets

- It's not a trade secret if you don't tell Uncle Sam it is
- It's not a trade secret if you disclose it in your bid
- Calling it a trade secret doesn't make it so

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Q & A

MARTENSEN 