

DoD, Innovation, and Intellectual Property in Commercial & Proprietary Technologies

Introduction

Technology developers and innovators who invest their time, energy, and imagination in creating and developing a new idea or technology deserve to reap the benefits of their work. The Department of Defense (DoD) recognizes and respects the critical need for these developers to protect and leverage the Intellectual Property (IP) in their works, and our regulations and contracting approaches for acquiring new technology reflect this outlook.

DoD understands that developers often rely on IP rights to ensure return on investment—by retaining and securing *exclusive rights* for future business opportunities involving their innovations. Similarly,

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when DoD invests in developing technology, we focus on securing IP rights to support our critical needs—although our core strategies typically focus on maximizing *open competition* to support DoD’s future mission needs.

There may be a mistaken impression that these two business models are in conflict and cannot coexist—for example, believing that a developer who accepts a DoD development contract will be unable to retain any form of exclusive rights to commercialize the newly developed IP, or even worse, it could result in the loss of the developer’s exclusive IP rights in the pre-existing

commercial or proprietary technologies that it brings to the development effort. Fortunately, for all of us, that is a myth. The reality is that doing business with DoD is ripe with opportunity, and structured to support a “win-win” business deal for innovative technologies having both military and commercial application.

This paper briefly explores DoD’s unique characteristics as a customer and co-developer; outlines key elements of our IP development policies and regulations designed to ensure

protection of commercial and proprietary technology while meeting DoD’s needs; explains the benefits of

our modular approach to IP licensing and technical architectures; and reinforces our flexibility to craft specialized business deals and creative solutions with innovative technology developers.



DoD as a Customer, and Perhaps as a Co-Developer

DoD leverages leading edge technologies to give our Warfighters an advantage over any potential future adversary. In a military context, we have practical and critical needs to ensure that defense capabilities can operate under adverse conditions, meet our safety objectives, are supportable and maintainable,

and will be available in time of conflict. These defense-unique needs may drive the Department to seek specialized types of technical information or license rights, in some but not all cases. Those situations would not be relevant to a non-defense customer base.

DoD as a Customer

When any Government agency purchases a commercial technology, the foundational policy and practice is that the agency will receive only the same IP rights, and the same deliverables, that are typically provided to other commercial customers. If the usual commercial deliverables and licenses do not meet a Government-unique need, for example when technical information is needed to assess risk and mission impact or to maintain and support the system for a longer than usual operational life, then we would seek to negotiate with the commercial vendor for any specialized deliverables or IP rights—on voluntary, mutually acceptable, terms.

DoD as a Co-Developer

DoD's specialized mission requirements may also require further development to extend or adapt a commercial or proprietary technology to address particular operational challenges and threats. When DoD funds the development of new technologies, there are significant benefits for the developer: DoD almost never seeks ownership of the IP developed under a contract, even when funding 100% of the development; and for technology development funded jointly by DoD and Industry, the standard license rights provided in the DoD regulations allow the developer to retain *exclusive rights* for any *commercial* (non-Government) uses for the new technology.

DoD's Approach to Protecting IP in Commercial & Proprietary Technologies

When DoD acquires commercial or proprietary technologies developed *exclusively at private expense*, DoD's license will typically be either the same commercial license applied to other customers, or the predefined minimum license specified in the DoD regulations—which is limited primarily to internal DoD use, allowing for non-DoD third parties to use that IP only on behalf of DoD in specified, mission-critical or mission-support circumstances (e.g., emergencies, or direct support of DoD's in-house activities), and subject to numerous legal and practical safeguards to protect the developer's proprietary rights. The regulations provide additional protections for *commercial* technologies: DoD is required to presume that commercial items were developed exclusively at private expense, and generally to utilize the same deliverables customarily provided to the public; and DoD does not even have a

unique clause for Commercial Computer Software, relying instead on the IP owner's standard commercial license. Exceptions are allowed only if necessary to comply with federal law or to meet military-unique mission needs (or by mutual agreement).

When DoD seeks to meet its military-unique needs by *funding* a specialized adaptation or modification of pre-existing commercial or proprietary IP, any minor modifications or modifications of a type customarily offered in the commercial marketplace do not alter the commercial status of the pre-existing technology; and only those modifications that rise to the level of a new technology "development" could affect the standard license rights granted to DoD in the newly developed modification.

Modularity to Preserve Commercial or Proprietary Interests

In “mixed funding” development scenarios, such as when DoD funds a specialized modification of a commercial or proprietary technology, the developer may be concerned that it will lose its IP rights in the proprietary components by taking the DoD funding. However, DoD uses a two-part approach to ensure a mutually beneficial business deal:

Modular Licensing

When a technology is developed with a mix of DoD and Industry funds, DoD policy ensures that the developer’s self-funded work can be segregated from the DoD-funded work, allowing separate licenses to govern each portion. This preserves the developer’s IP rights to its self-funded portion, while allowing DoD to obtain greater rights to only those subsystems or components that it funded. This policy (the so-called “Doctrine of Segregability”) protects the



developer, ensuring that accepting DoD funding does not threaten the developer’s exclusive IP rights or return on investment.

Modular Open Systems Approach

MOSA is primarily a technical approach for system design, which naturally facilitates a more effective

approach to technical data and software deliverables, as well as modular licensing. MOSA helps preserve competition throughout the system life cycle without threatening a developer’s proprietary IP—by enabling a “plug-and-play” approach for “black box” commercial or proprietary system components. More specifically, by leveraging

open, standard, interfaces *between* those components, and seeking only top-level data (e.g., “form, fit, and function” and interface data), rather than detailed technical information, for proprietary components.

The Flexibility to Negotiate—In All Cases

If the ability to follow commercial practices, the standard funding-based license rights provided in the DoD regulations, and the application of MOSA and modular licensing principles still do not result in the best balance of DoD and the Developer’s interests, the parties are

always allowed to negotiate specialized terms by mutual agreement. In addition to crafting specialized IP licenses, the form, content, and level of detail of the technical data and software deliverables are also completely negotiable.

Opening the Dialogue

DoD is reaching out to technology developers to discuss and explore creative solutions to meet our National security needs through and mutually successful business arrangements. DoD respects the critical need for technology developers to ensure a return on their technology investments, particularly through their IP rights. Through early and open

discussions about these key IP considerations, DoD hopes to refute myths about our business opportunities and find ways to improve our engagement with communities on the cutting edge of technology.

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