



DoD INSTRUCTION 5010.44

INTELLECTUAL PROPERTY (IP) ACQUISITION AND LICENSING

Originating Component: Office of the Under Secretary of Defense for Acquisition and Sustainment

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Approved by: Ellen M. Lord, Under Secretary of Defense for Acquisition and Sustainment

Purpose: In accordance with the authority in DoD Directive 5134.01 and the July 13, 2018 Deputy Secretary of Defense Memorandum, this issuance:

- Establishes policy, assigns responsibilities, and prescribes procedures for the acquisition, licensing, and management of IP pursuant to Sections 2320, 2321, and 2322(a) of Title 10, United States Code (U.S.C.).
- Establishes the DoD IP Cadre, pursuant to Section 2322(b) of Title 10, U.S.C.
- Designates the Assistant Secretary of Defense for Acquisition (ASD(A)) as the senior DoD official overseeing development and implementation of DoD policy and guidance for acquisition, licensing, and management of IP for DoD.

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SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY. This instruction:

a. Applies to:

(1) OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this instruction as the “DoD Components”).

(2) Acquisition, licensing, and management of IP that is acquired, created by or for, or used by or on behalf of the DoD for purposes relating to the acquisition, operation, maintenance, modernization, and sustainment of defense products and services, regardless of the legal instrument governing such activities, and regardless of whether the IP is treated as a product or a service.

b. Does not apply to:

(1) Licensing or other technology transfer of U.S. Government-owned IP or technology covered by DoD Directive 5535.03 and DoD Instruction 5535.8.

(2) Branding and trademark licensing by DoD Components covered by DoD Directive 5535.09 and DoD Instruction 5535.12.

1.2. POLICY. Weapon and information systems acquired by DoD in support of the warfighter are, and will be, increasingly dependent on technology for its operation, maintenance, modernization, and sustainment. Acquiring and licensing the appropriate IP is vital for ensuring the systems will remain functional, sustainable, upgradable and affordable. Because balancing the interests of the U.S. Government and industry in IP can be difficult, early and effective understanding, planning, and communications between the U.S. Government and industry is critical, as is ensuring delivery, acceptance, and management of the necessary IP deliverables (e.g., technical data and computer software), with appropriate license rights. The DoD requires fair treatment of IP owners, and seeks to create conditions that encourage technologically advanced solutions to meet DoD needs.

a. It is DoD policy to acquire, license, and manage IP to:

(1) Enable coordination and consistency across DoD Components in developing and implementing strategies for acquiring and licensing IP and communicating with industry.

(2) Ensure that program managers are aware of the rights and obligations of the Federal Government and contractors in IP, and that program managers fully consider and use all available techniques and best practices for acquiring and licensing IP early in the acquisition process.

(3) Encourage customized IP strategies for each system based on, at a minimum, the unique characteristics of the system and its components, the product support strategy for the system, the organic industrial base strategy of the military department concerned, and the commercial market.

b. The following core principles govern the DoD acquisition, licensing, and management of IP:

(1) Integrate IP planning fully into acquisition strategies and product support strategies to protect core DoD interests over the entire life cycle. Seek to acquire only those IP deliverables and license rights necessary to accomplish these strategies, bearing in mind the long-term effect on cost, competition, and affordability.

(2) Ensure acquisition professionals have relevant knowledge of how IP matters relate to their official duties. Cross-functional input and coordination is critical to planning and life-cycle objectives.

(3) Negotiate specialized provisions for IP deliverables and associated license rights whenever doing so will more effectively balance DoD and industry interests than the standard or customary license rights. This is most effective early in the life cycle, when competition is more likely.

(4) Communicate clearly and effectively with industry regarding planning, expectations and objectives for system upgrade and sustainment. Avoid requirements and strategies that limit the DoD's options in accessing vital technology and commercial solutions available from industry.

(5) Respect and protect IP resulting from technology development investments by both the private sector and the U.S. Government.

(6) Clearly identify and match data deliverables with the license rights in those deliverables. Data or software deliverables are of no value unless and until the license rights to use it are attached, and the U.S. Government actually obtains and accepts those deliverables.

SECTION 2: RESPONSIBILITIES

2.1. ASD(A). Under the authority, direction, and control of the Under Secretary of Defense for Acquisition and Sustainment, the ASD(A):

a. Serves as the senior DoD official overseeing development and implementation of DoD IP policy and guidance for DoD.

b. Manages a cadre of personnel who are experts in the acquisition, licensing, and management of IP, coordinating their development and activities, including:

(1) Establishing an appropriate leadership structure and office for the IP Cadre.

(2) Ensuring the Cadre has the appropriate number of staff and such staff possesses the necessary skills, knowledge, and experience to carry out the duties in Paragraph 3.3., including in relevant areas of law, program management, contracting, acquisition, logistics, configuration management, engineering, financial analysis, and valuation.

2.2. PRESIDENT, DEFENSE ACQUISITION UNIVERSITY (DAU). Under the authority, direction, and control of the ASD(A), the President, DAU:

a. In collaboration with the IP Cadre lead, develops and updates IP curricula and reference materials, making use of IP lessons learned from actual case studies to derive experiential learning materials for the acquisition workforce.

b. Provides IP training to help the U.S. Government identify, acquire, and license IP at the earliest appropriate time and at the most affordable cost, while treating industry fairly and providing incentives to participate in the defense marketplace.

c. Provides and continuously improves training and education tailored to the various disciplines that must implement and manage IP acquisition and licensing activities.

2.3. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE. Pursuant to Section 140 of Title 10, U.S.C., and DoD Instruction 1442.02, the General Counsel of the Department of Defense, as the chief legal officer of the DoD, and as Director, Defense Legal Services Agency, provides legal advice and services in support of this issuance and in support of the IP Cadre established in Section 3.

2.4. DOD COMPONENT HEADS WITH ACQUISITION AUTHORITY OR CONTRACT ADMINISTRATIVE RESPONSIBILITIES. The DoD Component heads with acquisition authority or contract administrative responsibilities:

a. Oversee implementation of this issuance, and identify one or more offices with responsibility to coordinate matters related to the functions described below with the IP Cadre.

b. Ensure that program personnel engaged in all stages of the acquisition life cycle have relevant knowledge of the rights and obligations of the Federal Government and contractors regarding IP matters, IP law and regulations, program management, logistics, contracts, data management, valuation, and other disciplines as appropriate. Program personnel must fully consider and use all available techniques and best practices early in the acquisition process for identifying, acquiring, licensing, and enforcing the U.S. Government's rights to IP necessary to support operation, maintenance, modernization, and sustainment.

c. Incorporate consideration of types of IP deliverables and level of associated license rights into source selection evaluation factors, and as negotiation objectives in sole-source awards, as appropriate. Ensure there is sufficient clarity in contractors' identification and assertion of restrictions on IP rights to enable the U.S. Government to assess how those assertions may affect DoD interests over the life cycle, e.g., by requiring contractors to align assertions to specific IP deliverables, to particular system components or/processes, and to development or modernization funding.

d. Facilitate coordination and consistency across the DoD in strategies for determining the IP deliverables and IP rights necessary for operation, maintenance, modernization, and sustainment.

e. Incorporate IP planning elements into acquisition strategies, emphasizing the criticality of long-term analysis and planning during the earliest phases of the program, while preserving flexibility to address developments in the program sustainment strategy. Planning before solicitation for programs will address costs and benefits of procuring required IP and IP rights in light of corresponding investment and the government's means to reuse and adapt same. This includes configuration management planning that considers how mixes of contractor and government changes impacting delivered IP and data reuse and the ability to compete life-cycle support.

f. Communicate clearly and effectively with industry on IP matters early in the program life cycle. When both DoD and industry are making and planning technology investments, IP considerations will be critical to recognizing a return on such investments. For example, DoD Component heads will ensure IP matters are prioritized and included in such things as industry days, draft solicitations, one-on-one meetings with potential offerors, and presolicitation notices.

g. When communicating with industry, explore ways to share appropriate details about the program's IP strategy and product support strategy. During such communications, address the need for competitive and affordable product support and upgrades while providing appropriate protections for privately developed IP.

h. Acquire the necessary IP deliverables and associated license rights at fair and reasonable prices, while supporting the product support and reuse strategy. Improve the quality and consistency of financial analysis and valuation practices for determining fair and reasonable prices and appropriate needs for IP and IP rights in order to develop program budgets and evaluate proposals.

i. Ensure that IP strategies identify and enable actions to ensure return on U.S. Government investment in IP developed in whole or in part at U.S. Government expense, including by

negotiating for delivery of that IP and acquiring the appropriate associated license rights, preferably at the time of development of the technology.

j. Ensure IP deliverables (e.g., technical data and computer software) and associated license rights are acquired and managed as necessary to support the use of modular open systems approaches pursuant to Chapter 144B of Title 10, U.S.C.

k. Establish and maintain IP management procedures to ensure that time-sensitive actions are executed as appropriate to avoid an unintentional loss of IP rights, e.g., inspection and acceptance of IP deliverables, challenge and validation of asserted restrictions on deliverable IP, exercise of time-limited contract options for IP deliverables or IP rights.

SECTION 3: THE IP CADRE

3.1. CADRE PURPOSE. The IP Cadre facilitates the development and use of a highly competent and consistent approach across the DoD for acquiring, licensing, and managing IP, by providing timely expert advice, assistance, and resources to the acquisition workforce on IP matters. IP Cadre members will advise, assist, and provide resources to DoD Components on IP matters at various stages of the life cycle of a system.

3.2. ORGANIZATION AND MANAGEMENT. The IP Cadre is established under the authority, direction, and control of the ASD(A). It will consist of a director, and such subordinate organizational elements and members as established within resources assigned. The IP Cadre will interact with the DoD Components to facilitate a highly competent and consistent approach to assigned areas. In performance of assigned functions and responsibilities, the director of the IP Cadre will:

- a. Provide oversight and coordination on all acquisition and licensing policy and procedures for DoD IP.
- b. Coordinate actions and exchange information with other DoD organizations that have collateral or related functions.
- c. Identify and distribute best practices.
- d. Interface on assigned functions with Congress, industry, academia, as well as organizations throughout the DoD engaged in activities throughout the life-cycle of programs.
- e. Support development of requirements for training and credentialing the acquisition workforce.
- f. Provide assistance, when requested by the DoD Components, within the scope of the IP Cadre roles and responsibilities.

3.3. ROLES AND RESPONSIBILITIES. Members of the IP Cadre:

- a. Issue and interpret policies relating to acquisition, licensing, and management of IP, consistent with law and regulation.
- b. Advise and assist in the development of an acquisition strategy, product support strategy, and IP strategy for a system.
- c. Conduct or assist with the financial analysis and valuation of IP.
- d. Assist program offices in drafting relevant IP provisions in solicitations, contracts, other transaction agreements, and licenses.

e. Assist contracting officers in interactions with contractors, including communications and negotiations with contractors regarding solicitations and awards.

f. Assist contracting officers in the conduct of challenges to contractors' asserted restrictions on IP or if IP deliverables are incomplete or do not comply with the terms of a contract.

g. Coordinate with the DAU, academia, and industry to develop and update IP curricula and reference materials, including guidance, training courses, and case studies.

h. Address the management of IP deliverables and IP rights to support the creation and sustainment of a competitive environment, from program inception through sustainment.

i. Facilitate coordination and consistency across the DoD in strategies for determining the IP deliverables and IP rights necessary for operation, maintenance, modernization and sustainment.

SECTION 4: IP IMPLEMENTATION GUIDANCE

4.1. IP STRATEGY. Each DoD program will have a robust IP strategy to identify and manage the full spectrum of IP and related matters (e.g., technical data and computer software deliverables, patented technologies, and license rights) from the inception of a program and updated throughout entire product life cycle—initially as part of the acquisition strategy, and during the operations and support phase as part of the life-cycle sustainment plan.

a. The IP strategy will describe, at a minimum:

(1) How program management will assess long-term program requirements, and total ownership costs of IP deliverables and associated license rights necessary for competitive and affordable operation, maintenance, modernization, and sustainment over the entire product life cycle. This includes integrating, for all systems, the IP planning elements required by Paragraph (S-70) of Section 207.106 of the Defense Federal Acquisition Regulation Supplement for major weapon systems and subsystems thereof.

(2) How IP and related matters necessary to support the program's use of modular open systems approaches, including in accordance with Sections 2320 and 2446a through 2446c of Title 10, U.S.C., will be addressed. This includes providing guidance for how solicitations and contracts will:

(a) Identify and require all major systems interfaces to be based on widely supported and consensus-based standards (if available and suitable), which are preferably non-proprietary.

(b) Include requirements to acquire the appropriate IP rights in such major systems interfaces.

(c) Include appropriate requirements for other non-major systems interfaces (e.g., interfaces necessary to segregation and reintegration activities).

b. Customize IP strategies based on, at a minimum, the common, shared, and unique characteristics of the system and its components, the system architecture and interfaces, the product support strategy, the organic industrial base strategy of the DoD Component concerned, whether the item can be found in the commercial market, and whether the standard commercial licensing terms meet DoD needs.

c. IP strategies must consider the use of specially negotiated licenses to acquire customized IP deliverables (e.g., technical data, computer software) and associated license rights appropriate for particular elements of the product support strategy.

4.2. DOD COMPONENT IP REQUIREMENTS.

a. Program management offices will use both direct competition at various levels and indirect means, such as best value considerations over the life cycle, to create competitive environments that encourage improved performance and cost control. Strategies to be

considered include, but are not limited to, competitive prototyping, dual sourcing, modular open systems approaches that enable competition for upgrades, acquisition of complete technical data packages for selected systems and components, competition at the subsystem level, and opportunities for small business and organizations employing the disabled.

b. Regarding IP developed at private expense, in whole or on part, the DoD Components will use all available techniques and best practices for developing and continuously refining requirements for the acquisition and licensing of IP and IP rights necessary for operation, maintenance, modernization, and sustainment, showing preference for modular open system approaches. The DoD Components will negotiate specialized licenses and delivery requirements whenever doing so will more effectively balance DoD and industry interests than the more limited standard license categories.

c. DoD Components will consider and use all available techniques and best practices, including modular open systems approaches when cost effective and feasible. Doing so will ensure visibility into the U.S. Government's and industry's relative investments in the development of the IP, and the approach to managing the associated IP rights as part of a strategy for return on such investments. This approach will reduce the risk of paying more than once for IP and IP rights. DoD Components will ensure these efforts account for IP rights that are not based on the source of development funding, e.g., technical data necessary for operation, maintenance, installation, and training; form, fit, and function data.

d. Information systems used to provide authorized access, retention, integration, sharing, transferring, and conversion of IP deliverables throughout their programs' life cycles must support product configuration management, data loss prevention, and data sharing or exchange.

GLOSSARY

G.1. ACRONYMS.

ASD(A)	Assistant Secretary of Defense for Acquisition
DAU	Defense Acquisition University
IP	intellectual property
U.S.C.	United States Code

G.2. DEFINITIONS. These terms and their definitions are for the purpose of this issuance.

IP. Information, products, or services that are protected by law as intangible property, including data (e.g., technical data and computer software), technical know-how, inventions, creative works of expression, trade names.

IP deliverables. Products or services (including information products and services) that are required to be delivered or provided to the U.S. Government by contract or other legal instrument and that include or embody IP (e.g., technical data and computer software).

IP rights. The legal rights governing IP, including ownership as well as license or other authorization to engage in activities with IP (e.g., make, use, sell, import, reproduce, distribute, modify, prepare derivative works, release, disclose, perform, or display IP). When the IP involves access to classified information, DoD Directive 5535.02, DoD Instruction 2000.03, and Volume 2 of DoD Manual 5220.22 may apply.

REFERENCES

- Defense Federal Acquisition Regulation Supplement, current edition
- Deputy Secretary of Defense Memorandum, “Establishment of the Office of the Under Secretary of Defense for Research and Engineering and the Office of the Under Secretary of Defense for Acquisition and Sustainment,” July 13, 2018
- DoD Directive 5134.01, “Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)),” December 9, 2005, as amended
- DoD Directive 5535.02, “DoD Patent Security Review Process,” March 24, 2010, as amended
- DoD Directive 5535.03, “DoD Domestic Technology Transfer (T2) Program,” May 21, 1999, as amended
- DoD Directive 5535.09, “DoD Branding and Trademark Licensing Program,” December 19, 2007
- DoD Instruction 1442.02, “Personnel Actions Involving Civilian Attorneys,” September 30, 2010
- DoD Instruction 2000.03, “International Interchange of Patent Rights and Technical Information,” January 17, 2006, as amended
- DoD Instruction 5535.8, “DoD Technology Transfer (T2) Program,” May 14, 1999, as amended
- DoD Instruction 5535.12, “DoD Branding and Trademark Licensing Program Implementation,” September 13, 2013
- DoD Manual 5220.22, Volume 2, “National Industrial Security Program: Industrial Security Procedures for Government Activities,” August 1, 2018
- United States Code, Title 10