

# Intellectual Property Strategy

## › What is Intellectual Property?

Intellectual Property (IP) is an expression of a new and useful concept that can be legally protected such that the originator (e.g., inventor, author) is granted certain exclusive rights. The most commonly known forms of IP protection are patents, copyrights, trade secrets, and trademarks, and any or all of these may arise in DoD programs. DoD programs also face IP issues in another specialized form: “data rights.” The term “data rights” is a short-hand way to refer to the license rights that DoD acquires in two types of deliverables: technical data and computer software. This approach allows DoD to use a single set of license rights to address what would otherwise be two separate forms of IP protection: copyrights and trade secrets. The “Understanding and Leveraging Data Rights in DoD Acquisitions” brochure provides an overview of key elements of the DoD approach to data rights and can be found at <https://acc.dau.mil/datarightstrifold>.



## › What is an Intellectual Property (IP) Strategy?

The IP Strategy is the program’s approach, which will be captured as part of the program documentation, to managing the IP issues that will affect the program’s cost, schedule, and performance.

The IP Strategy helps a program identify and manage the full spectrum of IP and related issues from the inception of a program and throughout the life cycle, by assessing program needs for, and enabling the competitive acquisition of, deliverables of IP (e.g., technical data and computer software) and the associated license rights necessary for competitive and affordable acquisition and sustainment. Programs will use specific contracting mechanisms (e.g., delivery requirements, priced options for non-commercial IP that can be negotiated prior to contract award, evaluation during source selection), in an affordable manner to better achieve the business objectives of the program.

*An IP Strategy is needed to take advantage of innovation and to provide fair compensation.*

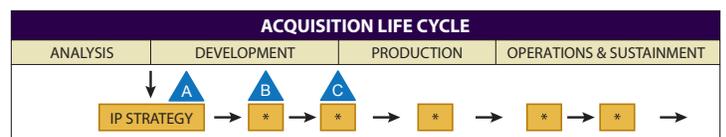
*An IP Strategy will give program offices greater ability to control the life cycle development and acquisition of warfighting systems.*

## › Who is responsible for the IP Strategy?

Program management is ultimately responsible for pulling it all together, subject to approval by the Milestone Decision Authority, but this must be a team effort. The development and continuous updating of an effective and robust IP Strategy will require active participation of subject matter experts from a wide variety of disciplines, including engineering, logistics, contracting, cost and accounting, and legal.

## › When is an IP Strategy Prepared?

The IP Strategy is required for all program types covered by DoDI 5000.02 (MDAPS, MAIS, and all other acquisition categories) starting at Milestone A, and is required to be updated as appropriate throughout the remainder of the entire program life cycle. Initially, the IP Strategy is to be summarized in the Acquisition Strategy. During the Operations and Sustainment phase, it is to be presented with the Life Cycle Sustainment Plan.



*\*Revisions as needed over the life cycle*

## › How does IP affect competition?

In DoD programs, system designs often include at least some technologies that are subject to privately-owned IP rights, commonly referred to as “proprietary” technology. The IP rights generally grant exclusive rights to IP owners to use their innovations, which may restrict or conflict with full and open competition. (The IP owner may be the sole source for a technology or may be legally entitled to compensation for use by anyone else.) Nevertheless, IP rights can co-exist or be integrated into a competitive environment, with some advance planning. In these cases, the IP Strategy will help the program take appropriate steps to promote competition to the maximum extent practical, and avoid or mitigate scenarios in which a relatively small amount of proprietary technology restricts the re-procurement or sustainment of the system or system elements.

► **It Takes Two: *Delivery Requirements and IP License Rights***

It is impossible to craft an effective IP Strategy without addressing the program’s need for BOTH IP rights and IP deliverables. Using technical data and computer software as an example, the IP Strategy must assess and account for both the data rights granted to the government AND the data deliverables that are required by the contract. The data rights will be granted by standard DFARS clauses, or by applicable negotiated or commercial license agreements, but the data delivery requirements must be specified, case-by-case, in each individual contract. Failure to include delivery requirements cannot be cured merely by including “all the data rights clauses” in the contract. If there are no data deliverables, then there is no way for the Government to actually exercise its data rights. Moreover, the data deliverables and data rights for any particular technology must be managed together, like two sides of the same coin, in any given contract or program activity. Addressing one early, and deferring the other until later, is likely to put the Government at a disadvantage.

► **Time is of the Essence: *Act Now for Future Flexibility***

One of the most significant challenges in managing IP issues over a program or system life cycle is the timing. IP rights are allocated early, at first development or first delivery of the technology, even though the Government’s need to use or release the delivered data likely occurs later in the program life cycle, sometimes significantly later. Given the inherent challenges in predicting the future (e.g., what sustainment approach will we use?), and the immense pressures of today’s fiscally constrained environment (e.g., deferring expenditures), the temptation is to “kick the can down the road” on IP issues. Programs must resist that temptation and make a cold, calculated, smart, business decision. Developing and regularly updating the IP Strategy will enable programs to forecast their downstream sustainment needs for data rights and to use the competitive environment early in the program life cycle to obtain competitive pricing for downstream activities.

► **Be Prepared: *“Segregability,” Modularity, and Open Systems Architecture***

**Segregation Part I: *The Bad News.*** Many DoD systems include a mix of commercial and noncommercial technologies, developed from various degrees of Government funding (none, mixed, or all). Contractors are allowed to assert data rights restrictions at the system, subsystem, component, or any other “segregable” level. This means that even a relatively small amount of privately-funded (“proprietary”) technology may restrict the competition for a much larger piece of the system. A rigorous application of the rules can result in a daunting array of license categories and delivery models scattered throughout the system. However, this predictive analysis can be simplified by grouping the system into its various functional subsystems or modules. Then the resulting approach to managing the IP issues for each module can be analyzed as falling into one of the following two models:

The Restricted-Proprietary (R-P) Model	The Open-Competitive (O-C) Model
When <b>EITHER</b> the data rights <b>OR</b> the data deliverables do <b>not</b> allow the data to be used or released for competitive life cycle activities.	When <b>BOTH</b> the data rights <b>AND</b> the data deliverables <b>allow</b> the data to be used or released for competitive life cycle activities.
<b>Data Rights:</b> Standard License rights for technology developed 100% private expense: Limited Rights (LR), Restricted Rights (RR), or customary commercial license (CCL) for commercial computer software (CCS).	<b>Data Rights:</b> Standard License rights for technology developed 100% Government funds or mixed funding: Unlimited Rights (UR), or Government Purpose Rights (GPR), respectively. FFF and OMIT data qualify for UR regardless of funding.
<b>Data Deliverables:</b> No contract requirements for delivery of necessary data or delivered data lacks technical information needed for sustainment or delivered with restriction.	<b>Data Deliverables:</b> Must have BOTH a contract requirement to deliver the data; and deliverable data with the level of technical detail necessary for the desired sustainment activity.

**Segregation Part II: *The Good News.*** The IP Strategy is a tool enabling a program not only to survive, but to thrive, even when the system relies on critical proprietary technologies. The key is the inherent modularity of the system. This solution will be most easily and readily available when using Open Systems Architecture (OSA) approaches to system design. Regardless of the degree to which a system relies on OSA, all complex systems can be organized into subsystems and sub-subsystems (e.g., components or modules), establishing some level of modularity. The better news is that modules which are initially in the Restrictive-Proprietary Model can be transitioned into an Open-Competitive Model through a number of mechanisms. Two options that emphasize alternative approaches for managing the IP are:

- Negotiate for additional IP deliverables (e.g., tech data or computer software ) and/or license rights. This is always more cost-effective during competitive phases or environments, usually earlier in the program life cycle.
- Seek delivery of alternative data types, for which standard data rights allow use and release for competitive activities. For example, form, fit, function (FFF) and operation, maintenance, installation, training (OMIT), both qualify for Unlimited Rights (UR) as the standard.

## › Guiding Principles for a Strategic Approach to IP Management

### **Anticipate and plan for sustainment -- and competition -- over the entire system life cycle**

- Identify IP deliverables and associated license rights that are necessary for critical sustainment activities, including: re-procurement of additional systems or spares; maintenance and repair at all levels (organizational, intermediate, depot); modification, interfacing, or ensuring interoperability with other systems; capability upgrades; or technology insertion.
- Address uncertainty regarding future sustainment strategies. Consider a competitively priced option (e.g., for data/software delivery, and/or for competitive-use license rights).
- Use a Data Repository approach to ensure that smart planning now will “pay off” in the future.
  - Record information needed to re-use data deliverables, to ensure the ability to use what has already been paid for.
  - Track and validate investments in technology development, both Government and Industry investments.

### **Align and Integrate the IP Strategy with Other Program Strategies/Plans**

The IP Strategy is documented, but cannot be, a “stand alone” strategy. It must be integrated with, and tailored to support, the other program strategies and plans, such as the Acquisition Strategy, the Life Cycle Sustainment Plan, the Configuration Management Plan, the Systems Engineering Plan, etc.

### **Just Do It: Delivery Now to Ensure Return on Investment (ROI) for DoD-funded development (or prior acquisition)**

- Remember: The Open-Competitive Model requires both IP deliverables and the necessary license rights.
- When DoD pays for technology to be developed (or modified or upgraded), this will typically result in:
  - Detailed technical data and computer software being created during the development, and
  - Unlimited, Government Purpose, or other competitive-use license rights granted to the Government.
- This is not a question of whether a program should require delivery of that data/software. When a program has funded development, the program has already paid for the IP to be created.
  - The cost of delivering such pre-existing data/software should be minimal (e.g., have the data delivered in its “native” format if it is not cost-effective to convert to a usual/typical DoD- unique format).
- Securing IP deliverable is “Step 1” to being able to actually use the license rights the program paid for!

### **But -- Don't make an unnecessary "grab" for deliverables or additional license rights for “Proprietary” IP**

- First, make sure that the necessary deliverables, or the necessary license rights, have not already been acquired during a previous development effort or contract. (Use the “Doctrine of Segregability!”)
- For “Proprietary” IP (i.e., privately-developed technology), the Government will be required to negotiate to purchase all of the IP deliverables, and their associated license rights, necessary to meet its needs.
- The goal is to establish prices for the deliverables and associated rights during competitive phases of the program (and each individual contract award).
- To address uncertainty regarding DoD needs, use a competitively priced option for IP deliverables or rights.

### **Before and After: Up-front evaluation and back-end validation of IP deliverables and license rights assertions**

- Every source selection should evaluate both data deliverables, and the associated license rights. This includes competitive awards and sole source awards.
- Delivery requirements are the necessary “triggers” to require offerors to assert their specific restrictions.
- When proprietary restrictions are asserted for a system or module, verify the technical segregability of that proprietary element from other DoD-funded (or otherwise open-competitive) elements.
- Upon delivery, inspection and acceptance procedures must include identifying non-conforming or unjustified markings and ensuring that data is delivered in the contract-specified format.



## Intellectual Property Strategy Checklist

Contract Phase	Key IP Management Activities, Considerations, Resources
<i>Pre-planning</i>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Align the initial design studies to the major functional elements</li> <li><input type="checkbox"/> Conduct Market research, including through the Defense Innovation Marketplace</li> <li><input type="checkbox"/> Write a strategy for the system modules that align with the Open-Competitive Model: Technology developed all/part by USG Funding, get delivery of what you're going to pay for (in native format, if it seems too early or costly to reformat the data for DoD's usual standard)</li> <li><input type="checkbox"/> Verify that the strategy includes an approach for the remainder of modules that can be competitively acquired under the Restricted-Proprietary Model: Technology developed entirely at private expense</li> <li><input type="checkbox"/> Verify the IP Strategy accounts for both short-term and long-term needs, covering the full life cycle of the system</li> </ul>
<i>Solicitation &amp; Source Selection; Negotiation</i>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Evaluate IP deliverables and license rights as part of source selection and negotiations</li> <li><input type="checkbox"/> Document (within contract) specific up-front delivery requirements for:                             <ul style="list-style-type: none"> <li>- Technology being developed under the contract (i.e., you're already paying for it!)</li> <li>- Known requirements for proprietary technology deliverables, when cost-effective</li> </ul> </li> <li><input type="checkbox"/> Use (and negotiate) competitively-priced options for IP deliverables for which:                             <ul style="list-style-type: none"> <li>- DoD's "need" for the deliverable is dependent on future uncertain events or decisions</li> <li>- When it is not certain whether an up-front purchase is cost-effective</li> </ul> </li> <li><input type="checkbox"/> Extend the standard DFARS listing &amp; assertion requirements to commercial technologies, include CDRL requirement for copies of commercial and negotiated licenses</li> <li><input type="checkbox"/> Use the deferred ordering clause (but don't overestimate its power!)</li> <li><input type="checkbox"/> Update the IP Strategy and ensure a life cycle consideration for competition is sustained</li> </ul>
<i>Contract Performance</i>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Update Post-award changes to the list of asserted data rights restrictions</li> <li><input type="checkbox"/> Monitor compliance with requirements to report subject inventions</li> <li><input type="checkbox"/> Conduct reviews to verify the data is delivered and complies with the contract requirements                             <ul style="list-style-type: none"> <li>- Did the data delivered match the technical/functional requirements of the contract?</li> <li>- Asserted data rights markings (does the marking match up with the list of assertions?)</li> </ul> </li> <li><input type="checkbox"/> Review the IP Strategy as major development milestones are completed</li> </ul>
<i>Delivery: Inspection &amp; Acceptance</i>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Assess Technical compliance (audit or IV&amp;V)</li> <li><input type="checkbox"/> Audit deliverables for Restrictive Markings (recurring) conforming and justified</li> <li><input type="checkbox"/> Invoke withhold payment clause (DFARS 252.227-7030) for non-compliant technical data</li> <li><input type="checkbox"/> Initiate a validation procedure when markings are not justified (i.e., do not accurately describe the DoD's license rights)</li> </ul>
<i>The Payoff: Retention and Reuse (and Recordkeeping)</i>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Create a Program or PEO Repository to ensure that the data can be retrieved and [re] used when it is needed later (bonus: transfer to, and reuse by, other programs whenever possible)</li> <li><input type="checkbox"/> Technical/operational needs are the responsibility of the Government. Do not count on industry to act in a way that will ensure they can be competitively replaced</li> <li><input type="checkbox"/> Business/legal needs are the responsibility of your program (e.g., tracking Gov't investment to support challenging IP restrictions/assertions)</li> </ul>