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# OT COUNSEL CORNER: IP AND AI IN OTs

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# *LEARNING OBJECTIVES*

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- **Alignment of IP Terms in OTAs with DoD IP Policies**
  - **Key IP Challenges and Tension Points**
  - **Solutions for IP Challenges**
  - **Practical Recommendations for Developing and Implementing IP Strategies**
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## ***CORE PRINCIPLES OF DOD ACQUISITION, LICENSING, AND MANAGEMENT OF IP UNDER DODI 5010.44***

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- 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.**
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## ***CORE PRINCIPLES OF DOD ACQUISITION, LICENSING, AND MANAGEMENT OF IP UNDER DODI 5010.44***

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- 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.**
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# *KEY RAI IP CHALLENGES*

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**The following are key RAI IP-related challenges for DoD buyers and AI vendors, particularly non-traditional defense contractors:**

- **Understanding how the current acquisition framework applies to AI technology;**
  - **Understanding how DoD IP requirements (including RAI technical requirements) and business models can align with AI vendor business models;**
  - **Resolving differences between the DoD acquisition process and commercial licensing models that are common for AI vendors; and**
  - **Communicating perceived tension points between DoD and AI vendor business models with acquisition teams and finding solutions that meet both parties' needs.**
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# ***IP CHALLENGES RE: DATA RIGHTS FOR AI CAPABILITIES***

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- The term “data rights” pertains to the licensing of computer software and technical data being acquired by DoD. Under the DFARS, data rights are well defined and generally depend on the source of development funding for the technology acquired. Unlike FAR-based contracts, there are **no standard data rights terms** under OTAs.
  - While the DFARS rules and “standard licenses” can be applied to the acquisition of AI, the DFARS authorizes the negotiation of specialized licenses that may be **tailored to meet the needs of the parties** more effectively than the standard licenses. Similarly, specialized licenses may be negotiated under OTAs.
  - The flexibility of specially negotiated licenses may help to **alleviate AI vendor concerns** regarding compatibility with their license models.
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# **STATUTORY/REGULATORY IP CONSTRAINTS IN PROCUREMENT CONTRACTS**

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**Under 10 USC 3771, Contractor may not be required:**

- (i) to sell or relinquish TECHNICAL DATA rights\* to the Gov't OR**
- (ii) to refrain from using privately developed items (e.g., IRAD)**

**The DFARS goes one step further, and applies these restrictions to both technical data and software**

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## ***MORE DFARS BOUNDARIES AND LIMITATIONS REGARDING TD/CS LICENSE RIGHTS***

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- **Contractors may not be required to deliver commercial TD and CS not customarily provided to the public**
  - **Contractors may not be prohibited or discouraged from selling privately developed products SOLELY because the Government's license rights may be restricted.**
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# *IP CHALLENGES RE: DATA RIGHTS FOR RAI CAPABILITIES*

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- DFARS Data Rights clauses (and **statutory/regulatory minimums for license rights and 10 USC 3771**) **DO NOT** apply to **OTAs** and other Non-DFARS agreements.
  - Accordingly, under OTAs, the parties have even **greater flexibility to negotiate** specialized or tailored **license agreements** for non-commercial software.
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# ***CONTRACTING SOLUTIONS FOR RAI AND IP CHALLENGES***

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- **DoD buyers should avoid one-size-fits-all solution for contract language** to encourage AI vendors to partner with the DoD.
  - AI vendors frequently seek **negotiation and flexible license solutions**, which can be implemented under both FAR-based procurement contracts and other types of contract vehicles.
  - **Interest-based negotiations focused on more equitably balancing the needs of the AI vendor** and those of the Department (e.g., relative to the standard DFARS license categories) are key to successful partnerships and AI acquisitions.
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# OTHER SOLUTIONS FOR RAI AND IP CHALLENGES

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Other Solutions to **Educate and Empower** DoD Buyers:

- **Guidance and Training** on negotiating and developing IP terms in OTAs, as well as applying DFARS license terms to AI acquisitions
  - **AI Standards** that facilitate requirements building in DoD AI acquisitions, such as AI-centric data item descriptions
  - **Leveraging AI to Buy AI**: AI-powered software tools that empower DoD buyers and vendors
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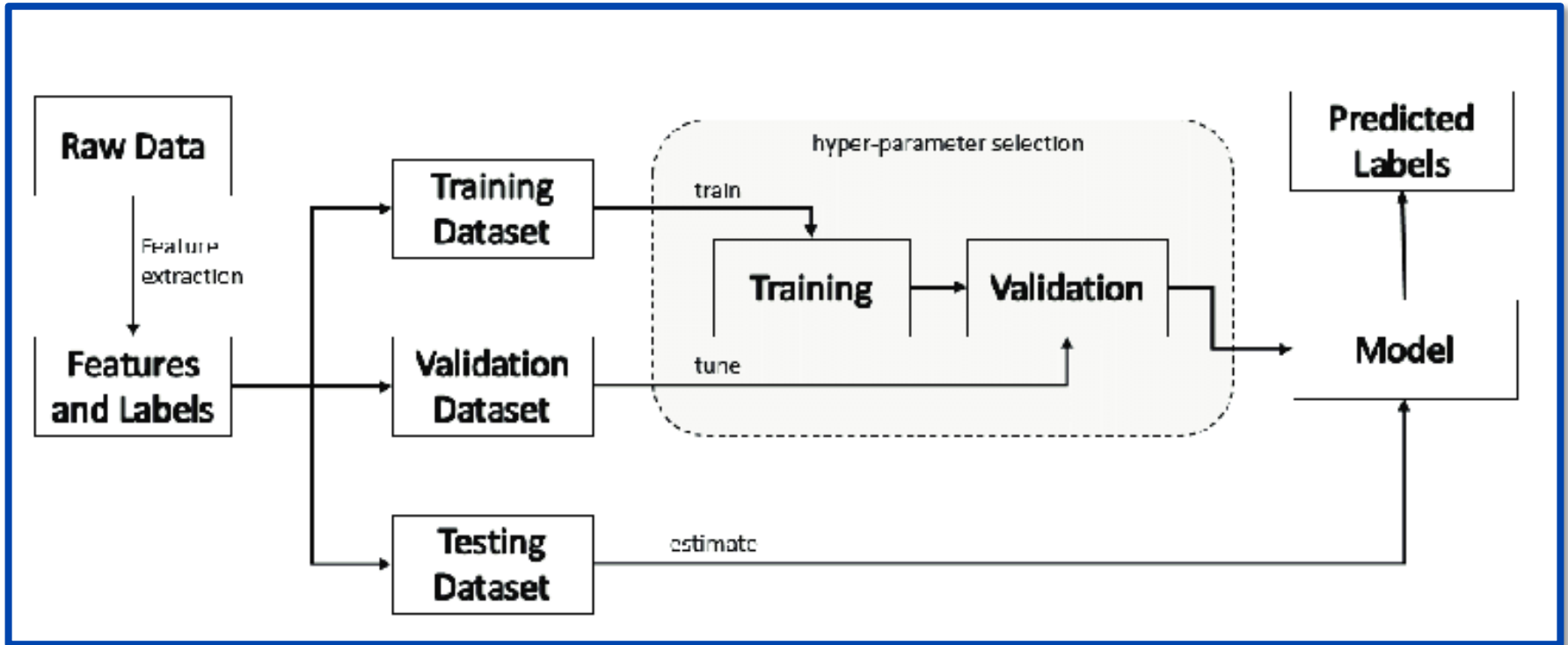
# ***DEVELOPING AND IMPLEMENTING IP STRATEGIES FOR OTAs***

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- 1. Set your 1, 3, and 5-year Goals for the Prototyping effort**
  - 2. Define Data and Software Deliverables Needed to Accomplish these Goals**
  - 3. Define Scope of Data and Software Deliverables for EACH Phase of Prototyping**
  - 4. Use CDRLs OR at least existing Data Item Descriptions so that industry understands expectations**
  - 5. Select Specific IP Evaluation Plan (and Execute this Plan Consistently)**
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# CONVENTIONAL MACHINE LEARNING FLOW DIAGRAM



\* Basavaraju et al., "A Machine Learning Approach to Road Surface Anomaly Assessment Using Smartphone Sensors", IEEE Sensors Journal (CC by 4.0 License, available at <https://creativecommons.org/licenses/by/4.0/>)



# ***PRACTICAL CONSIDERATIONS FOR DEVELOPING AI TD/SW REQUIREMENTS***

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- **Training Data (including raw, synthetic, real, and labelled training data sets)**
- **Trained Models (in executable and/or source code format)**
- **Validation and Verification Reports (including test data related to ethical AI requirements)**
- **Cybersecurity Documentation (including RMF documentation)**



# SAMPLE IP LICENSE SCHEMA

INCREASING LEVEL OF RISK FOR GOV'T

- **OPTION A: All data and software will be delivered with Unlimited rights**
- **OPTION B: All data and software will be delivered with Government Purpose rights**
- **OPTION C: Only certain types of deliverables (e.g., F3 data and test data) will be delivered with Government Purpose Rights**
- **OPTION D: No License Requirements, but Offerors' Proposed License Rights will be evaluated based on Mission Goals (e.g., ability to competitively procure production or sustainment services)**
- **OPTION E: Negotiate ALL License Rights prior to award of OTA**

INCREASING LEVEL OF RISK FOR CTR



# *IP EVALUATION FACTORS BASED ON USE CASES*

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**Consider evaluating proposals based on use cases and objectives (rather than evaluating proposals on whether certain categories of license rights are offered), including (but not limited to):**

- **Facilitating competitive procurement of sustainment services**
  - **Facilitating organic software sustainment services**
  - **Ability of DoD personnel and support contractors to use and distribute cybersecurity documentation for ATO/certification purposes**
  - **Use of specific software items to facilitate integration of software with other systems**
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# *CONCLUDING THOUGHTS*

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- **How do we better understand the IP concerns of our industry partners?**
  - **How do we better communicate our goals and seek proposals that leverage IP to accomplish these goals?**
  - **How do we leverage OTAs to motivate non-traditional defense contractors to partner with the DOD?**
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# Questions?

