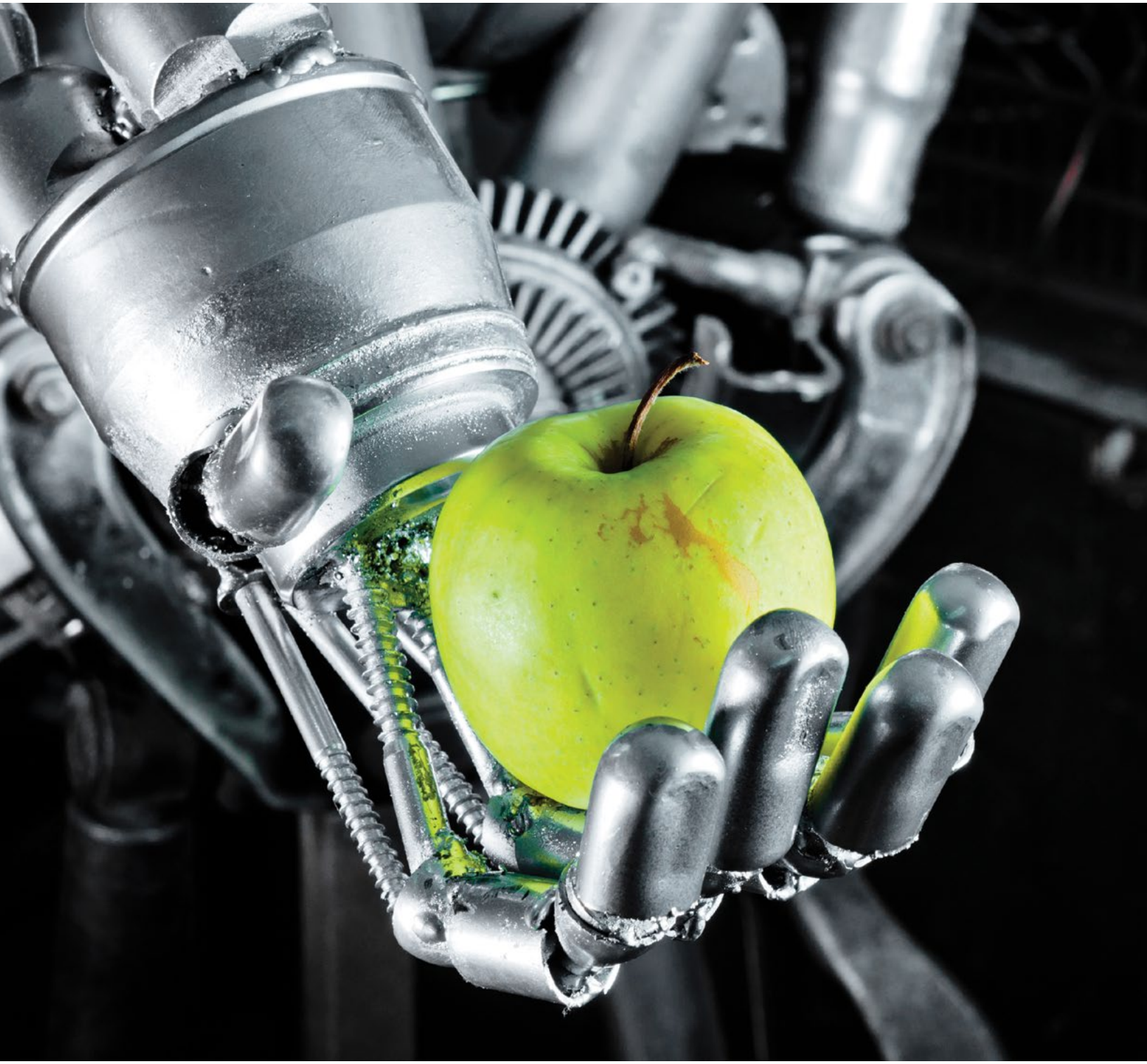
# Intellectual Property Considerations for the Robotics Industry



FINNEGAN

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP

WWW.FINNEGAN.COM

# Table of Contents

# Introduction

Innovations in the robotics fields are happening at breakneck speed, bringing science fiction into our factories, businesses, and homes. Today's robotics developers not only face traditional technical challenges, but also find growing competition for investment dollars and end users. A comprehensive and strategic plan for intellectual property protection of technical developments and enhancements, including design elements, are hallmarks of a successful and sophisticated business. A strong intellectual property portfolio provides several competitive advantages for robotics companies of all sizes—whether positioning for investment or sale, protecting from competitive threat in the marketplace, or building a strong brand name.

Finnegan attorneys are passionate about robotics and appreciate your interest in learning more about the value of IP strategy in achieving your business goals. This article series, as contributed to *Robotics Business Review*, provides insight and consideration towards securing meaningful IP protection across the robotics industry at large. From a comparison of patents and trade secrets to a three-part series on IP rights protection when seeking government funding, Finnegan attorneys have considered several key issues for robotics companies.

For more in-depth coverage of these topics and more on intellectual property, we encourage you to visit our firm's website at www.finnegan.com and to meet our Robotics team at www.finnegan.com/roboticsindustry.

*August 2015*

FINNEGAN | FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
WWW.FINNEGAN.COM

# Patents or Trade Secrets: The Choice Is Yours

*By Michael R. McGurk and Rachel L. Emsley*
*Originally published in Robotics Business Review, May 1, 2014*

Rachel L. Emsley
+1 617 646 1624
rachel.emsley@finnegan.com

Rachel Emsley focuses on district court litigation, appeals, post-grant review proceedings including inter partes review, patent prosecution, and client counseling. As an electrical engineer, she concentrates her IP practice on electronic technology, computer software, robotics, business methods, internet applications, and medical devices..

Robotics inventors and businesses recognize intellectual property as a valuable commercial and corporate asset—protecting precious market share, quantifying innovation, and providing a competitive edge. Trade secrets are a common form of IP protection for innovations of companies whose robots interact with few humans, live behind closed doors on factory floors, or serve only in top-secret military missions. But today's robots are in the "public" eye like never before, and when robots are designed for homes and businesses, companies may mistakenly believe that trade secrets should take a backseat to patent protection. For any robotics company, trade secrets provide a crucial component of a robust intellectual property portfolio and should not be overlooked. A technology-driven business plan needs to consider which innovations can be protected more effectively (and potentially indefinitely) as trade secrets, which should be patented, or how to use both forms of IP!

## What Is a Trade Secret?

The Uniform Trade Secrets Act, a legal framework which many states have adopted, defines trade secrets as having two key features. A trade secret is information that: (1) derives economic value from not being generally known or readily ascertainable by proper means; and (2) is the subject of "reasonable efforts" under the circumstances to maintain its secrecy.[1] When a trade secret owner makes a claim for trade secret misappropriation, the owner must prove that these two criteria are met, by clear and convincing evidence.

Generally, to have made "reasonable efforts" to maintain secrecy, a company must have robust employment agreements and policies, non-disclosure agreements with investors and contractors, and mechanisms to prevent public disclosure—both intentional and accidental. The magnitude of these requisite efforts depends on the value of the trade secret.

Much like with patents, laboratory notebooks can prove invaluable to assist a company in identifying, protecting, and then proving the existence and maintenance of trade secrets. Many companies also maintain an inventory or some other mechanism to identify trade secrets internally. Such systems can assist in proving the existence of trade secrets, that the company adequately protected those secrets, and can help quantify the value of the trade secret—for legal and financial purposes.

## Which Is Better for Robotics: Trade Secrets or Patents?

Depending on the circumstances facing your business and the technology itself, a thoughtful approach might counsel in favor of patents or trade secrets, or even some combination.

Innovation in robotics spans technologies and can take any form. Beyond the robot itself, or its component parts and software, innovations often come in the form of new methods of manufacture to make the robotics lighter, faster, or more flexible. Whether one or the other, or both types of protection make sense depends on the invention itself. Of course, business circumstances matter just as much; no robotics company is the same. For burgeoning companies, patents (or at least applications) may be necessary to prove and provide value to investors, who are frequently unwilling to submit to non-disclosure agreements and may have difficulty quantifying the value of a trade secret. For companies with many or "equal" competitors, who have patent portfolios covering their innovations, a robust defensive or offensive patent portfolio may be a good strategy to leverage against

competitive threats. For example, the ability to attack a competitor with potential counterclaims if accused of infringement can help level the playing field. In competitive fields, filing patent applications early creates prior art that can block competitors from obtaining their own patents. As a first step to determine which form of protection best fits the circumstances, a company must first and foremost familiarize itself with the benefits and drawbacks of each form of protection. Several of these are discussed below.

Patents create the right to exclude others from practicing the claimed invention, and arguably may, depending on all the circumstances, provide stronger protection than a trade secret. Although defendants and would-be defendants can challenge patent validity once the patent issues, an issued patent is presumed valid.[2] Unlike published patents, trade secrets are by definition kept in the strictest confidence, because even accidental disclosure can irreparably destroy the secret and extinguish any enforcement rights. For example, if a careless employee discloses the secret to a third party in casual conversation or otherwise, there may be no further protection. And, although many courts allow sealed filings and carefully worded protective orders to reduce disclosure risks, bringing suit against another party may require disclosure of your trade secrets.[3]

Trade secrets can protect subject matter that patents cannot, even when the secret is shipped with the robot. In such products, trade secrets offer value if the secret cannot be reverse-engineered.[4] Of course, trade secrets work especially well in circumstances where the trade secret is not apparent or easily discoverable in the end-product—for example, perhaps the invention operates behind the scenes to create the end product or in a controlled environment where those that see and work with the robot are sworn to secrecy. Or, for the many robotics that rely on software, perhaps the secret is not in the executable code that is shipped with the robot, but instead lies in source code that is kept under lock-and-key in true trade secret fashion.

A trade secret may also protect more than what is implemented in the robot, it may protect information about what was not done; patents do not necessarily reach such “negative know-how.” Knowing that many more-obvious iterations/approaches were not the best solution to the problem-at-hand can have great value. Unlike patents, which require publication of a detailed description of the invention, enabling others to make/use/build the invention, trade secrets help keep competitors behind, having to start at ground zero, and thus protect a long history of trial-and-error development.

For many technologies, a patent’s limited life-span of twenty years from filing provides adequate protection for the innovative company. But for technologies and inventions whose useful life spans have the potential to be much longer, trade secrets offer a more valuable option because the protection can last indefinitely, i.e., as long as the secret can be kept. Many famous inventions have taken advantage of trade secret protection—the formulations of WD-40 and Coca-Cola come to mind. And because patents all eventually expire, trade secrets can be critical to inventions that may not gain market acceptance and momentum for a long time.

The remedies available for trade secret misappropriation and patent infringement include both monetary and injunctive relief. In patent cases the successful plaintiff can be awarded a reasonable royalty and/or lost profits, but cannot disgorge the infringer’s profits. Unlike patent cases, a trade secret judgment can award the plaintiff its losses as well as the defendant’s unjust enrichment. Both types of protection also permit additional monetary relief for a defendant’s willful or malicious conduct.

Many companies leverage their patents and trade secrets in the same lawsuit. With the addition of trade secret claims, the courts can provide additional remedies to monetary compensation, such as barring the defendant from competing in the field. In addition, threatened trade secret misappropriation is immediately actionable, whereas threatened patent infringement generally is not.

By its very nature, a patent infringement action requires proof that the defendant practices each and every element of the claimed invention. With some inventions, it may be difficult to identify and therefore prove that a competitor infringes the patent. In robots that work in warehouses and on manufacturing floors, where they are not readily obtainable on the open market for dissection (to verify patent infringement suspicions), or that have innovations deep within their software, companies have trouble detecting actionable infringement. Under these circumstances, such innovations may be best protected with trade secrets.

### Every Robotics Invention Should Begin as a Trade Secret

Savvy companies almost always use trade secret protection initially, often operating in stealth mode until a technology is developed and proven. Because the disclosure of a patentable invention starts a clock ticking when one must file a patent application without the danger of that prior disclosure becoming prior art against the application, companies must practice the art of secrecy for their inventions until such time as it becomes necessary to file. And, although at least U.S. patent law provides mechanisms to challenge those that file patent applications on inventions derived from others, avoiding such situations certainly saves costs and prevents unnecessary business disruptions. At some point, the company must decide whether to maintain the secret, or to file for patent protection.

Especially in the new "first-to-file" system established by the America Invents Act (AIA),[5] it may be worthwhile to file a provisional patent application initially to preserve your invention date, which can be relied upon for one year without risk of publication, i.e., it remains a secret. The provisional patent application secures the early filing date, and allows the applicant to file for a non-provisional patent within one year if it decides that patent protection is necessary. Patent applications publish about 18 months from their earliest effective filing date (the provisional filing date, if there is one). Thus, usually, the decision to keep the invention under wraps as a trade secret can be delayed for nearly 18 months after filing a patent application, which the applicant can withdraw prior to publication. This should provide sufficient time to investigate and determine the potential value of a patent and/or trade secret.

### Trade Secrets Are Even More Important after the America Invents Act (AIA)

Patent law has recently undergone significant reform with the enactment of the AIA. One such reform improves the value proposition of trade secrets.

Before the AIA, an accused infringer who had practiced a patented invention in secret for many years prior to the patentee's filing date could not rely on a so-called "prior user right," unless the patent was for a so-called "business method."[6] Under the AIA, prior user rights were extended to any technology.[7] Having a robust trade secret, and practicing that trade secret, prior to later patenting by another can provide an invaluable affirmative defense to patent infringement charges (through prior user rights).

The AIA also expanded what is available as prior art to patent applications and patents, thereby expanding the universe of material prior art over which a claimed invention must be novel and non-obvious. In view of these developments under the AIA, companies may now opt for trade secret protection; because a trade secret does not require novelty or non-obviousness to be valuable and protectable.

As demonstrated above, robotic innovations may be protected by patents and/or as trade secrets. Deciding which path to follow is made more difficult with the expansive changes introduced by the AIA, but the authors believe that with careful consideration of the technology and business concerns, the right choice can be made.

---

[1] See *Uniform Trade Secrets Acts* §1(4), 14 U.L.A. 402-03 (1985 & Supp. 1990).

[2] In a district court proceeding, this presumption can be a significant hurdle because the accused is required to prove that the patent is not valid by clear and convincing evidence. However, the accused now has even more options to pursue a post-grant challenge at the U.S. Patent and Trademark Office under the America Invents Act §§ 311-29, where no such presumption exists.

[3] Even arguably the most famous trade secret of all time, the secret Coca Cola formula, has been provided to an opponent in litigation. See, *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 289, 227 U.S.P.Q. (BNA) 18, 19 (D. Del. 1985) (the plaintiffs successfully contended that in order to prevail they needed to discover the complete formula for the Coca-Cola drink, one of the best kept trade secrets in the world). Of course, this does not destroy the trade secret or its value per se, it just means that at least one more individual(s) may know the secret recipe, albeit under the threat of likely jail time or significant monetary damages if disclosed outside of the court's protective order.

[4] Reverse engineering is not generally "misappropriation" of a trade secret, and the owner does not have legal recourse.

[5] With the AIA, United States moved from a "first-to-invent" system to a "first-to-file" system.

[6] 35 U.S.C. § 273 (2000).

[7] 35 U.S.C. § 273 (2011).

FINNEGAN | FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
WWW.FINNEGAN.COM

# Design-Patent Protection for Modern Robotics Companies: What to Do When the Face of Your Robot Becomes the "Face" of Your Company

*By Meenakshy Chakravorty, Elizabeth D. Ferrill, Linda J. Thayer, and Robert D. Wells*

*Originally published in Robotics Business Review, July 1, 2014*

Elizabeth D. Ferrill
+1 202 408 4445
elizabeth.ferrill@finnegan.com

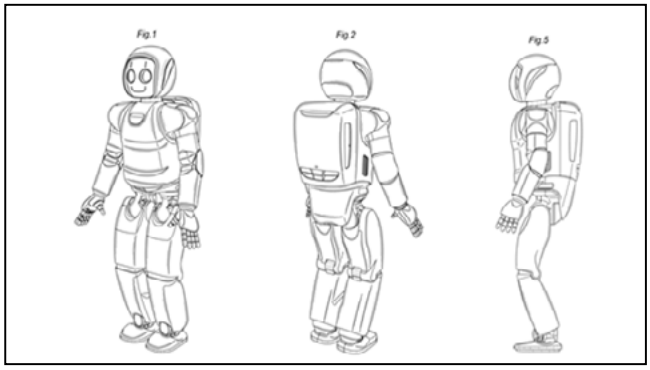
Beth Ferrill focuses her practice on all aspects of design patents, including prosecution, counseling, and litigation.

Linda J. Thayer
+1 617 646 1680
linda.thayer@finnegan.com

Linda Thayer focuses her practice on patent litigation and administrative trial procedures to request review of the patentability of issued patents outside of litigation.

Robert D. Wells
+1 202 408 4087
robert.wells@finnegan.com

Rob Wells focuses his practice on patent litigation, patent prosecution, and client counseling involving various intellectual property issues.




**U.S. Design Patent No. D677743, assigned to Honda Motor Co., Ltd.**

Without doubt, robots today are much more consumer-facing than they have ever been. According to ABI Research, the global market for consumer robots was estimated at $1.6 billion in 2012, and is expected to grow to $6.5 billion by 2017. As consumers, we are already feeling the effects in our everyday lives: a growing number of us employ robots to perform routine household tasks (think Roomba® from iRobot) or to entertain our children (think Mindstorms® from Lego). In the healthcare realm, surgeons have grown increasingly accustomed to performing robot-assisted surgeries, and amputees now enjoy greater mobility with state-of-the-art robotic prosthetics.

With the robot's increased visibility, physical appearance—known as *ornamental design* to patent geeks—plays an increasingly significant role in determining the overall success or failure of robotics products in the marketplace. A robot's ornamental design encompasses various aspects of its look and feel: aspects discernible up close (e.g., facial features and facial expressions) and aspects discernible from afar (e.g., shape and color scheme). Because these physical characteristics can strongly influence brand recognition and consumer appeal, developers should consider protecting the intellectual investments that go into creating the successful look and feel of their products.

Design patents (or design registrations as they are known in many parts of the world) protect how something "looks." In the United States, by statute, that "something" must be an "article of manufacture." An article of manufacture is a useful, manufactured (as opposed to natural) good. Examples include everything from cars and medical devices to belt buckles and plastic water bottles. A design patent may cover the entire article (such as an entire robot) or only an innovative part (such as the robot's "face" or certain spare parts).

A design patent may cover the shape of an article, its surface pattern, or both. To be deserving of a patent, a design must be original, novel (new) over the existing designs (known as "prior art"), ornamental, and must not be an obvious variant of any existing design. The "original" nature of a design is typically not an issue, except where a design is deemed to be a "simulation" of

something naturally occurring (such as a wood-grain pattern or a person's face). The "ornamentality" requirement means that the design must not be solely dictated by function. For instance, a design would not be considered solely functional if the underlying good could be designed in an alternative way, but still function the same. Finally, to pass examination, a design must be clearly and consistently depicted in the drawings (or photographs) of the design-patent application.

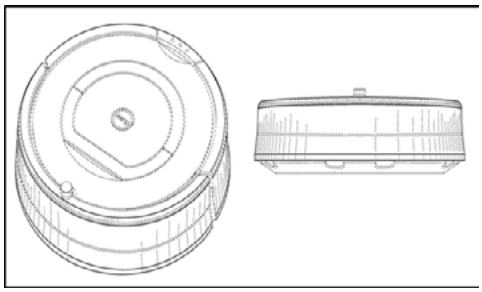
Typically, companies with innovative designs obtain design patents for three main reasons: (1) to protect against counterfeit products intended to confuse the consumer into believing the article is the authentic design; (2) to protect against competitors who sell "after-market" replacement or spare parts; and (3) to protect the unique design elements of the authentic product that differentiate it from the competition. In the robotics world, companies may protect their robots for any or all of these reasons.

Like utility patents that may be filed on the functionality of a product, design patents are also subjected to examination by the U.S. Patent and Trademark Office, although the process is much shorter and less expensive. The examination process for a design patent typically takes only 15-18 months. Once issued, design patents have a term of 14 years from the date of issue. Like utility patents, applications for design patents must be filed before the design is disclosed to the public, especially if the applicant intends to apply for international rights.

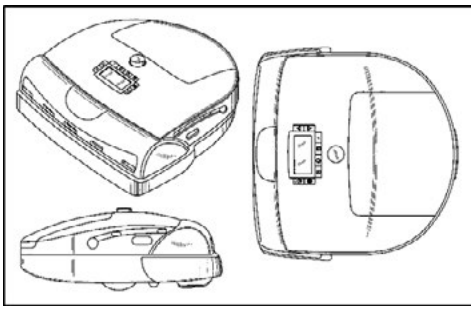
Design patents are enforced more like trademarks. The test for design-patent infringement centers on whether an ordinary observer, familiar with the prior art, would be deceived into believing the design protected by the patent is substantially the same as the design of the product accused of infringement. Damages for infringement can be substantial, depending on the articles involved. According to statute, design patent owners may receive damages equal to the total profits of the infringing product. Practically speaking, however, the vast majority of infringement situations are resolved without litigation. Often, the mere existence of design patents encourages competitors to think twice before copying or closely mimicking patented designs.

While utility patents filed on the functional aspects of an invention are the most common patent application, design patents are gaining in popularity as companies recognize the importance of protecting the significant time and effort that goes into designing the look of their products. iRobot, for example, has invested significant resources developing the Roomba's unique form. Ultimately, companies should not overlook the value of any investment in an aesthetic design when deciding how to protect a new product.

iRobot protected its investments in developing its product by seeking design-patent protection for its patentable designs. As a result, competitors are discouraged from imitating the Roomba's form, and consumers today are more likely to recognize and differentiate an iRobot Roomba from competing products (see e.g., drawings from U.S. Design patents below).

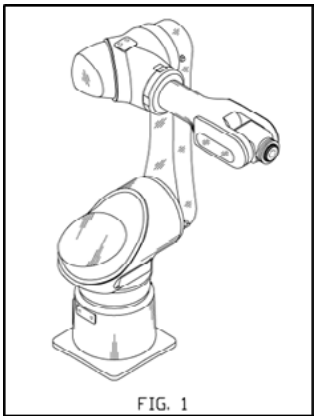


**U.S. Design Patent No. D670877 assigned to iRobot Corporation on the ornamental design for a robot vacuum cleaner.**



**U.S. Design Patent No. D548411 assigned to Bsh Bosch Und Siemens Hausgeraete Gmbh on the ornamental design for a robot vacuum cleaner.**

Design-patent protection may apply to parts and accessories of a product and the overall appearance of the whole product; it is not just for consumer products. Although not as visible to lay consumers as compared to vacuum-cleaner robots, industrial robots may also possess unique ornamental features that increase their appeal and distinguish them from other similar robots on the market.




**U.S. Design Patent No. D650820 assigned to Hon Hai Precision Industry Co., Ltd. on the ornamental design for a robot.**

In fact, the potential value of design patent protection is evident from a recent case involving Apple and Samsung. In April 2011, Apple sued for patent infringement alleging that many of Samsung's most popular smartphones and tablets infringed several of Apple's patents, including four design patents. Two of the asserted design patents related to the ornamental appearance of a front face for smartphones, one to the overall appearance of a tablet, and one to the graphical user interface that appears when the smartphone is turned on. On August 24, 2012, a jury found that all four of Apple's design patents were valid, and that 18 of the accused Samsung products infringed at least one of Apple's design patents. In total, the jury initially awarded Apple $1.05 billion dollars in damages for what Apple called "slavish copying" of its world famous product designs.

Simply put, looks matter. When evaluating IP needs, companies sometimes underestimate the value of design patents. While not a substitute for utility patents or trademarks, design patents can serve as useful tools for protecting against counterfeit and competing products with similar appearances. Obtaining a design patent can be inexpensive compared with a utility patent, and often design rights can be enforced without costly litigation. As a result, robotics companies entering the consumer market should strongly consider design-patent protection as part of their IP strategy.

# Patent Eligibility of Software in the Wake of the *Alice Corp. v. CLS Bank* Decision

*By Linda J. Thayer and Arpita Bhattacharyya, Ph.D.*
*Originally published in Robotics Business Review, August 14, 2014*

Linda J. Thayer
+1 617 646 1680
linda.thayer@finnegan.com

Linda Thayer is a partner in the Boston office of the intellectual property law firm Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, where she counsels clients on all aspects of worldwide patent portfolio development, including due diligence, clearance, and assertion in federal courts.

Arpita Bhattacharyya, Ph.D.
+1 617 646 1676
arpita.bhattacharyya@finnegan.com

Arpita Bhattacharyya, Ph.D. is an associate in Finnegan's Boston office where she focuses on drafting and prosecuting patent applications, portfolio analysis, and litigation for life science and medical device clients.

Earlier this year, we asked the question: "Will the Supreme Court Rein in Software Patents?" with its decision in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, a case dealing with patent eligibility of computer-related inventions. Would the Court provide needed guidance and, more importantly, what would be the impact on the field of robotics?

With the Supreme Court's June decision, we have at least some answers to our questions. All types of claims (system, method, and computer-readable media) in all fields will be examined for patent eligibility under the framework in *Mayo v. Prometheus*, including those involving computer implementations. Analysis under *Mayo* involves a two-step process, namely: (1) determining whether claims are directed to a patent-ineligible concept (i.e., an abstract idea, a physical phenomenon, or a law of nature); and (2) if so, searching for an "inventive concept," in the claim, i.e. "an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself.'" Applying this framework, the Court affirmed the rejection of *Alice's* claims.

There is good news. While the rejected claims were related to a computerized trading platform to mitigate risk when exchanging obligations, the Court did not categorically exclude all software or computer-implemented inventions from patentability. The Court did, however, clarify that claims to "well-understood, routine and conventional activities previously known to the industry" performed using a generic computer system would not be patent-eligible unless the invention "improve[s] the functioning of the computer itself," or "effect[s] an improvement in any other technology or technical field." In the wake of the decision, the USPTO has issued preliminary examination guidelines and pulled back from issuance many previously allowed applications that contain computer-implemented claims. Those still undergoing examination are being subjected to much stricter scrutiny.

While the Supreme Court's decision provided some guidance, further interpretation will be left to the Federal Circuit. In the recent *Digitech Image Technologies, LLC v. Electronics For Imaging, Inc*. decision, for example, the Federal Circuit found a process of combining two data sets into a "device profile" was an abstract idea, not eligible for patent protection. Citing *Alice Corp*., the Federal Circuit emphasized that "fundamental concepts, by themselves, are ineligible abstract ideas." The Federal Circuit further explained that "[w]ithout additional limitations, a process that employs mathematical algorithms to manipulate existing information to generate additional information is not patent eligible."

The *Alice Corp*. decision does not spell doom and gloom for robotic inventions. As the Court recognized, the claims at issue in *Alice Corp*. were more similar to the unpatentable business method claims in *Bilski v. Kappos* than other computerized methods found in other high-tech industries. As more decisions issue from the Federal Circuit, the boundaries of patent eligibility of computer-implemented inventions will become clearer.

In the meantime, robotics companies seeking patents on software-related innovations should focus on system claims directed to the combination of software and hardware elements. If off-the-shelf components are used, how is the combination of components better than the sum of the parts? All patent applications—but especially those implemented in software—should clearly explain *how* the invention effects an improvement in some other technical field. With all the many new and exciting developments of late in the robotics industry, this should be easy.

# Conducting R&D with Government Funding; Great Idea, but How Do We Protect Our Intellectual Property Rights? Part 1 of 3

*By William H. Pratt*

*Originally published in Robotics Business Review, February 13, 2015*

William H. Pratt
+1 202 408 4054
bill.pratt@finnegan.com

William Pratt's practice is focused on intellectual property licensing, government contracts, export controls, and the arbitration and litigation of intellectual property disputes.

## Introduction

Thirty-five years ago, the Patent and Trademark Law Amendments Act of 1980 (aka the "Bayh-Dole Act") ushered in what many will argue is the golden age of collaborative research. Through the Bayh-Dole Act and other reforms that followed, we now have a system, albeit a complex one, that enables entities to conduct research and development ("R&D") activities, either in whole or in part, with federal funding while protecting their intellectual property interests.

Yet, many entities, both large and small, are reluctant to pursue such opportunities for fear of losing valuable intellectual property rights either to the public or to the government. Figuring out the wide variety of agreements under which such funding or assistance is provided, and the complex and various regulations and clauses governing ownership and use of data, software, and patents, is a daunting task.

In three articles, we will attempt to demystify the government contract process. This introductory article identifies and explains the agreements you may encounter when conducting a research project for which the government is providing funding or technical support. The subsequent articles will provide more detailed examinations of the regulations and clauses governing ownership and use of data, software, and patent rights, and provide basic guidelines and best practices for complying with them.

## Types of Government Agreements

There are two basic categories of agreements that the U.S. government may use. Procurement contracts are used by government agencies to acquire goods and services directly to benefit the government. Non-procurement agreements, such as grants or cooperative agreements, are used by the government to transfer funding to a recipient to support research that addresses a public need.

## Procurement Contracts

Procurement contracts are, mostly, governed by the Federal Acquisition Regulations ("FAR"). Various other agencies (e.g., DOD, NASA, etc.) have issued additional acquisition regulations that supplement (not replace) the FAR. A procurement contract can take many forms (e.g., fixed price, cost, letter contracts) and imposes an array of standard clauses. Although compliance with these regulations may appear at first to be a daunting task, especially for a small business concern, compliance becomes easier over time and with practice and patience, because these contracts are based a standard set of regulations.

Of the two contracts, a procurement contract is not as flexible (from an R&D perspective). Payments are typically performance-based, and there are consequences for failure to perform.

Procurement contracts are often used by the government to procure a variety of robotics-related services, including R&D. Last year, NASA awarded a three-year contract to one company to develop simulation models, including in-orbit robotic manipulator systems, advanced future robotic systems, and vehicles for rendezvous operations, for Johnson Space Center in Houston. In another recent example, the Department of Defense funded the further testing and miniaturization of a company's existing, internally developed, medical device for potential use by the military in the field.

### Non-Procurement Agreements

Each year, Congress allocates funding for various forms of research and development not directly associated with a specific procurement need. Rather, these funds are intended to encourage private sector development of technology that addresses short, medium, and long term national interests consistent with an agency's mission. These non-procurement agreements are aimed at addressing vexing problems that both the government and industry are facing or will face in the future.

According to the National Science Foundation, the federal government is the second-largest funder of U.S. R&D, providing an estimated $124 billion, or 31% of the U.S. total in 2009. The vast majority of funding for these types of agreement is issued by a relatively small number of agencies (e.g., DOD, DOE, NIH, NASA, etc.).

A grant is typically used when substantial involvement between the government agency and the recipient is not expected when conducting the research project. Conversely, a cooperative agreement is used when the funding agency expects to be substantially involved in the research project. Both can be issued to commercial organizations, nonprofit entities, and educational institutions.

Although grants and cooperative agreements are legal documents, neither is subject to the FAR or any of its supplements. Each issuing agency does, however, have a specific set of regulations that apply to grants and cooperative agreements. The DOE regulations encompassing its grant and cooperative agreement program can be found at 10 C.F.R. Part 600.

### OTAs and TIAs

Besides grants and cooperative agreements, the DOD may issue an "Other Transaction Agreement" ("OTA") or a Technology Investment Agreement ("TIA") for certain research projects. An OTA agreement is defined as an agreement other than a contract, grant, or cooperative agreement. The purpose of an OTA is to provide flexibility to the parties in creating the agreement.

TIAs are a class of assistance agreements that can be used to carry out basic, applied, and advanced research, when the research is to be performed by a for-profit firm or by a consortium that includes a for-profit firm. Because TIAs are used to develop commercial technologies for future defense needs by the DOD, TIAs are designed to reduce defense research barriers to commercial firms and provide DOD with the broadest possible access to technology.

### CRADAs, WTOs, and User Agreements

Up to this point, this article has been examining the various agreements under which the U.S. government provides funding for research. However, given the complexity of the technological challenges facing industry today, many entities are also taking advantage of vast government non-monetary resources by jointly conducting research with government agencies and its national laboratories, through Cooperative Research and Development Agreements ("CRADAs").

A CRADA enables a non-government entity to jointly pursue common research goals with government scientists and thus leverage its own R&D efforts. A CRADA makes government facilities, intellectual property, and expertise available for collaborative interactions to further the development of scientific and technological knowledge into useful, marketable products.

Although a federal laboratory may, under a CRADA, provide personnel and access to government technology and facilities, no federal funding can be used in conducting the research. The non-government entity must fund the government lab's participation in the project. Each agency, and in some cases different offices within an agency, issues its own rules governing its participation in CRADAs, which generally provide contractual flexibility.

As many may know, the DOE maintains a network of national laboratories that offers access to exception personal, technology, and equipment. Besides CRADAs, the DOE offers other types of agreements (i.e., Work for Others (WFO) Agreements and User Agreements) for working with its national laboratories. A WFO is typically

used when the non-government entity is hiring the laboratory to conduct a research project on its behalf, as opposed to the two parties jointly conducting a research project. As a general rule, a WFO covers a specific project that was created and designed by the non-government entity for which it hires a laboratory to conduct. As will be discussed in subsequent articles, a WFO generally provides far better intellectual property terms and conditions than a CRADA.

A User Agreement, on the other hand, sets forth the terms and conditions under which a laboratory will allow the non-government entity to use the laboratory's equipment and facilities to experiment. A non-government entity can find a User Agreement to be of great value to its research program, given the National Laboratories' highly specialized facilities and equipment. Two types of User Agreements are offered by DOE laboratories (Proprietary and Non-Proprietary), each of which offer different intellectual property protection.

The U.S. government also has programs aimed at providing research opportunities to small business in the form of either procurement contracts or non-procurement agreements. Numerous resources are available on the Internet for researching such opportunities. The Small Business Innovation Research ("SBIR") Small Business Technology Transfer website is just one of many sites that post solicitation opportunities for small business. www.acq.osd.mil/osbp/sbir/. Numerous other web sites offer business opportunities to entities large and small (e.g., https://www.fbo.gov/, www.darpa.mil/opportunities /solicitations/darpa_solicitations.aspx).

As previously noted, this article briefly summarizes the different research agreements used by government entities. In subsequent articles, we will discuss the complex patent, software, and data rights clauses found in these various types of research agreements and how they differ from one another, including what to watch out for.

FINNEGAN | FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
WWW.FINNEGAN.COM

# Conducting R&D with Government Funding; Great Idea, but How Do We Protect Our Intellectual Property Rights? Part 2 of 3

*By William H. Pratt*

*Originally published in Robotics Business Review, March 26, 2015*

William H. Pratt
+1 202 408 4054
bill.pratt@finnegan.com

William Pratt's practice is focused on intellectual property transactions and licensing, government contracts, and the arbitration of intellectual property disputes.

## Introduction

Part One discussed the various types of agreements entities encounter when conducting research projects with federal funding or technical assistance. In this segment, we focus on the clauses found in agreements that govern ownership of inventions created in the performance of a research project. Although there are different variations of the U.S. patent rights clause, these variations are very similar in many respects.

## Various Types of Clauses

The Bayh-Dole Act (BDA) applies to small business and nonprofit organizations. The standard patent rights clause ("Patent Rights (Small Business Firms and Nonprofit Organizations)") (37 C.F.R. § 401.14), which codifies the BDA, accordingly applies only to small businesses and nonprofits. When the BDA was subsequently extended by Executive Order 12591 to large companies, the Patent Rights Clause in the Federal Acquisition Regulations (FAR) (48 C.F.R. § 52.227-11) was eventually created and can apply to all entities.

The Department of Defense (DOD) employs Federal Acquisition Regulation (FAR) 52.227-11 for procurement contracts or subcontracts with small entities and nonprofits, but uses the "Patent Rights—Ownership by the Contractor (Large Business)" (48 C.F.R. § 252.227-7038) for contracts or subcontracts involving large for-profit companies.

The clauses set forth above are, arguably, the primary clauses used in government contracting. One may encounter other variations of these clauses when conducting research under the other agreements discussed in Part One of this article (e.g., grants, cooperative agreements, Cooperative Research and Development Agreements (CRADAs), Work For Others Agreements, etc.); however, the basic components that are described below still apply.

## Basic Components of the U.S. Patent Rights Clauses

### 1. Ownership

Any invention conceived or *first actually reduced to practice* in the performance of a research project conducted, in whole or in part, with federal funding constitutes a "Subject Invention," and will be subject to the terms of the research agreement's U.S. Patent Rights Clause. It is important to note that an invention first conceived with private funding, but thereafter made with federal funding, becomes a "Subject Invention."

By accepting federal funding to reduce an invention (even one previously conceived with private funds) to practice for the first time, one will subject that invention to the provisions of a U.S. patent rights clause, including a license that allows the government "to practice, or have practice for or on behalf of the United States, the Subject Invention throughout the world."

With two exceptions, any entity (large, small, or nonprofit) may retain ownership in any Subject Invention by complying with the Reporting and Election of Title Requirements discussed below.

NASA and Department of Energy (DOE) are the only two agencies that, by statute, retain ownership of Subject Inventions made, with federal funding, by a large business. Executive Order 12591 only requires federal

agencies to follow the BDA when contracting with large businesses to the extent permitted by law.

Because NASA and DOE both operate under statutes that expressly obligate them to retain ownership of inventions created under a contract, the Executive Order enables neither agency to follow the BDA when contracting with large businesses.

Both agencies, however, may waive ownership of a Subject Invention created by a large business under certain conditions. Such a waiver must be applied for and is not automatically granted. Companies seeking a waiver are strongly encouraged to actively seek waiver prior to formally entering into a research agreement with either NASA or DOE.

When a waiver is not granted, NASA and DOE will use clauses in its agreement that grant them ownership of the Subject Invention, with a license to use the invention being granted to the inventing party. For examples, please refer to 48 C.F.R. §§ 952.227-13 (Patent Rights—Ownership by the Government) & 1852.227-70 ("New Technology").

**2. Reporting and Election Requirements**
To retain title to a Subject Invention, the inventing party must (a) report the invention to the sponsoring agency within a specified time frame (typically within two months after it is reported internally); and (b) elect to retain title to the invention within two years of reporting it to the agency. If the inventing party fails to report or elect title within the stated timeframe, the government has sixty days, after learning of such failure, to request title to that invention.

As a general rule, absent egregious circumstances, federal agencies do not actively seek to obtain title to a Subject Invention if the inventing party inadvertently fails to comply within the stated timeframes. However, given the government's right to seek title upon learning of an infraction, failure to comply leaves a cloud over the title.

**3. Government License to Use**
If the inventing party retains ownership of the Subject Invention, the government, in return, receives a nonexclusive, nontransferable, irrevocable, paid-up license "to practice, or have practice for or on behalf of the United States, the Subject Invention throughout the world."

This license is limited to use by or on behalf of the government, so the government does not have the right to use or allow others to use the Subject Invention for commercial purposes.

**4. March-In Rights**
This component of U.S. Patent Right Clauses seems to worry contractors the most when it ought to be the least of their concerns. March-in rights allow the government to require the contractor to license its Subject Invention to a third party if: (a) the contractor has not tried to achieve practical application of the Subject Invention; (b) needed to alleviate health or safety concerns; (c) needed to meet public use requirements specified in federal regulations; or (d) the Preference For U.S. Industry requirement (described below) has not been obtained or waived or breached.

Although march-in rights have been around in one form or the other since the 1960s, this author is not aware of a single case where such rights have been implemented.

**5. Preference For U.S. Industry**
The U.S. Patent Rights Clause states that if the Subject Invention is exclusively licensed, any products embodied by the Subject Invention, or produced through its use, must be "*substantially manufactured*" in the United States.

Despite this potential draconian measure, neither the BDA nor any of the U.S. Patent Rights Clauses define "substantially" or "manufactured" or provide any guidance on how to interpret such terms. This requirement can be waived upon a showing that unsuccessful attempts have been made to grant a license to a party likely to manufacture in the United States or under the circumstances that domestic manufacturing is not possible.

**6. U.S. Competiveness**
In certain situations (e.g., CRADAs with DOE National Laboratories or when a DOE patent rights waiver is granted), one may encounter a U.S. competiveness provision, which can be far more troublesome than the Preference for U.S. Industry provision discussed above.

The U.S. Competiveness provision requires any product that embodies a Subject Invention to be "substantially manufactured" in the United States and is not limited to an exclusive licensing situation. This provision can also be

modified or waived upon a showing of undue hardship or by submitting a Net Benefit Statement.

**7. Other Administrative Obligations**
U.S. Patent Rights Clauses also impose on the contractor other obligations, such as, the requirement to:

a) File patent applications in the United States and abroad within certain time frames;

b) Notify the government of its decision not to file a patent application, continue prosecution, pay maintenance fees, or defend in a reexamine or opposition, in a particular country;

c) Include in the issued patent a statement indicating that the invention was created with government support;

d) Submit, upon request, periodic reports on the utilization of the Subject Invention;

e) Require through written agreement that its technical employees promptly disclose Subject Invention to management; and

f) If the contractor is a nonprofit organization, it must: (i) not assign rights to a Subject Invention in the United States without written approval of the funding agency; (ii) share royalties with the inventors; (iii) use the balance of the royalties or income for the support of scientific research; (iv) try to license the Subject Invention to small businesses; and (v) allow the Secretary of Commerce to review its licensing program.

## Summary

Part Two provided you with a general understanding of basic components of the U.S. Patent Rights Clauses that you may encounter when conducting research with federal funds. These clauses will enable you to protect and benefit from the valuable inventions that your company creates with federal funding.

With a little practice and guidance, compliance with such clauses should not be difficult. In Part Three of this article, we will examine the clauses that affect rights in software and non-patentable data disclosed, used or created in the performance of research funded in whole or in part with Federal Funds.

# Conducting R&D with Government Funding; Great Idea, but How Do We Protect Our Intellectual Property Rights? Part 3 of 3

*By William H. Pratt*

*Originally published in Robotics Business Review, June 19, 2015*

William H. Pratt
+1 202 408 4054
bill.pratt@finnegan.com

William Pratt's practice is focused on intellectual property transactions and licensing, government contracts, and the arbitration of intellectual property disputes.

## I. Introduction

This last segment focuses on the government's rights in data and software developed or used in the performance of government funded research. Due to space limitations, we will focus on the three primary clauses used in procurement contracts under which data/software is produced, furnished, or acquired.

## II. FAR 52.227-14 Rights in Data

This clause is used by most government agencies, although some agencies modify it slightly. The term "Data," as used in this clause, encompasses all recorded information, regardless of the media on which it is recorded, including both technical data and computer software, but excluding information incidental to contract administration.

The clause creates three categories (Unlimited, Limited, and Restricted) of rights and must be included in all subcontracts. The Contractor cannot, without the Contracting Officer's (CO) permission, incorporate any copyrighted Data into a deliverable that was not first produced in the performance of the contract, unless the Contractor identifies the Data and obtains all applicable rights for the government.

### Unlimited Rights

This gives the government the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, publicly perform and display in any manner and for any purpose, and to permit others to do so. The government receives Unlimited Rights in Data first produced in the performance of the contract and any other Data delivered under the contract, unless marked with Restricted or Limited Rights. The Contractor should avoid agreeing to deliverables that encompass proprietary Data. If this is not possible, the Contractor must be sure to deliver such Data with Limited Rights or Restricted Rights, as explained below. The Contractor retains ownership, the ability to use or publish, and the right to establish copyrights in Unlimited Rights Data. But third parties will have the ability to use such Data for commercial purposes. Unlimited Rights, as discussed throughout this article, are inchoate (e.g., incomplete) rights, as the government's ability to exercise such rights is dependent upon it receiving delivery of the Data.

### Limited/Restricted Rights

Limited Rights encompasses Data, other than software, that embody trade secrets or are commercial or financial and confidential or privileged, pertaining to items/processes developed at private expense, including minor modifications. Restricted Rights encompasses software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged or copyrighted software, including minor modifications.

A Contractor may withhold Limited Rights data or Restricted Rights software from delivery, provided that such data/software: (a) was not first produced in the performance of the contract, (b) was developed at private expense; and (c) does not constitute form, fit, or function data or manuals or instructional materials for the installation, operation, or maintenance of items being furnished under the contract. To withhold such data/software, the Contractor will need to identify the data/software being withheld and provide form, fit, or function data instead. If it is necessary to include Limited Rights data or Restricted Rights software as part of the deliverables, Alternatives II (data) or III (software) to FAR 52.227-14 must be incorporated into the contract to

enable such data or software to be delivered with a Limited or Restricted Rights notice.

Limited Rights allow the government to reproduce and use the data, provided that the data is not, without the Contractor's permission, used for manufacturing or disclosed outside the government. The government, however, may negotiate greater rights in such data. Restricted Rights allow the government to: (1) use the software with computer(s)(and their replacements) for which it was acquired; (2) use/copy for archive/backup purposes; (3) modify, adapt, or combine the Restricted Rights software with other computer software, *provided* that the portions of the incorporated Restricted Rights software continue to be subject to Restricted Rights; and (4) disclose and reproduce the software for use by support service contractors in accordance with the above restrictions. Subject to the above, the Contractor retains all rights, title, and interest in the Limited or Restricted Rights Data.

**III. DFAR 252.227-7013 Rights in Technical Data**

This clause is used in Department of Defense (DOD) procurement contracts. The term "Technical Data" encompasses all recorded information, regardless of the form or method of the recording, of a scientific or technical nature, including software documentation, but excludes software or information incidental to contract administration. The clause creates three different categories (Unlimited, Limited, and Government Purpose) of rights and must be included in all subcontracts. The Contractor cannot, without the CO's written permission, incorporate any copyrighted Technical Data into a contract deliverable that was not first produced in the performance of the contract, unless the Contractor identifies the data and obtains all applicable rights for the government.

**Unlimited Rights**

The government receives "Unlimited Rights" (as defined in Section II) in: (a) Technical Data pertaining to an item/process developed exclusively with government funds; (b) any analyses, test data, etc., specified as an element of performance; (c) Technical Data created solely with government funds under a contract that does not require the development, manufacture, construction, or production of an item/process; (d) form, fit, and function data; (e) installation, operation, maintenance, or training data (but not detailed manufacturing or process data); (f) modifications to government furnished Technical Data; (g) publicly available Technical Data; (h) Technical Data in which the government has obtained Unlimited Rights under another contract or through negotiations; and (i) Government Purpose Rights or Limited Rights Technical Data whose restrictive condition(s) have expired.

The Contractor retains ownership, the ability to use or publish, and the right to establish copyrights in such Technical Data. Third parties will have the ability to use such data for commercial purposes.

**Limited Rights**

With very limited exceptions, the government receives Limited Rights in any Technical Data: (1) pertaining to items/processes developed exclusively at private expense, or (2) created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items/processes.

Limited Rights allow the government to use, modify, reproduce, release, perform, display, or disclose Technical Data within the government. The Contractor's express written permission is required before the government can: (1) release or disclose such data outside the government; (2) use such data for manufacturing; or (3) authorize its use by a third party. The government may allow third parties who are: (1) government support contractors or (2) performing emergency repair or overhaul services, to use such data. The government may also allow foreign governments to use Technical Data (other than detailed manufacturing data) for evaluation or informational purposes. The Contractor will receive advance notice of any such third-party releases, and the release itself will be subject to prohibitions on further reproduction, disclosure, and use. Subject to the above, the Contractor retains all rights, title, and interest in any Limited Rights Technical Data that it delivers to the government under a contract.

**Government Purpose Rights**

With limited exceptions, the government receives, for a five year period, Government Purpose Rights in Technical Data: (1) pertaining to items/processes "developed with mixed funding;" or (2) created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items/processes. Upon expiration of the five-year period, the government retains Unlimited Rights in the Technical

Data. “Developed with mixed funding” means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

Government Purpose Rights allows the government to use, modify, reproduce, release, perform, display, or disclose Technical Data within the government without restriction and to disclose such data outside the government to enable others to use, modify, reproduce, release, perform, display, or disclose such data for “Government Purposes.” “Government Purposes” encompasses any activity (including competitive procurement) in which the U.S. government is a party, excluding the right to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so. Except in very limited circumstances, the government is precluded from releasing or otherwise disclosing Government Purpose Rights Technical Data outside of the government. Subject to the above, the Contractor retains all rights, title, and interest in Government Purpose Rights Technical Data, including the exclusive right to use and license others to use such Technical Data for commercial purposes until such rights convert to Unlimited Rights.

To obtain Limited or Government Purpose Rights in Technical Data, the Contractor must identify such data in the contract as being delivered with either Limited or Government Purpose Rights. Except in limited circumstances, the Contractor cannot, subsequently, assert Limited or Government Purpose Rights in Technical Data not previously identified in the Contract. All Limited or Government Purpose Rights Technical Data must be marked with the proper Notice, **before** it is disclosed to government.

### IV. DFAR 252.227-7014 Rights in Computer Software and Software Documentation

This clause in also used in DOD procurement contracts. The term “Non-Commercial Computer Software” is defined as any software that does not meet the definition of “Commercial Computer Software.” “Commercial Computer Software” is any software developed or regularly used for nongovernmental purposes which: (a) has been offered for or actually sold, leased, or licensed to the public; (b) will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of the contract; or (c) satisfies either (a) or (b) and would require only minor modification to meet the requirements of the contract. “Computer Software Documentation” refers to owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the software or provide instructions for using the software.

The clause creates three categories (Unlimited, Restricted, and Government Purpose) of rights in such software and software documentation and must be included in all subsequent subcontracts. The Contractor cannot, without the CO’s written permission, incorporate any copyrighted software or software documentation into a contract deliverable, unless the Contractor identifies such software and documentation and obtains all applicable rights for the government.

**Unlimited Rights**

The government receives Unlimited Rights (as defined in Section II) in: (a) software developed exclusively with government funds; (b) all software documentation required to be delivered under the contract; (c) corrections or changes to software or documentation furnished by the government; (d) software or documentation that is publicly available or released or disclosed by the Contractor or a subcontractor without use or disclosure restrictions; (e) software or software documentation obtained with Unlimited Rights under another contract; or (f) software or documentation whose Restricted or Government Purpose Rights have expired.

The contractor retains full ownership of the Unlimited Rights software or software documentation as well as the ability to use, modify, reproduce, release, display, or disclose such software and documentation. Third parties will have the ability to use such software or software documentation for commercial purposes.

**Restricted Rights**

The government receives Restricted Rights in noncommercial software or software documentation required to be delivered or otherwise provided to the government under the contract that was developed exclusively at private expense. Restricted Rights enable the government to: (1) use the software with one computer at one time; (2) transfer the software to another government agency; (3) make the minimum number of copies required for backup, archive, or modification

purposes; and (4) modify the software, provided that the modified software is subject to the above restrictions. The government may allow third parties who perform: (a) services relating to the same or a related contract; (b) emergency repair or overhaul services; or (c) government service or support contracts, to use and modify the software, subject to limitations on use, disclosure, restrict decompiling, disassembling or reverse engineering.

**Government Purpose Rights**

With limited exceptions, the government receives, for a five-year period, Government Purpose Rights in software "development with mixed funding" (as previously defined). Upon expiration of the Government Purpose Rights, the government retains Unlimited Rights in the software or software documentation.

Government Purpose Rights allow the government to: (1) use, modify, reproduce, release, perform, display, or disclose software or software documentation within the government without restriction; and (2) disclose such software or documentation outside the government to allow others to use, modify, reproduce, release, perform, display, or disclose the same for "Government Purposes" (as defined in Section IV). Except in very limited circumstances, the government is precluded from releasing or otherwise disclosing such software/documentation outside of the government. Subject to the above rights, the Contractor retains all rights, title, and interest in Government Purpose Rights software/documentation, including the exclusive right to use and license others to use the same for commercial purposes, until such rights convert to Unlimited Rights.

To obtain Restricted or Government Purpose Rights in software/software documentation, the Contractor must identify such items in the contract as being delivered with either Restricted or Government Purpose Rights. Except in limited circumstances, the Contractor cannot, subsequently, assert Restricted or Government Purpose Rights in software/software documentation not previously identified in the Contract. All Restricted or Government Purpose Rights software/software documentation must be marked with the proper Notice, **before** it is disclosed to government.

## V. Summary

Part Three of the series provided a general understanding of the government's rights in data and software developed or used in the performance of government funded research. Careful consideration should be given to these clauses when negotiating the statement of work and deliverables for government funded research.

In this three-part series of articles, we have identified the basic types of agreements that you may encounter when conducting a government-funded research project and discussed some of the primary clauses pertaining to rights in patents, data, and software developed or used in the performance of research. Although arguably complex when first confronting these clauses, with practice and guidance, compliance should not be difficult. However, given the nature of these clauses and importance of intellectual property in today's market, one must always give careful consideration to these clauses when negotiating an agreement for a government-funded research project.

# Additional Finnegan Resources

America Invents Act Blog
http://www.aiablog.com

Federal Circuit IP Blog
http://www.federalcircuitipblog.com

*Full Disclosure* Patent Newsletter
http://www.finnegan.com/publications/updatenewsletters/FullDisclosureLanding.aspx

*IP Marketplace* Newsletter
http://www.finnegan.com/publications/updatenewsletters/IPMarketplaceLanding.aspx

IP Articles
http://www.finnegan.com/resources/articles

IP Podcasts
http://www.finnegan.com/podcasts

IP Updates
http://www.finnegan.com/ipupdates

IP Webinars
http://www.finnegan.com/resources/webinars

Patent App[eals] App
https://itunes.apple.com/us/app/patent-app-eals/id623855865

# About Finnegan

Finnegan is one of the largest IP law firms in the world. From offices in Atlanta, Boston, London, Palo Alto, Reston, Seoul, Shanghai, Taipei, Tokyo, and Washington, DC, the firm practices all aspects of patent, trademark, copyright, and trade secret law, including counseling, prosecution, licensing, and litigation. Finnegan also represents clients on IP issues related to European patent oppositions, international trade, portfolio management, the Internet, e-commerce, government contracts, antitrust, and unfair competition. For additional information on the firm, please visit www.finnegan.com. Follow us on LinkedIn and Twitter.

# Disclaimer

These materials have been prepared solely for educational and entertainment purposes to contribute to the understanding of U.S. and European intellectual property law. These materials reflect only the personal views of the authors and are not individualized legal advice. It is understood that each case is fact specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the authors, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP (including Finnegan Europe LLP and Fei Han Foreign Legal Affairs Law Firm) cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with these authors. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.