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A Reliable Liability Shield For Government-Sponsored R&D

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In the decision of Arlton v. AeroVironment Inc. last month, the U.S. Court of Appeals for the Federal Circuit reaffirmed the broad scope of Title 28 of the U.S. Code, Section 1498, holding that AeroVironment was immune from patent infringement liability for work performed under small business innovation research, or SBIR, and small business technology transfer, or STTR, contracts.

The court concluded that because AeroVironment had performed all allegedly infringing activities pursuant to SBIR and STTR contracts, those activities were conducted for the government and with its authorization, bringing them squarely within Section 1498's liability-shifting framework.

In this article, we break down the SBIR and STTR programs, how they fit into the broader federal procurement system, and the significance of this decision — both from a government contracts and patent law perspective.

Background

Initial Dispute

The dispute arose from patent infringement allegations tied to AeroVironment's development of Ingenuity, an unmanned aerial vehicle, or UAV, as a subcontractor to the California Institute of Technology's Jet Propulsion Laboratory for the National Aeronautics and Space Administration.

AeroVironment's work took place under SBIR and STTR contracts, programs designed to advance early stage research and development, and technology maturation for government use.

The plaintiffs claimed in their complaint filed in the U.S. District Court for the Central District of California that AeroVironment's UAV systems embodied their patented rotary-wing vehicle design, including features such as an elongated tubular backbone and a counter-rotating coaxial rotor system, and therefore infringed their patent.

AeroVironment moved for summary judgment, arguing that because its activities were performed on behalf of the federal government and with its authorization and consent, Section 1498 immunized them

from patent infringement liability. AeroVironment argued that the plaintiffs would need to seek relief against the federal government in the U.S. Court of Federal Claims.

The district court agreed, granting summary judgment and dismissing the case. In its decision, the Federal Circuit affirmed.

Small Business Innovation Research Program

The SBIR program is structured to move early-stage ideas through the technical and testing stages and into government-usable prototypes, all while preserving the contractor's commercial rights.

The SBIR program is a staged process: Agencies fund Phase I and Phase II efforts to mature technologies that address defined mission needs, whereas Phase III — commercialization or follow-on government procurement — is intentionally outside the SBIR funding framework.

From a government contracts standpoint, this means a contractor's Phase I/II work is performed squarely for the government, under tightly scoped statements of work, deliverables and reporting obligations.

There is nothing open-ended about the obligations: SBIR contracts specify the technical tasks, schedule and level of effort, and the government generally exercises continuous oversight. As a result, development work performed under an SBIR award has a nexus to government direction.

Small Business Technology Transfer Program

The STTR program operates in a similar vein, but with a required research partnership between the small business and a nonprofit research institution. Notably, from a government contracts perspective that collaboration does not dilute the government-directed nature of the work. STTR awards still involve detailed statements of work, government-defined research objectives and agency oversight.

In the STTR context, the mandatory research partnership aims to harness the federally funded research already occurring at laboratories and inject those advances into deployable prototypes that meet government mission requirements.

This unique STTR structure translates to the government acting not only as a finder, but also a guiding participant with an up-close view of any advances so as to be able to shape technical priorities and deliverable expectations.

As with SBIR, STTR awards typically involve no guaranteed production or follow-on procurement. Again, however, the absence of a downstream commitment has no effect on a recipient's ongoing obligation to the government: Contractors and research institutions are performing defined tasks at the government's request, making the government purpose of the work central and unmistakable.

Section 1498 Immunity Defense

Section 1498 provides that where "an invention ... is used or manufactured by or for the United States," the patent owner's "remedy shall be by action against the United States in the United States Court of Federal Claims" for "reasonable and entire compensation."

The statute also makes explicit that a contractor's work counts as being for the U.S. where it is performed "for the government and with the authorization or consent of the government." It is a rare statute that can be invoked both as a defense, by a defendant in district court, or as a cause of action, by a plaintiff in the Court of Federal Claims.

Section 1498 is grounded in principles of eminent domain, and effectively treats patent infringement in this context as a taking by the U.S., funneling any remedy exclusively to the Court of Federal Claims and shielding the contractor from direct liability.

For patentholders, this means that the proper defendant when challenging alleged infringement of government-driven work, as defined by the statute, is the government itself. For contractors, it means that when executing a government-directed R&D effort — particularly where the government defines the technical objectives and sponsors the work — Section 1498 provides a defense against assertions of patent infringement.

The availability of the Section 1498 defense does not immunize conduct relating to commercial products sold outside the government-directed scope. But when the alleged infringement arises from work the government asked the contractor to perform, the statute applies with full force, shifting risk away from the contractor and reinforcing the stability of R&D-driven procurement.

The Federal Circuit's Decision

The defendant in this case invoked Section 1498 — pointing to the fact that it had developed its allegedly infringing UAV solution as a subcontractor to the federal Jet Propulsion Laboratory — and argued that the government, not AeroVironment, was the proper defendant. The Federal Circuit agreed.

In reaching its decision, the Federal Circuit first rejected the plaintiffs' contention that the SBIR/STTR regime foreclosed the Section 1498 defense. A prior company associated with the plaintiffs, Lite Machines, had received multiple SBIR and STTR Phase I and II awards for R&D relating to similar technology, and the plaintiffs argued that the government could not validly authorize or consent to AeroVironment's patent infringement because doing so would conflict with its obligation to award any SBIR Phase III contract to Lite Machines.

The court held that the relevant SBIR-related statute, Title 15 of the U.S. Code, Section 638, does not conflict with Section 1498 or otherwise limit the government's discretion to authorize or consent to the use of third-party inventions.

On the substance, the court looked to the contracting record and the undisputed facts surrounding the program under which AeroVironment developed the UAV at issue, which demonstrated that the work was performed for the government and "with the authorization or consent of the government."

Specifically, the court pointed to the NASA — JPL prime contract between Jet Propulsion Laboratory and NASA, and AeroVironment's Jet Propulsion Laboratory subcontracts, which expressly provided that the government "authorizes and consents to all use and manufacture" of any patented invention "in the performance of" the prime contract or any lower-tier subcontract.

The court also credited record evidence tying the allegedly infringing development and testing to government needs, including declarations and testimony that Terry, the terrestrial Ingenuity counterpart the plaintiffs averred constituted further infringement, was built at Jet Propulsion

Laboratory's prompting and used for purposes of the government and Jet Propulsion Laboratory, as well as the government's stated position in the appeal expressly confirming authorization and consent.

Accordingly, the Federal Circuit concluded Section 1498 mandated that any remedy be sought against the U.S. in the Court of Federal Claims — not against AeroVironment. In doing so, the Federal Circuit reinforced long-standing precedent that Section 1498 offers broad protection for contractors engaged in government-authorized R&D. The decision also suggests several other important takeaways both from government contract and patent law perspectives.

Key Takeaways

Section 1498 remains an effective liability shield available to federal contractors.

The decision reinforces that Section 1498 is not merely procedural, but operates as a true liability-shifting statute: Where alleged infringement occurs in the course of work performed "by or for the United States," the contractor is not the proper defendant.

For patent purposes, that means the case cannot proceed in district court against the contractor, and the patentee's sole remedy becomes a compensation action against the U.S. in the Court of Federal Claims — injunctive relief against the contractor is off the table.

For contractors, particularly those doing early-stage engineering in technology-dense domains like SBIR/STTR, Section 1498 remains a viable safeguard against the risk that routine development work triggers exposure to private patent litigation.

Early-stage R&D and prototype work are squarely covered.

The ruling confirms that Section 1498 applies well beyond production contracts: The statute also reaches prototype design, feasibility testing, technology maturation and other early-phase activities when those efforts are undertaken at the government's direction.

From a patent standpoint, this is a meaningful affirmation that R&D-stage work still is "for the Government." The Federal Circuit has said as much.

If the reason the prototype exists is to satisfy a government-driven objective — even if it also generates publicity or later commercial interest — Section 1498 still will apply.

The decision thus gives contractors greater confidence that exploratory engineering work will not expose them to private infringement suits so long as the work stays within the scope of government-directed performance.

Documenting "authorization or consent" is important.

While authorization or consent is often expressly stated in a prime contract or flow-down subcontract, it can also be demonstrated through how the work is structured and performed.

Contractors should ensure that statements of work map directly to government-stated mission needs, program officials understand the technology the contractor intends to use, and any government-requested changes, testing or design decisions are well documented.

The following are examples of authorization or consent clauses contractors should look for, or suggest equivalent language:

- Basic authorization and consent (Federal Acquisition Regulation 52.227-1): Government authorizes/consents to all use or manufacture of patented inventions embodied in delivered items or required by contract compliance.

- Broad authorization (Federal Acquisition Regulation 52.227-1, Alternate I): Government authorizes/consents to all use and manufacture of any patented invention used in performing the contract or any subcontract.

- Communications/services authorization (Federal Acquisition Regulation 52.227-1, Alternate II): Government authorizes/consents to use/manufacture of patented inventions for communication services/facilities, including delivered articles and required methods/tools.

This is not only good contracting hygiene — it can create the factual record to secure Section 1498 protection should a patent claim arise. Having the requisite authorization-and-consent documentation in place may determine whether a Section 1498 defense can be resolved at summary judgment as it was here.

Patent owners face a high procedural barrier to suing contractors directly.

The decision serves as a reminder that Section 1498 can radically alter a patent litigation action. Where the statute applies, the patent owner cannot sue the contractor in district court and cannot seek injunctive relief; instead, the patentee must bring a monetary-only claim against the U.S. in the Court of Federal Claims. That shift dramatically affects leverage, remedies and litigation posture.

The decision also illustrates that efforts to characterize contractor activity as commercial — whether through demonstrations, publicity appearances or investor outreach — will not necessarily defeat a Section 1498 defense if the core activities were still undertaken as part of government-directed effort.

For patentees, this raises the bar for keeping a contractor in the case; for contractors, it provides a strong early-exit path when the relevant work is tied to government authorization.

Separate commercial and government-directed work.

Section 1498 may be broad, but it still applies only to work performed for the government. Contractors should keep a clear line between commercial development and government-contract performance — using separate prototypes, distinct workstreams and dedicated documentation wherever possible.

This reduces the risk that a contractor inadvertently pulls commercial product development into the Section 1498 analysis or, worse, loses the protection due to activities no longer appearing tied to government direction. Clean operational boundaries are a practical safeguard to ensure Section 1498 remains available when needed.

SBIR/STTR participants should take note.

For entities that are or wish to be active in the SBIR and STTR programs, the decision is a timely

reminder that government-funded R&D comes with structural legal protections.

Because these programs inherently involve government-directed research tasks, participants often fall within the protective sphere of Section 1498 in the event that patent allegations arise. This protection reduces the risk that an early-stage technical demonstration or prototype test becomes the basis for a private infringement action against the company.

Practically, contractors performing pursuant to the SBIR and STTR programs should view Section 1498 as part of their overall IP-risk strategy and treat authorization-and-consent documentation as routine contract management, not an afterthought.

Looking Ahead

The Federal Circuit's decision in Arlton v. AeroVironment reinforces Congress' intent behind Section 1498: to ensure that contractors performing government-directed work are shielded from patent infringement liability.

For government contractors — particularly those engaged in SBIR, STTR and other development stage programs — the ruling provides renewed assurance that Section 1498 can be a powerful, predictable and dependable defense.

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