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NEWSLETTER

Immunities and Defenses for Government Contractors, Part 2: Patent and Copyright Infringement Claims

June 2026

The tort doctrines surveyed in Part 1 of this series protect contractors from liability for only government-directed conduct. Title 28, Section 1498 of the United States Code goes further by shielding contractors performing government work from patent and copyright infringement suits in district court entirely. Under this statutory scheme, the rights holder's exclusive remedy for infringement committed by a government contractor or subcontractor acting for the government is suing the *government* in the U.S. Court of Federal Claims. The framework is simpler than *Yearsley* or *Boyle*, and the payoff is immediate: outright dismissal in district court.

Section 1498(a): Statutory Immunity for Patent Infringement

The statute's origins trace to a problem that predates many of these other doctrines by decades. In *Schillinger v. United States*, the Supreme Court held that patent infringement was a tort for which the government had not waived sovereign immunity, leaving patent holders without a remedy when the government used their inventions. Congress responded by enacting the precursor to § 1498, giving patent holders a damages action against the government in what is now the Court of Federal Claims (COFC). But the statute's contractor coverage was additionally uncertain. In 1918, the Supreme Court held in *William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co.* that the early statute did not shield defense contractors even when they were building warships to the Navy's "comprehensively detailed" specifications. Spurred in part by the exigencies of World War I production, Congress amended the statute within months to extend its protection explicitly to government

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Practice Areas

Copyright
Data Rights and Other Contractor IP Issues
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Intellectual Property
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contractors.

As it stands today, § 1498(a) provides that when a patented invention "is used or manufactured by or for the United States without license of the owner," the patent holder's remedy lies exclusively against the government in the Court of Federal Claims. A contractor, subcontractor, or other person acting "for the Government and with the authorization or consent of the Government" is shielded from direct infringement liability in district court. The practical effect is a forced channeling of such claims. The patent holder can still recover, but only from the Government, not from the contractor that performed the work. In practice, the government effectuates authorization and consent through FAR clause 52.227-1, which contractors should confirm is present in their contracts before performance begins. To prevail on a § 1498 defense, the contractor must show that the patented invention was used or manufactured (1) for the Government and (2) with the authorization or consent of the Government. The statute is intended not only to shield contractors from liability, but also to "relieve private Government contractors from expensive litigation with patentees," thus protecting the government's interest in ensuring that contractors will not avoid doing business with the federal government out of a concern that they will be exposed to expensive litigation. *Astornet Techs. Inc. v. BAE Sys., Inc.*, 802 F.3d 1271, 1277 (Fed. Cir. 2015).

The Federal Circuit has consistently read the § 1498 immunity broadly. In *Zoltek Corp. v. United States*, the court reaffirmed that when the government is subject to suit under § 1498 for a contractor's alleged infringement, the contractor is by law rendered immune from individual liability. The court expressly noted the policy rationale of avoiding interruption to the government's procurement of important military materiel through infringement actions against the contractors building it. More recently, in *Astornet Technologies Inc. v. BAE Systems, Inc.,* the Federal Circuit extended that immunity to indirect infringement. Astornet argued that its contractor defendants should be held liable for inducing the government to use a patented airport-security system, even though the contractors themselves were not directly using the patent. The court rejected that theory, holding that § 1498(a) prevents contractors from being held liable for inducing or contributing to the government's infringement as well as direct infringement. The word "entire" in the statute, the court noted, signals that the Court of Federal Claims remedy is intended to be exclusive.

The Federal Circuit's recent nonprecedential decision in *Arlton v. AeroVironment* illustrates how broadly the defense can reach in practice. Paul and David Arlton were the inventors and co-owners of a patent on a rotary-wing UAV, which they licensed to their company, Lite Machines Corporation. Lite Machines then received SBIR and STTR contracts from the Navy, Air Force, and Special Operations Command to develop the underlying technology. When the Air Force informed the Arltons that Lite Machines would receive no further follow-on work, they shut the company down. Meanwhile, AeroVironment had been subcontracted under a NASA contract to build the Ingenuity Mars helicopter. The Arltons, as owners of the patent, then sued AeroVironment in district court for patent infringement. The court had little difficulty applying the § 1498 standard to those facts. AeroVironment was a government subcontractor specifically contracted to build Ingenuity, and the government had expressly authorized and consented to all use and manufacture of any patented invention in the performance of the contract or any subcontract at any tier.

Unlike *Yearsley* and *Boyle*, § 1498 immunity has a relatively clear trigger. The contractor must have (1) been acting for the government and (2) with its authorization or consent. Courts have generally read both requirements broadly, but the contractor must establish them nonetheless. A contractor that uses a patented method or design that is not required by the government contract and is not otherwise authorized by the government will not qualify. The Federal Circuit's decision in *Sevenson Environmental Services v. Shaw Environmental* illustrates the point. There, the court held that § 1498 protects a contractor whose use of the patented invention was necessary to meet contract specifications, not one that chose to use it independently.

Section 1498(b): Statutory Immunity for Copyright Infringement

Section 1498's forced-channeling framework extends beyond patents to copyright. Under § 1498(b), whenever a copyrighted work is infringed by the United States, by a government-owned or -controlled corporation, or by a contractor acting for the government and with its authorization and consent, the copyright owner's exclusive remedy is an action against the United States in the Court of Federal Claims following the same logic as § 1498(a). The contractor is shielded from direct infringement liability in district court, and the copyright holder is left to seek damages from the government.

The copyright analog tracks § 1498(a) in large part, but carries a few important wrinkles. Unlike the patent provision, § 1498(b) expressly excludes from its coverage works prepared by government employees as part of their official functions or with government time, materials, or facilities because no copyright subsists in such works. This carveout has, at times, generated litigation in cases where a contractor's work product was developed in close collaboration with government personnel. For instance, in *Geospatial Technology Associates, LLC v. United States*, the court took up a case in which a contractor alleged that several agencies had infringed the copyright in its geospatial software. The government argued the claim was jurisdictionally barred in part because the work had been developed with government resources. The court denied dismissal, finding that a genuine factual dispute about the extent of government involvement in preparing the copyrighted work had to be resolved at trial. Indeed, this theme of the murky line between contractor-owned work product and government-produced material looms large in many § 1498(b) cases.

For contractors, particularly those with government IT contracts, software development agreements, and data services work that involves the creation or use of copyrighted material, disputes may arise over who owns or can use the material. A contractor that uses a third party's copyrighted software in performance of a government contract, or that incorporates licensed material into a deliverable at the government's direction, has a credible argument under § 1498(b) that any infringement claim belongs in the Court of Federal Claims, not the district court. Unlike the patent context, there is no FAR clause providing an express contractual basis for the government's authorization and consent to copyright infringement. Authorization and consent under 1498(b) instead typically arises implicitly from the contracting officer's direction.

From a litigation strategy standpoint, § 1498 is in some respects the most contractor-friendly of the defenses surveyed here. Unlike *Yearsley* after *GEO Group*, a § 1498 dismissal terminates the district court action entirely rather than merely postponing appellate review. Unlike *Boyle*, it does not require the contractor to satisfy a merits showing. And unlike qualified immunity, its availability for government contractors is settled law rather

than an open question. The tradeoff is in scope. § 1498 applies only to patent infringement and copyright, and an increasing number of government contracts involve significant intellectual property components – making the statute an increasingly relevant planning consideration for contractors in those spaces.

Conclusion

Section 1498 offers government contractors a more predictable off-ramp than the protections described in Part 1 of this series. Where it applies, it applies cleanly. The district court action ends and the claimant's potential remedy comes exclusively from the government. The growing prevalence of intellectual property concerns in federal contracting means that more contractors will need to understand how to appropriately leverage these protections when performing work for the federal government.