Message from Charles “Pete” Polen, LaRC Chief Counsel

As we approach fall 2019, I am happy to share our first OCC Newsletter since last September. Much change has occurred, which has contributed to the departure from our regular cadence of three newsletters a year. Last November, Dacia Bruns transferred from our Business Law Team (BLT) to become counsel to the Commercial Crew Program at KSC. Andrea Warmbier moved from being a full-time patent attorney on our Intellectual Property Law Team (IPLT) to Deputy Chief Counsel in January 2019. The furlough hit us in December and January, and then we had to recover. In March of this year, Hannah Kohler transferred from our Human Resources and Ethics Law Team (HRELT) to join Goddard OCC. Pam Boerner and her husband Matt welcomed their son, Grant, in April. OGC kicked off as a MAP Project in June, and several members of our office serve on the OGC MAP Project Team. In the midst of all this, Ken Goetzke received well-deserved recognition as the recipient of the NASA Legal Team’s 2019 Meritorious Service Award, one of the NASA Legal Team’s highest awards.

These changes, challenges, and celebrations, which reflect the ebb and flow of work and life, reduced our staff for a significant period. Everyone worked hard to support each other and press forward to deliver effective and timely legal advice and counsel along the way. Now, we can take a bit of a breath. On August 19th, OCC welcomed Rob Ayers as our newest attorney on the HRELT and Bruce Harper as our newest patent attorney on our IPLT. On the next page, we have included a bio for Rob and Bruce. Both bring a wealth of experience to our office. Tory Kauffman from NASA OGC also graciously agreed to serve a part-time detail in place to support our BLT. Thank you, Tory. It is a true pleasure to lead this office and serve you, this Center, NASA, and our great country. Happy reading.
Rob Ayers joined the LaRC Office of Chief Counsel and will be serving as an attorney on our Human Resources and Ethics Team. Rob retired from the U.S. Army with 19 years of experience as an attorney/judge advocate. Before joining NASA, Rob served as an Ethics Counselor for 13 years, and his job responsibilities included the management of three ethics programs; providing hundreds of ethics opinions on gifts, fundraising, and the use of government resources; and providing ethics training to hundreds of soldiers and numerous one-on-one briefs with senior Army leaders. Rob also has significant experience in the labor and employment law area and litigation experience, including service as defense counsel, Government counsel, and military magistrate. He has represented an individual or the Government in approximately 25 administrative hearings and in roughly 50 criminal proceedings. He has also many years of indirect litigation support experience, such as creating opinions on potential litigation risks for the U.S. Army, assisting in discovery requests for the U.S. Army’s Litigation Branch, and monitoring medical claims brought on behalf of military dependents. Please join us in welcoming Rob to the NASA family!

Bruce Harper is our newest patent attorney on the Intellectual Property Law Team. Bruce has over thirty years of work experience and started his career as a nuclear qualified Navy surface warfare officer. After his active duty service, Bruce became a reserve member of the Navy and entered into the legal field. He practiced as an attorney for over twenty years in both the private and public sectors. He started his legal practice by serving as the Intellectual Property Manager responsible for creation of the Office of Technology Transfer for Old Dominion University/Old Dominion University Research Foundation. In that role, he handled many technology transfer issues, including the negotiation of a complex transaction under a NASA Space Act Agreement by which the University took custody of and operated the NASA LaRC Full Scale Wind Tunnel. After five years of working with the University, Bruce joined Williams Mullen, a mid-sized corporate law firm in the mid-Atlantic region, where he advised clients on a wide range of intellectual property and technology related matters, including technology transactions, patent prosecution, cyberlaw issues, intellectual property and technology in mergers and acquisition, licensing and development of computer software, including computer software and technical data under government contracts, and research & development grants and contracts. He is a permanent member of the Fourth Circuit Judicial Conference. Bruce was also named among Virginia Business magazine’s “Legal Elite” (2008, 2010) and as The Best Lawyers in America for Litigation - Intellectual Property (2018-present). Welcome Bruce!
Last week I hired a neighborhood kid to mow my lawn. As agreed, he showed up on Saturday morning, rang my doorbell, and said he was ready to mow. “Great” I said. “Go ahead and get started.” “Fine,” he said. “Where’s the mower, and where’s your gas can?”

That’s when it hit me this kid has a bright future ahead as a contractor to the federal government. Government Contractors often attempt to use government property, rather than their own, to accomplish services under a federal contract. This article notes some of the rules and considerations regarding contractors’ use of what we commonly call GFE (Government Furnished Equipment) or GFP (Government Furnished Property).

Part 45 of the Federal Acquisition Regulations (FAR) and Part 1845 of the NASA FAR Supplement (NFS) cover contractual considerations for GFE and GFP. Issues such as responsibilities and liability, accountability, authorizations, disposal, maintenance, and property management systems are all covered with ready-made clauses. But, like my situation with the young lawn mowing entrepreneur, if it isn’t in the contract then you’re SOL (Shearing your Own Lawn). Don’t make assumptions; work with OP, OCC, and the LaRC Installation Property Officer to make sure both parties—NASA and your contractor—clearly understand each other’s expectations and obligations regarding the use of government equipment. Then apply the correct property clauses based on the contract type, factual situation, and the product or services ordered.

GFP can come in many forms. FAR Part 45.101 defines GFP as:

“Property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract. Government furnished property includes, but is not limited to, spares and property furnished for repairs, maintenance, overhaul, or modification. Government furnished property also includes contractor acquired property if the contractor acquired property is a deliverable under a cost contract when accepted by the Government for continued use under the contract.”

The Government’s official GFP policy is stated in FAR section 45.102 “Policy”:

- Contractors are ordinarily required to furnish all property necessary to perform Government contracts.
- Contracting officers shall provide property to contractors only when it is clearly demonstrated:
  - To be in the Government’s best interest;
  - That the overall benefit to the acquisition significantly outweighs the increased cost of administration, including ultimate property disposal;
  - That providing the property does not substantially increase the Government’s assumption of risk; and
  - Government requirements cannot otherwise be met.

The contractor’s inability or unwillingness to supply its own resources is not sufficient reason for the furnishing or acquisition of property. The Government Contracting Officer is ultimately responsible for determining whether Government Property should be provided to a Contractor. The Contracting Officer will work with the Project Manager to make the determination. OCC is available to help. When providing Government Property to a Contractor, NASA must make sure that a Contractor is not given an unfair competitive advantage over another Contractor who may not have Government Property. Typically, when considering the use of GFE, a model is developed for analyzing both Contractor Furnished Equipment (CFE) and GFE. Decisions to provide GFE must be identified and a comparison made of the cost difference between using GFE or CFE. Reasons for this decision can be related to standardization, economy, production, or other circumstances.

Feel free to contact OCC if you have questions regarding GFE.
Rights in Government Employee Inventions

Per NPD 2091.1C Inventions Made by Government Employees, each NASA civil servant who makes an invention is required to submit a disclosure of such invention, regardless of whether the invention was made on or off-duty. Such disclosure should be made through the NASA e-NTR system available at http://invention.nasa.gov/.

The respective rights of the Government and federal employees in employee inventions are governed by Executive Order 10096, as amended by Executive Orders 10695 and 10930. These executive orders set forth the policy contained in 37 CFR § 501 Uniform Patent Policy for Rights in Inventions Made by Government Employees which, under most circumstances where there is any nexus between the employee’s federal employment and the invention, results in the Government having title to the invention. The regulation (37 CFR § 501.6(a)(1)) states:

The Government shall obtain...the entire domestic right, title and interest in and to any invention made by any Government employee:
♦ During working hours, or
♦ With a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other Government employees on official duty, or
♦ With bears a direct relation to or is made in consequence of the official duties of the inventor.

The regulation (37 CFR §501.6(a)(3)) additionally states that it shall be presumed that an invention falls under the above conditions if the invention was made by an employee who is employed or assigned:
♦ To invent or improve or perfect any art or process, machine, design, manufacture, or composition of matter,
♦ To conduct or perform research, development work, or both,
♦ To supervise, direct, coordinate, or review Government financed or conducted research, development work, or both, or
♦ To act in a liaison capacity among governmental or non-governmental agencies or individuals engaged in such research or development work.

The regulation (37 CFR § 501.6(a)(2)) further states that the Government must leave title with the federal employee in the following two situations:
♦ The contribution of the Government...is insufficient equitably to justify a requirement of assignment of the entire right, title and interest, or
♦ The Government has insufficient interest in an invention to obtain the entire right, title, and interest, subject, however, to the reservation to the Government of a nonexclusive, irrevocable, royalty-free license in the invention with power to grant licenses for all governmental purposes.

The above does not preclude a determination that the facts and circumstances justify leaving the entire right, title and interest in and to the invention in the employee.

Rights Determinations

When an employee of NASA submits an invention disclosure, the employee will be requested to complete NASA Form 434 titled “Patent Rights Questionnaire.” The sections of the form completed by the employee depend on whether the employee (1) agrees to assign to the Government, (2) agrees to license to the Government or 3) does not agree to grant any rights to the Government. Except when the inventor assigns all rights to the Government, the LaRC Patent Counsel will prepare a “Determination of Rights” in the invention, which sets forth the employee’s and the Government’s rights, as well as the basis for the determination. This determination is made in accordance with 37 CFR § 501.

The employee’s and supervisor’s responses on the Form 434, the employee’s position description, and an assessment of the Government’s interest in the invention are used in making the determination.
Grady J. Koch and Bruce W. Barnes, NASA LaRC. U.S. Patent Number 10,067,235 issued September 4, 2018 for “Wind Event Warning System”


Henry H. Haskin and Peter Vasquez, NASA LaRC. U.S. Patent Number 10,072,840 issued September 11, 2018 for “Flame Holder System”


Kelly Ann Burke and David J. Wing, NASA LaRC; Joseph G. Ponthieux, Mymic, LLC; Sharon Woods and Stephen DePascale, Engility Corporation. U.S. Patent Number 10,102,756 issued October 16, 2019 for “Method and Apparatus for Providing In-Flight Pilot Interface for Trajectory Optimization”


Tian-Bing Xu and Jin Ho Kang; National Institute of Aerospace Associates; Emilie J. Siochi and Glen C. King, NASA LaRC. U.S. Patent Number 10,147,863 issued December 4, 2018 for “Pyroelectric Sandwich Thermal Energy Harvesters”


Lisa S. Carnell, Emilie J. Siochi and Nancy M. Holloway, NASA LaRC; Kam Leong and Karina Kulangara, Duke University. U.S. Patent Number 10,196,603 issued February 5, 2019 for “Aligned and Electrospun Piezoelectric Polymer Fiber Assembly and Scaffold”


Frank L. Palmieri, John W. Connell and Christopher J. Wohl, Jr., NASA LaRC. U.S. Patent Number 10,369,767 issued August 6, 2019 for “Aerodynamically Actuated Thrust Vectoring Devices”

Paul M. Rothhaar, William J. Fredericks and David D. North, NASA LaRC. U.S. Patent Number 10,370,100 issued August 6, 2019 for “Coatings with Molecular Flexibility for Ice Adhesion Mitigation”


Anthony M. Calomino and Mary E. Wusk, NASA LaRC. U.S. Patent Number 10,381,125 issued August 27, 2019 for “System and Method for Onboard Wake and Clear Air Turbulence Avoidance”

1. Area of law that encompasses patents, trademark, copyrights, trade dress and trade secret
2. Congress passed this Act to curb the fiscal abuses that frequently created “coercive deficiencies” that re-
   quired supplemental appropriations.
3. Time period for the Federal Government beginning on 1 October and ending on 30 September.
4. Head of the United States Government Accountability Office, which is an investigative arm of Congress
   charged with examining all matters relating to the receipt and disbursement of public funds
5. Space Policy Directive 1 amended the National Space Policy of the USA to direct NASA to begin a U.S.-led,
   integrated program with private sector partners for a human return to this location.
6. This Act is a United States federal law whose main provision prohibits employees in the executive branch of
   the federal government, except the president, vice president, and certain designated high-
   level officials, from
   engaging in some forms of political activity.
7. If a party interested in a Government contract believes that an Agency has violated procurement law or reg-
   ulation in a solicitation for goods or services, or in the award of a contract, it may file this with the U.S.
   Government Accountability Office.
8. Under 18 U.S.C. § 371, this felony is committed when two or more persons work together to commit an of-
   fense against the United States or any agency of the United States, and one or more of the persons commits
   an act to effect the object of the offense.
9. A legal right to use another’s land for a specific limited purpose.
This summer, we held our annual OCC Summer Picnic (AKA Lunch Luau) on the center! We were also joined by one of our own recently-retired employees, Shawn Gallagher, and his wife, Mary Pat.

Ken Goetzke received the NASA Legal Team’s 2019 Meritorious Service Award

Pete Polen receiving the Silver Achievement Award in May 2019 for his contributions during the Government shutdown

OCC touring the Measurement Systems Laboratory Building
Our thanks and appreciation to Autumn Tyler, an intern in our Office this summer. Autumn will graduate with her JD from the University of Cincinnati's law school in May 2020. During her time here, she researched the copyrightability of joint works between a government employee and a non-government individual, anti-assignment provisions in license agreements, settlement options, fiscal law and electronic signatures. She also assisted in litigation (sitting in on EEO settlement conference), drafted discovery responses, and worked labor law issues with Langley’s revised collective bargaining agreement.

Autumn was a welcome addition to our office this summer. Her willingness to participate and her ability to quickly assimilate the facts of an issue were impressive. We wish Autumn the best in future endeavors!

Legal Humor

Grayson’s Maxim on Modernity: Progress is the measure of man’s ability to create complexity out of simplicity.

Law of Observation: Nothing looks as good close up as it does from far away.

OR – Nothing looks as good from far away as it does up close.

Lowell’s Law: You always will find the easiest, fastest, most economical way to do any project just as you are finishing it.

Phillips’ Investment Rule: Every time you have a 50-50 chance of being right, but you’re wrong 90 percent of the time.

Whitmore’s Rule for Public Speakers: If you haven’t struck oil in 20 minutes, quit boring.

More Courtroom Humor:

Attorney: Doctor, isn’t it true that when a person dies in his sleep, he doesn’t know about it until the next morning?

Witness: Did you actually pass the bar exam??