

No. 2021-1552

In The
United States Court of Appeals
for the Federal Circuit

**AARON G. FILLER, as an individual and on behalf of Neurografix-Sole
Proprietorship,
NEUROGRAFIX, NEUROGRAPHY INSTITUTE MEDICAL ASSOCIATES, INC.,
IMAGE-BASED SURGICENTER CORPORATION,**
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee,

Appeal from the
UNITED STATES COURT OF FEDERAL CLAIMS
Judge Ryan T. Holte
1:19-cv-00173C-RTH
Complaint for 28 USC §1498 Taking
As to U.S. Patent No. 5,560,360

**COMBINED PETITION FOR PANEL REHEARING
AND
PETITION FOR REHEARING EN BANC OF APPEAL**

Dated: March 6, 2022

/s/ Aaron G. Filler
Aaron G. Filler, Esq.

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on behalf of
(NeuroGrafix Sole-Proprietorship)
& for additional
Appellants: NeuroGrafix;
Neurography Institute Medical
Associates, Inc. & Image Based
Surgicenter Corporation

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 21-1552

Short Case Caption Filler v. US

Filing Party/Entity Aaron G. Filler as an individual and on behalf of NeuroGrafix SP, NeuroGrafix, Neurography Institute Medical Associates, Inc, and Image-Based Surgicenter Corporation.

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. <input type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. <input checked="" type="checkbox"/> None/Not Applicable
Aaron G. Filler as an individual and on behalf of NeuroGrafix Sole Proprietorship	Aaron G. Filler	
NeuroGrafix	None/Not Applicable	
Neurography Institute Medical Associates, Inc	None/Not Applicable	
Image-Based Surgicenter Corporation	None/Not Applicable	

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☒ None/Not Applicable

☐ Additional pages attached

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable

☐ Additional pages attached

*NeuroGrafix v. Brainlab ND-IL 1:12-cv-06075 (Voluntary Dismissal of Counterclaim for Invalidity ND-IL Dkt. 447, 11/1/2020)	Filler v CIR 9th Cir. 21-71080	
*(Voluntary Dismissal of Action Upon Settlement 4/27/2021)		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable

☐ Additional pages attached

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I certify the above information in this Certificate of Interest is accurate and complete to the best of my knowledge.

Date: 3/6/2022

Signature: /s/ Aaron G. Filler

Name: Aaron G. Filler, MD, PhD, JD

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I. STATEMENTS OF APPLICABILITY OF PETITIONS

1. Rule 35(b) Statement of Counsel as to Petition for Rehearing En Banc

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

1) The Assignment of Claims Act 31 USC §3727 (hereinafter “ACA”) should not be applied against patent claims where the assignment at issue is among closely related parties who continue, after said assignment, to possess a shared claim (here a 35/65 percentage split of any litigation proceeds).

This new precedent affecting the Vth Amendment Just Compensation Clause accessed through the procedures of the Tucker Act, 28 USC §1498(a), for United States taking of intellectual property is warranted to clarify situations of applicability of the Assignment of Claims Act.

2) When a patent assignment divides a right to sue and a right to exclude – it is the party who has the right to exclude that suffers the injury – so it is the party with the right to exclude (here NeuroGrafix) and not the party with the right to sue (here Washington Research Foundation) who should be considered the original claimant for the purposes of the

Assignment of Claims Act (31 USC §3727). This precedent on standing and jurisdiction should be establishing to provide litigants a more clear understanding of how to prepare for such litigations.

3) The Panel's ruling conflicts with *J.D. v. Azar* 925 F.3d 1291 (DC Cir. 2019) causing an unwarranted circuit split because it withholds subject matter jurisdiction when at least one party has both the injury and standing.

2. Statement of Counsel as to Petition for Rehearing or Rehearing

En Banc AFTER RULE 36 DISPOSITION Because the

Ruling Below Was Clearly Erroneous and an Error of Law

The Ruling Below is Clearly Erroneous: The Panel was misled by an Incorrect Statement by counsel for Appellee United States at Oral Argument and thereby missed the clear error of the court below. Judge Pauline Newman identified that the case stood upon the Assignment of Claims Act (oral argument at 16:40) and warned that this Act is not generally applied if the potential plaintiffs were related. Defense counsel then wrongly informed the court at 17:42 that WRF and NeuroGrafix are unrelated even though WRF and NeuroGrafix shared a divided right to the proceeds (35%/65% split) and WRF was a shareholder in NeuroGrafix. Counsel for Appellant had already pointed out that NeuroGrafix SP was an alter ego of NeuroGrafix.

The Ruling Below Was Additionally an Error of Law because it accepted that the Federal Claim rests with alleged holder of the right to sue, while in fact the great weight of law shows that the Federal Claim should rest with the party have the right to exclude – because that is the party that suffers the injury resulting in standing.

For these reasons the Panel erred and a Panel Rehearing or En Banc Rehearing in this matter is warranted, necessary and appropriate despite the Rule 36 disposition.

3. Rule 40(a)(5) Points of Law Overlooked or Misapprehended by the Court

Based on my professional judgment, I believe that three separate situations exist each of which warrant rehearing:

1) A material factual or legal matter was overlooked in the decision:

- The additional party (WRF – Washington Research Foundation) maintained a 35/65 split interest in the claim at the time of filing so that despite the assignment the WRF should have been considered a related party blocking application of the Assignment of Claims Act.

2) The decision is in conflict with a decision of another Court of Appeal and the conflict is not addressed:

The D.C. Circuit in *J.D. v. Azar* 925 F.3d 1291, 1323 (DC Cir. 2019), citing to *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*

547 U.S. 47, 53, n2 (US 2006) found that plaintiffs seeking a single remedy satisfy Article III case-or-controversy requirement if one plaintiff can establish injury and standing, when considered with the finding in *MDS Associates Ltd v. US* 31 Fed.Cl. 389,394 (Fed.Cl. 1994) that conveyances between related parties should not be proscribed by Assignment of Claims Act.

3) The proceeding involves one or more questions of exceptional importance:

If a necessary party is obligated by contract to join a litigation, then the court should assert mandatory joinder under Rule 19 rather than dismiss the matter – whether to establish subject matter jurisdiction or to repair standing.

Dated: March 6, 2022 /s/ Aaron G. Filler
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Court of Appeals for the Federal Circuit
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Counsel for Appellants

II. ARGUMENT

1. Introduction

The Assignment of Claims Act 31 USC §3727 (hereinafter “ACA”) should not be applied against closely related parties with a shared claim

under the Vth Amendment Just Compensation Clause accessed through the procedures of the Tucker Act, 28 USC §1498(a), for taking of intellectual property.

Plaintiff-Appellant Aaron G. Filler, as an individual and on behalf of NeuroGrafix Sole Proprietorship, NeuroGrafix, Neurography Institute Medical Associates, Inc. and Image-Based Surgicenter Corporation respectfully Petitions the Court to Grant this Petition for Panel Rehearing or in the alternative to Grant this Petition for En Banc Rehearing of Appeal. The ruling at issue is a Rule 36 affirmation of the grant of an FRCP 12(b)(1) dismissal for lack of subject matter jurisdiction in a Court of Federal Claims 28 USC §1498(a) patent takings case. The matter is in relation to US 5,560,360 on grounds arising from a dispute in relation to the interpretation and application of the Assignment of Claims Act 31 USC §3727.

2. Rule 36 Should Not Be Applied to Allow Implied Establishment of Unintended Precedent

Here the gross error of the Court of Federal Claims is compounded by the failure of the Court of the Appeals for the Federal Circuit to confront the gamesmanship of the United States in its shameful theft of valuable intellectual property to which it has no right. Rehearing is sought because of the harmful precedent that this failure establishes and the inappropriateness of a Rule 36 avoidance of comment on this critical precedential issue.

The Federal Claim should rest with the party holding the right to exclude when the right to exclude and the right to sue are separated in a patent license. When separated, mandatory joinder should be applied if the additional party is required to be present as a necessary party, rather than dismissal.

3. Need for Extension of a Closely Related Parties Doctrine

The concepts of the “Closely Related Parties Doctrine” – as applied to issues such as transfer of venue, see *In re: Howmedica Osteonics Corp.* 867 F.3d 390, 407 (2nd Cir. 2017), *In re: McGraw Hill Global Education Holdings, LLC* 909 F.3d 48, 58-9 (3rd Cir. 2018), in relation to forum selection clauses, see *Magi XXI, Inc. v. Stato Della Citta Del Vaticano aka The Holy See*, 714 F.3d 714, 720 (2nd Cir. 2013) and *Weatherford International LLC v. Binstock* 452 F.Supp.3d 561, 570-571 (SD-Texas, 2020), in relation to disgorgement of profits *Securities and Exchange Commission v. AbsoluteFuture.com* 393 F.3d 94, 96 (2nd Cir. 2004) and in relation to the application of the Younger doctrine as to interference between State and Federal actions *Women’s Community Health Center of Beaumont Inc. v. Texas Health Facilities Commission*, 685 F.2d 974, 981 (5th Cir., 1982), should be applied to cases involving the ACA. In *Women’s Community Health*, the ruling cites: “there plainly may be some

circumstances in which legally distinct parties are so closely related that they should be subject to the Younger considerations that govern any of them”

Hicks v. Miranda 422 US 332, 349-50 (US 1975) (finding sufficient closeness of the interests of employees and their employer). This should also be applied to determining the applicability of the ACA to transfers of certain components of the bundle of patent rights among closely related entities.

Nota bene – when WRF did transfer certain patent rights to NGFX, it still retained its claim to a 35% portion of any proceed of the claim. Here – there was no relevant separation of the parties by the assignment because after the transfer, WRF has the same 35% interest in the claim today that it had – all the way back to December 29, 1998.

The non-WRF Plaintiffs – still today have the same 65% interest in the claim that they had all the way back to December 29, 1998. It is impossible to see how there arises some necessity to protect the United States from double attack by these parties since – as to the actual claim for money – their relationship was not changed by any transfer. This 35/65 split exists whether or not WRF joins the action as it is entitled to its share of the claim whether or not it joins the litigation. NGFX is a party to the litigation and its presence should be sufficient as a closely related party as to void any protective application of the ACA.

4. The Two Parties Shared a Divided Claim

The two parties at issue – NeuroGrafix (hereinafter “NGFX”) and The Washington Research Foundation (hereinafter “WRF”) – had a divided interest in any infringement claim so that if WRF led the litigation, the proceeds were split 65% to WRF and 35% to NGFX (Appx05786). Alternately, if NGFX led the litigation the proceeds were split oppositely 65% to NGFX and 35% to WRF (Appx05785) as noted in Section 7.2 or 7.3 of all of the licensing agreements (this section is cited to in the Appellants Opening Brief in this matter at page 32). The continuation of this division of proceeds (35% to WRF) survived the assignments of 2013 (which assigned ownership to NGFX SP – the original licensee of 12/7/1998) as confirmed by an associated covenant. WRF and NeuroGrafix filed a joint affidavit in this case which laid to rest any possible uncertainty about notice or intent or shared interest (Appx03121)

It simply cannot be said – for instance – that the relevant December 29, 1998 agreement resulted in one or the other of these two parties being the sole claimant. In either situation WRF held a right to initiate suit and NGFX held the right to exclude. If either sued – the other party would be necessary (WRF lacking the right to exclude so not suffering an injury, while NGFX is argued to have lacked the right to file suit).

WRF was a founding shareholder of NGFX and at the time of formation Aaron Filler was the 75% shareholder while each of WRF and four others (individuals) had 5% shareholdings (Appx02898). There was never any possibility of double suit because WRF participated in the action as a shareholder when NGFX filed suit against the United States and was a beneficiary of any resulting recovery.

5. Closely Related Parties Doctrine

The “Closely Related Parties Doctrine” as currently applied in other areas of jurisprudence is based on identification of a relationship that includes four types of findings about the relationship of two parties during the period of alleged infringement by the United States, as cited in *Magi* at 720: (1) – interests of the two parties are derivative of and directly related to actions of the offending third party – here the United States; (2) – both parties have rights derivative of the then patent owner, here The State of Washington (University of Washington); (3) - both NGFX and WRF had interests in the intellectual property which were governed by the same owner – the State of Washington; (4) – the owner The State of Washington is a third party beneficiary of the action against the United States since it is entitled to a portion of the proceeds (through WRF) whether either WRF or NGFX litigates.

Other issues in – for instance – the application of this Doctrine concern notice between the two parties and possession of any separate claim.

7. Infringement Actions

7.1 Notice. If, during the term of this Agreement, WRF or Licensee shall suspect that one or more Third Parties are infringing or are threatening to infringe the Patent Rights, that Parry shall immediately provide the other Party all available and useful information concerning the kind and character of the infringement and any other pertinent information.

7.2 Licensees Right to Settle or Sue. [...] If Licensee recovers costs and or damages for past infringement of Patent Rights as a result of a lawsuit or a negotiated settlement, such proceeds shall be used first to pay off Licensee infringement litigation expenses. Surplus recoveries shall be shared such that Licensee receives 65% and WRF 35%.

7.3 WRF's Right to Settle or Sue. [...] If WRF brings an action for infringement, Licensee shall assist WRF and cooperate in such litigation at WRF 's request and at no cost to Licensee. WRF shall recover its out-of-pocket expenses associated with such litigation or settlement thereof from any monetary recovery. In that case the proceeds of the license or infringement action after recovery of WRF' s costs and fees shall be divided with WRF receiving 65% and Licensee 35%.

License Agreement between WRF and NGFX of 12/29/98 (Appx05785-6).

The two parties WRF and NGFX are inseparable in that both were entitled to an accounting as between them and a distribution of any proceeds of the litigation.

6. Interests of the United States Protected by Assignment of Claims

Act Would Not Be Impaired By Establishing This New

Precedent

The Court of Federal Claims has recently reviewed the interests of the United States to be protected by the Assignment of Claims Act:

As the Supreme Court explained, the “primary purpose” of the Assignment of Claims Act: [W]as undoubtedly to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the [g]overnment,’ and ... a second purpose was ‘to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the [g]overnment to deal only with the original claimant.’ Other courts have found yet another purpose of the statute, namely, to save to the United States ‘defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to an assignee.’ *United States v. Shannon*, 342 U.S. 288, 291–92, 72 S.Ct. 281, 96 L.Ed. 321 (1952) (footnote omitted) (quoting *United States v. Aetna Surety Co.*, 338 U.S. 366, 373, 70 S.Ct. 207, 94 L.Ed. 171 (1949)).

^{3rd} *Eye Surveillance, LLC v. United States*, 133 Fed.Cl 273, 277 (Fed.Cl. 2017). None of these interests are jeopardized when two closely associated entities in which both hold a designated share in the proceeds (before and after any assignment) exchange certain rights by assignment.

7. Importance of This Issue Warrants a Rehearing or Rehearing En Banc

Few actions are more corrosive and harmful to the life, progress, and success of America and its citizens than aggressive uncompensated seizure of intellectual property rights from U.S. citizens by the United States itself. This is because it treats critical innovation as grounds to dispossess, harm and punish inventors. Explicitly barred by the Constitution (Vth Amendment, Just Compensation Clause) – such acts evade justice when the administrative requirements of opposing an uncompensated taking are construed in inconsistent and unpredictable ways so that no citizen can

properly comport his actions to obtain protection from such constitutionally impermissible seizures.

Unlike many other types of government claim, those arising from patent ownership have a very high likelihood of being involved in complex assignment agreements. Indeed, the patent law in the United States differs from patent law in the United Kingdom as to patent ownership when employer/employee and student/university affect inventions. Here, for instance the actual inventors are the original patent owners, but all were required to assign to their respective Universities. In many other cases, an inventor creates a startup business and assigns the patent while retaining some benefits. This differs from the UK law where the assignee may be listed as the inventor. The result is mandatory assignment to entities who may not pursue commercialization, followed by further assignments set against a perplexing and unpredictable conflicting sets of imperatives. The U.S. here for instance, chose not to apply the ACA in NeuroGrafix I, then changed its position and did apply it in NeuroGrafix II – reversing the requirements that the plaintiffs faced to help assure they were excluded either way, a sort of *capita: vincimus, caudis: victus es* (“heads we win, tails you lose”) opportunity for the United States. They avoid losing this option to a finding of waiver by the court’s general reluctance to find waiver.

Further, an important result is that the law as to standing and subject matter jurisdiction, is dramatically different between U.S. District Court and the Court of Federal Claims. This is why the full assignment of the patent to Filler (NGFX-SP) in 2013 resolved and settled years of litigation over ownership in the Motion to Dismiss in U.S. District Court (Appx06116), while only serving to complicate the dispute in the Court of Federal Claims.

This court should recognize the close relationship between employers/universities/inventor-startups and inventors by setting forth a Closely Related Entities Doctrine for the Tucker Act that prevents the United States from first refusing to fund innovation and then seizing the intellectual property without compensation. The current arrangement unnecessarily compromises a critical right of citizens relative to the state that dates back to the Magna Carta and which is enshrined in the United States Constitution's Vth Amendment.

The technology involved has revolutionized neurological medicine, was a transformational technological breakthrough (brain Diffusion Tensor Imaging) and has saved and continues to save tens upon tens of thousands of lives. The U.S. refused to fund the research – on the grounds that it was just technology and not science. Sources in the UK then funded the work. Once successful, the U.S. – without license and despite warnings – commenced

expending billions of dollars in the unlicensed use of the technology.

Through this incorrect ruling – the U.S. pays nothing for the taking.

***8. The Application of the Assignment of Claims Act is In Disarray
and Harms the Interests of the United States by Discouraging
Important Innovation***

The application of the Assignment of Claims Act in the intellectual property arena is in disarray and the addition of Rule 36 decision making to this frustrating and complex area of law further aggravates the problem instead of contributing to progress towards much needed clarification.

[I]n modern practice, the obsolete language of the Anti-Assignment Act means that **the Government has the power to pick and choose which assignments it will accept and which it will not.**

Despite the Anti-Assignment Act's plain language, the Supreme Court has carved out equitable exceptions to its application, noting that the Act “must be interpreted in the light of its purpose to give protection to the Government.... [A]ssignments may be heeded, at all events in equity, if they will not frustrate the ends to which the prohibition was directed.” *Martin v. Nat'l Sur. Co.*, 300 U.S. 588, 596–97, 57 S.Ct. 531, 81 L.Ed. 822 (1937).

US v. Kim 806 F.3d 1161, 1169/1170 (9th Cir 2015).

First – the government refuses to fund innovation. When the inventor then succeeds in developing a successful technology that transforms and advances American life – the government strikes a second time by seizing the technology without compensation where no Bayh-Dole rights have accrued. This is done despite the fact that it is eminently obvious in this

situation that respecting the rights of the patent inventor/owner will not frustrate the objectives of the Assignment of Claims Act.

A rule 36 disposal of an appeal is unwarranted where the Court of Federal Claims ruling is clearly erroneous, the ruling conflicts with CAFC case law, and where various panels of this court have sowed the seeds of unnecessary disputes by inconsistent rulings in this area.

III. Conclusion

For the foregoing reasons, the Court should grant this Petition for Panel Rehearing or the Petition For En Banc Rehearing Of Appeal.

Dated: March 6, 2022 /s/ Aaron G. Filler
Aaron G. Filler, Esq.

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Addendum

Court's Decision

Statutes at Issue

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

AARON G. FILLER, AS AN INDIVIDUAL AND ON
BEHALF OF NEUROGRAFIX-SOLE
PROPRIETORSHIP, NEUROGRAFIX,
NEUROGRAPHY INSTITUTE MEDICAL
ASSOCIATES, INC., IMAGE-BASED SURGICENTER
CORPORATION,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2021-1552

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00173-RTH, Judge Ryan T. Holte.

JUDGMENT

AARON GERSHON FILLER, Tensor Law, PC, Santa Monica, CA, argued for plaintiffs-appellants.

GARY LEE HAUSKEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also

represented by BRIAN M. BOYNTON, JENNA ELIZABETH MUNNELLY.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (NEWMAN, REYNA, and WALLACH, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

January 21, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

United States Code Annotated

Title 31. Money and Finance (Refs & Annos)

Subtitle III. Financial Management

Chapter 37. Claims (Refs & Annos)

Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3727

§ 3727. Assignments of claims

Currentness

(a) In this section, “assignment” means--

(1) a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or

(2) the authorization to receive payment for any part of the claim.

(b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.

(c) Subsection (b) of this section does not apply to an assignment to a financing institution of money due or to become due under a contract providing for payments totaling at least \$1,000 when--

(1) the contract does not forbid an assignment;

(2) unless the contract expressly provides otherwise, the assignment--

(A) is for the entire amount not already paid;

(B) is made to only one party, except that it may be made to a party as agent or trustee for more than one party participating in the financing; and

(C) may not be reassigned; and

(3) the assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract.

(d) During a war or national emergency proclaimed by the President or declared by law and ended by proclamation or law, a contract with the Department of Defense, the General Services Administration, the Department of Energy (when carrying out duties and powers formerly carried out by the Atomic Energy Commission), or other agency the President designates may provide, or may be changed without consideration to provide, that a future payment under the contract to an assignee is not subject to reduction or setoff. A payment subsequently due under the contract (even after the war or emergency is ended) shall be paid to the assignee without a reduction or setoff for liability of the assignor--

(1) to the Government independent of the contract; or

(2) because of renegotiation, fine, penalty (except an amount that may be collected or withheld under, or because the assignor does not comply with, the contract), taxes, social security contributions, or withholding or failing to withhold taxes or social security contributions, arising from, or independent of, the contract.

(e)(1) An assignee under this section does not have to make restitution of, refund, or repay the amount received because of the liability of the assignor to the Government that arises from or is independent of the contract.

(2) The Government may not collect or reclaim money paid to a person receiving an amount under an assignment or allotment of pay or allowances authorized by law when liability may exist because of the death of the person making the assignment or allotment.

CREDIT(S)

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 976.)

Notes of Decisions (646)

31 U.S.C.A. § 3727, 31 USCA § 3727

Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 91. United States Court of Federal Claims (Refs & Annos)

28 U.S.C.A. § 1498

§ 1498. Patent and copyright cases

Effective: October 28, 1998

Currentness

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. Reasonable and entire compensation shall include the owner's reasonable costs, including reasonable fees for expert witnesses and attorneys, in pursuing the action if the owner is an independent inventor, a nonprofit organization, or an entity that had no more than 500 employees at any time during the 5-year period preceding the use or manufacture of the patented invention by or for the United States. Notwithstanding ¹ the preceding sentences, unless the action has been pending for more than 10 years from the time of filing to the time that the owner applies for such costs and fees, reasonable and entire compensation shall not include such costs and fees if the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in [section 504\(c\) of title 17, United States Code](#): *Provided*, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: *Provided, however*, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person

while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further*, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provisions of this section shall not apply to any claim arising in a foreign country.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government, and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement: *Provided*, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the protected plant variety by the Government: *Provided, however*, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further*, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.

(e) Subsections (b) and (c) of this section apply to exclusive rights in mask works under chapter 9 of title 17, and to exclusive rights in designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 941; May 24, 1949, c. 139, § 87, 63 Stat. 102; Oct. 31, 1951, c. 655, § 50(c), 65 Stat. 727; July 17, 1952, c. 930, 66 Stat. 757; [Pub.L. 86-726](#), §§ 1, 4, Sept. 8, 1960, 74 Stat. 855, 856; [Pub.L. 91-577](#), Title III, § 143(d), Dec. 24, 1970, 84 Stat. 1559; [Pub.L. 94-553](#), Title I, § 105(c), Oct. 19, 1976, 90 Stat. 2599; [Pub.L. 97-164](#), Title I, § 133(d), Apr. 2, 1982, 96 Stat. 40; [Pub.L. 100-702](#), Title X, § 1020(a)(6), Nov. 19, 1988, 102 Stat. 4671; [Pub.L. 102-572](#), Title IX, § 902(a), Oct. 29, 1992, 106 Stat. 4516; [Pub.L. 104-308](#), § 1(a), Oct. 19, 1996, 110 Stat. 3814; [Pub.L. 105-147](#), § 3, Dec. 16, 1997, 111 Stat. 2680; [Pub.L. 105-304](#), Title V, § 503(d), Oct. 28, 1998, 112 Stat. 2917.)

[Notes of Decisions \(400\)](#)

Footnotes

¹ So in original. Probably should be “Notwithstanding”.

28 U.S.C.A. § 1498, 28 USCA § 1498

Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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