LEGAL CONSIDERATIONS AND COOPERATIVE OPPORTUNITIES FOR SPACE COMMERCIAL ACTIVITIES

by

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ABSTRACT

It is a national policy to make the capabilities of the Space Transportation System available to a wide range of potential users. This includes its availability as a space manufacturing facility for commercial activities, which may be carried out on a reimbursable basis or as a joint endeavor with NASA, but with substantial private investment. In any high risk, long lead-time research and development activity directed towards commercialization, the protection afforded the results of the research and development under the laws relating to intellectual property rights may provide an important incentive for private investment.

The paper reviews NASA's policies and practices for the protection of privately-established intellectual property rights involved in STS use, with particular emphasis on reimbursable launch agreements and joint endeavor agreements.

INTRODUCTION

The Space Transportation System (STS)[1] has reached a point in its operational maturity where it can be treated as a national resource. That is, it can be made available to a variety of customers, public and private, for a wide range of uses in space not previously available. These potential uses greatly exceed the capabilities of expendable launch vehicles, which are limited primarily to placing free-flying payloads into orbit. While this capability still exists, the STS is, in addition, a true spaceborne laboratory or facility for the conduct of experiments, demonstrations, and even ongoing commercial operations for space manufacturing. In recognition of this, NASA has evolved policies whereby the STS may be made available to all potential customers under a broad range of agreements or arrangements. These possibilities range from use by NASA[2] and other Government agencies to carry out their traditional programs and missions,[3] to use by the private sector for commercial purposes on a reimbursable basis.[4] However, NASA has recognized that for commercial uses other than for launches of free-flying payloads of the type normally launched by expendable launch vehicles (e.g., communications satellites), the risks and uncertainties, both technical and financial, are not necessarily conducive to early commitment of private resources. Activities such as space manufacturing, for example, involve a number of risks not present in earlier commercial launches. Thus, intermediate possibilities for risk-sharing, falling between full Government funding on one end of the funding spectrum and full reimbursement on the other end of the funding spectrum, had to be considered in order to provide an additional inducement to encourage commercial organizations to take the first "small step" towards manufacture in space. This led to the development, by NASA, of the joint

endeavor approach to bridge the gap between traditional Government funding and full private funding in order to demonstrate the commercial viability of STS use in certain technological areas. Basically, a joint endeavor is a cooperative arrangement between NASA and a private participant to share the risks of a common objective of demonstrating commercial feasibility for a given spaceborne activity, with each party funding its own agreed-upon program responsibilities to reach that objective.[5] Not surprisingly, since one of the unique capabilities of the STS is to provide a facility for experiments and demonstrations in a zero-gravity, near-perfect vacuum environment, the first joint endeavors entered into were for material processing in space.[6]

INCENTIVES FOR COMMERCIALIZATION

Even though the policies, implementing mechanisms and legal instruments have been developed to enable use of the STS under a variety of funding possibilities, including risk-sharing under a joint endeavor, these factors alone will not necessarily result in private investment for commercial use. Much has been written and many theories expounded, ranging from tax incentives to interest rates, and from regulatory reform to corporate management practices, on the economic, competitive, and political factors that must be present to create an environment conducive to substantial private investment for undertaking high-risk, long lead-time research, development and demonstration activities for the marketing of commercial products and processes. While these factors are not limited to commercialization in space, the risks and lead times involved in space activities introduce even greater uncertainties. However, one factor that appears to be relatively constant in any high-risk, long lead-time research and development activity directed towards commercialization, whatever the other variables, is the need for some protection that provides a degree of exclusivity as an aid in assuring a return on the investment, and to minimize predatory, second-to-market practices. While the need for this exclusivity may differ depending on the nature of the technology and the various economic and competitive factors involved, it is usually a truism that in most situations the higher the risk or the longer the lead time, the greater the exclusivity needed as an incentive for a significant private commitment of funds.

From a legal point of view, this exclusivity may be established by the protection afforded under the laws relating to intellectual property rights. These rights manifest themselves in three basic ways: patent protection, copyright protection and trade secret protection.[7] It was therefore not unexpected that during the evolution of NASA's policies to encourage the commercial use of the STS, whether such use be on a reimbursable basis or under a joint endeavor, there were recurring concerns expressed by the private sector over the manner in which NASA would treat the rights to inventions, patents, trade secrets, and to some extent copyright, involved in such activities.

What follows is a discussion of NASA's policies and practices regarding the protection of privately-established, intellectual property rights as they may relate to commercial activities in space, such as space manufacturing. The discussion focuses on current policies and practices in these areas under both reimbursable launch agreements and joint endeavors agreements.[8]

RIGHTS TO INVENTIONS AND PATENTS

Reimbursable Launches

It is NASA policy not to acquire rights to any inventions or patents which may be used in or result from an STS launch and associated services for which NASA is reimbursed.[9] This is a straightforward policy which requires no implementing action other than a statement to that effect in the launch agreement. The rationale for this policy is equally straightforward; that is, since the launch and related services are performed for the customer, and not for NASA, and since NASA is reimbursed for such services, neither NASA's statutory provisions regarding patent rights nor the Presidential Memorandum on Government Patent Policy apply.[10] This is a long-standing NASA policy for reimbursable launches on expendable launch vehicles that has merely been formalized in policy directives relating to STS, as well as in the standard launch service agreement for STS, to avoid any misunderstanding that may inhibit the use of STS on a reimbursable basis.

Joint Endeavors

NASA's policy regarding inventions and patents resulting from a joint endeavor differs somewhat from the policy for reimbursable activities because of the mutual interests involved. It is important to note, however, that as in the case of reimbursable activities, neither NASA's statutory patent provisions nor the Presidential Memorandum apply to the activities of the non-NASA participant under a joint endeavor. This is because a joint endeavor, also, does not require the performance of work for NASA. Rather each party carries out certain stated responsibilities on its own behalf, and funds its own activities, in furtherance of a common, mutually agreed-upon objective. Thus agreement on the treatment of rights to inventions and patents must be stated in the joint endeavor agreement. This usually requires negotiation to reach a mutually acceptable approach consistent with the purposes of the particular activity involved.[11] As a basic premise, since the common objective upon which a joint endeavor is based is the encouragement of early space ventures to demonstrate usefulness of space technology to meet marketplace needs, the commercial participant may retain all right, title and interest to any inventions and resulting patents, but NASA obtains certain contingent rights consistent with that objective. Essentially these contingent rights are structured to assure limited access to, or availability of, the technology for further commercialization under agreed-upon terms and conditions in the event the private participant cannot or does not carry out its responsibilities under the joint endeavor. Additional consideration may be given to availability sufficient to meet public needs in the area of health and safety if applicable, as well as an understanding on the allocation of rights between the parties in the event of termination by either party under various circumstances.

While these contingent rights are a matter of negotiation depending on the technology involved and the respective responsibilities of each party, in the typical agreement involving the demonstration of the feasibility of a space manufacturing process, NASA may receive a royalty-free license for certain stated Governmental purposes, as well as the right to license others upon reasonable terms and conditions in the event the private participant has not, or cannot be reasonably expected to take, effective steps to achieve commercialization, or if the private participant unilaterally terminates in some situations. If the involved technology is the type that could directly affect the public health or safety, the contingent rights may be expanded to

assure that such technology is reasonably available to meet those needs. Early termination will usually leave all rights with the private participant, except that the parties may mutually agree to negotiate allocation of rights. Somewhat greater contingent rights may be expected by NASA if there is unilateral termination after certain launch commitments are made. In all instances, these contingent rights will not become effective unless an express determination is made by the NASA Administrator, or designee, as to the need to exercise the right. In making such determination the private party is given notice, an opportunity to present facts and reasons why it should not be made, the opportunity for an administrative hearing within NASA, and the right to seek legal redress, before the determination becomes final and acted upon.

RIGHTS TO DATA, INCLUDING TRADE SECRETS AND COPYRIGHTS

Protection of valuable information such as design, manufacturing and processing information (know-how), as well as certain commercial and financial information, whether this information is patentable or not, is also an important consideration in any commercially-oriented enterprise. Such information, when reduced to tangible and useful documented form (on any media) is commonly referred to as "data." Of necessity NASA must receive or have access to some of this data in order to carry out its responsibilities under either a reimbursable launch agreement or a joint endeavor.

Reimbursable Launches

Data is acquired from a customer under a reimbursable launch agreement only to the extent necessary to enable NASA to carry out its responsibilities under the agreement. Generally this is data necessary for payload integration, establishment of launch parameters, safety checks, determination of orbital performance, verification of peaceful purposes and compliance with law, and related matters. Much of this data, while generally technical in nature, is not of the type that would qualify for protection as a trade secret (i.e., it is form, fit and function data, data readily apparent by inspection, or data which the customer either has not maintained, or does not wish to maintain in confidence or protect as a trade secret). Thus the expectation (and intent) is that most of the data furnished to NASA in order to carry out a reimbursable launch will be provided without restriction.

However, there may be instances where some of the data furnished under a reimbursable launch agreement may qualify as a trade secret which the customer wishes to protect from unauthorized use and disclosure in order to maintain its trade secret status. In this event, as is the case with inventions and patents, the statement of NASA's policy regarding such data is straight-forward.[12] However, implementation of this policy requires further, positive action. For example, it is necessary in the launch agreement to create an understanding as to the type of data to be protected, as well as an understanding that in order for protection to be established and maintained such data is to be treated in confidence, with specified limitations on its use, duplication and disclosure.

This is achieved by provisions in the launch agreement authorizing the customer to place a restrictive legend on any technical data (such as detailed design, manufacturing and processing information) that the customer considers a trade secret in order to put NASA on notice that the data is to be protected. The legal effect of acceptance of qualifying data with the authorized notice is to obligate NASA to limit the use, duplication and disclosure of the data to the

purposes stated in the notice; that is, those purposes necessary for NASA to carry out its launch responsibilities. Disclosure of the data may extend to NASA contractors, but only to the extent necessary to support the launch and only if the support contractor has agreed in writing to protect the data from further use, duplication or disclosure. This maintains the chain of confidentiality necessary for trade secret protection.[13]

Obviously, the submission of restrictively-marked data creates administrative burdens, as well as certain legal risks, for both NASA and the customer. Thus it is NASA policy to include provisions in the launch agreement requiring that, before delivering restrictively-marked data, the customer must inform NASA that the data is considered a trade secret, and not to deliver it unless there is a written request for delivery by NASA. This provides a checkpoint to prevent the over-ordering of restrictively-marked data by NASA and to reduce over-marking of data by the customer.

A somewhat different approach is taken for a customer's financial and commercial data if data of that nature is to be furnished under a reimbursable launch agreement. This difference is based on an assumption that very little, if any, data of that type will be required to carry out a launch, as well as an assessment that the law regarding protection of non-technical data (at least in dealings with the Government) is less clear than as it is regarding the protection of technical data qualifying as a trade secret. Basically, as to non-technical data, NASA agrees that if such data is considered confidential or privileged, and if its disclosure could either cause substantial harm or impair NASA's ability to obtain such data in the future, NASA will protect such data to the extent permitted by law.[14]

Joint Endeavors

While the same basic tenets discussed above apply to data furnished to NASA by the participant under a joint endeavor, some modifications are made in recognition of the common objective of both parties to achieve commercialization of the results of the involved activities. Also, of necessity, the rights and obligations of the parties under a joint endeavor are considered on a case-by-case basis, taking into account the specific technology involved, the respective responsibilities of both parties, and the interrelation of intellectual property rights to the technology and the objectives to be achieved. As a general rule, in the area of space manufacturing, NASA will agree to treat most of the data developed or used by the other participant and required to be furnished to NASA in carrying out its responsibilities under a joint endeavor as a trade secret and to restrict or limit its use, duplication and disclosure to only those activities necessary for NASA to carry out its concomitant responsibilities under the joint endeavor. Again, as in the case of a reimbursable launch, the intent is that the amount of such data to be furnished to NASA be kept to a minimum. In addition, in recognition of the mutual objectives of both parties, as well as the diversity of the nature of the activities, there is a greater need in a joint endeavor to have a clear understanding as to certain data which NASA is to obtain without restriction and may be released to the general public. Thus a joint endeavor will usually include certain agreed-to categories of releasable information.[15]

Once the basic approach mentioned above has been established, the major point of departure between the treatment of data rights under a joint endeavor and under a reimbursable agreement is in the area of contingent rights. Essentially such contingent rights regarding data are structured to be compatible with the contingent rights acquired in relation to inventions and patents. That is, the participant to a joint endeavor agrees to provide sufficient data, and

attendant rights to either NASA or third parties, in those limited situations where the participant is not pursuing the commercialization objectives of the joint endeavor, fails to perform, unilaterally terminates under certain circumstances, or as may be needed to practice license rights acquired under patents and inventions. As is the case with inventions and patents, this may be under reasonable terms and conditions, as well as under protective conditions so as not to compromise the intellectual property rights in the data. Also, the same procedural safeguards apply to a determination to exercise contingent rights in relation to data as apply to the contingent rights for patents and inventions.

COPYRIGHT CONSIDERATIONS

As a general rule, copyright matters have not been a consideration, and are not expressly addressed, in a reimbursable launch agreement or a joint endeavor agreement relating to space manufacturing. This comes about primarily because of the nature of the activities, where it is customer preference to protect its technology as a trade secret rather than to publish under copyright.

Under the copyright laws, right to establish claim to copyright in a work resides in the author unless there is an express understanding otherwise, or unless the work is prepared by an employee within the scope of employment. Thus silence on the matter in a reimbursable launch agreement or a joint endeavor agreement means that the right to establish claim to copyright stays with the customer or participant and does not flow to NASA or the Government. There is one very limited exception in that to the extent copyrighted material may be furnished to NASA under the agreement, NASA has an implied license to duplicate material to the extent necessary to carry out its responsibilities under the agreement.

If the situation should arise (outside the realm of space manufacturing) where the production of copyrightable works may be an objective of a joint endeavor, the allocation of copyrights is a matter of negotiation. Generally, the principles discussed in conjunction with patents and trade secrets would apply; that is, commercial rights will be left with the private participant, with NASA receiving certain contingent rights, license rights, or derivative rights as appropriate and consistent with the mutual objectives of both parties.

CONCLUSION

NASA takes the view that the development of its policies, practices and procedures in the area of intellectual property rights are an integral part of its overall approach to research and development activities in carrying out its mission requirements. Thus during the development of the Space Transportation System, when its potential as a national resource became apparent for a wide variety of customers under diverse funding possibilities, these policies, practices and procedures were continually assessed and refined to provide maximum flexibility to fit the entire spectrum of possibilities. Foremost in this assessment was the recognition of the need to provide an environment conducive to private investment in the furtherance of commercial activities in space, such as space manufacturing. As a result, the policies, practices and procedures discussed above have been developed to provide maximum protection of privately-established intellectual property rights as they relate to commercial activities in space, compatible with NASA's goal of expanding opportunities for U.S. private sector investment and involvement in space activities.

FOOTNOTES

1. The Space Transportation System for the purposes of this paper, may be considered as consisting of the Shuttle, Spacelab and Inertial Upper Stage and provision for the availability of qualified Atlas/Centaur-class and Delta-class Spinning Solid Upper Stages from a customer.

2. NASA Management Instruction (NMI) 8610.12, Utilization of an Funding for Space Transportation System (STS) Elements and Services for NASA and NASA-Related Payloads.

3. NASA Management Instruction (NMI) 8610.9, Reimbursement for Shuttle Services Provided to Civil U.S. Government Users and Foreign Users Who Have Made Substantial Investment in the STS Program. Published in the Federal Register under Title 14, Chapter V, Subpart 1214.2 (42 FR 8631-8634, February 11, 1977).

4. NASA Management Instruction (NMI) 8610.8, Reimbursement for Shuttle Services Provided to Non-U.S. Government Users. Published in Federal Register under Title 14, Chapter V, Subpart 1214.1 (42 FR 3829-3833, January 21, 1977).

5. Under a typical joint endeavor (relating to materials processing) a private participant selects an experiment and/or technology for feasibility demonstration in space, conducts necessary ground investigations, and develops flight hardware, at its expense. NASA, on its part, provides an STS flight and related support in order to demonstrate feasibility, with the expectation that subsequent to a successful demonstration of feasibility the private participant may become involved in commercial flight operations on a reimbursable basis.

6. NASA's commitment to commercialization in this area is reflected in its announced "Guidelines Regarding Joint Endeavors with U.S. Domestic Concerns in Materials Processing in Space" (44 Fed. Reg. 47,650, 1979), where it is stated: "NASA, by virtue of the National Aeronautics and Space Act of 1958, is directed to contribute to the preservation of the roles of the United States as a leader in aeronautical and space science and technology, and their applications. In furtherance of these objectives, the Administrator of NASA on June 25, 1979, promulgated a statement of NASA Guidelines Regarding Early Usage of Space for Industrial Purposes. These guidelines recognized that 'since substantial portions of the U.S. technological base and motivation reside in the U.S. private sector, NASA will enter into transactions and take necessary and proper actions to achieve the objective of national technological superiority through joint action with United States domestic concerns' ".

7. The laws in the United States relating to patents and copyrights are derived from the U.S. Constitution, Article I, Section 8, and are established by Federal Statutes: Title 35 and Title 17 of the United States Code, respectively. These statutes prescribe certain standards as well as the procedures and formalities to be followed in order to establish and maintain patent or copyright protection. Once a valid patent is established and maintained, protection is afforded against all potential infringers within the United States, including those who may independently develop the invention. Appropriate notice of copyright will preclude all from unauthorized copying. In addition, while the U.S. laws have no extraterritorial effect, similar protection may be established and maintained in most other countries by following and adhering to their standards, procedures, formalities and conventions.

The law of trade secrets, on the other hand, is based on the common law. That is, protection is afforded only to the extent provided by state or local law, and not under Federal statute. A significant distinction between trade secret protection and patent or copyright protection is the element of secrecy or confidentiality, with which the subject matter of a trade

trade secret must be cloaked. In addition, the standards as to the subject matter that may be subject to trade secret protection are more a matter of agreement between the parties than any external standard. Thus if the proprietor of a trade secret is to make it available to another, the subject matter must be identified and made available under an understanding of confidentiality which the other party is aware of and agrees to, or protection may be compromised. Also, trade secret protection is enforceable only against parties who breach this understanding of confidentiality or otherwise acquire the trade secret by improper means, and not against those who may independently or innocently discover it. It is therefore extremely important that in any agreement or arrangement regarding commercially-directed activities relating to space manufacturing (whether they be under a reimbursable launch agreement or a joint endeavor agreement) that the treatment of, and protection to be afforded, trade secrets that are to be made available to NASA be specifically addressed.

8. This is not to suggest that intellectual property rights are not an important consideration in NASA-funded activities. However, NASA's policies and practices in that area are well established and understood, and as a practical matter come into play during the procurement process (see for example, Part 9 of the NASA Procurement Regulation, 41 CFR Ch. 18) and not in consideration of a reimbursable launch or joint endeavor. In order to provide a comparison of the treatment of intellectual property rights arising out of NASA-funded activities with the treatment afforded such rights under reimbursable launch agreements and joint endeavors, the following is a summary of NASA's policies and practices as they relate to NASA-funded activities.

The NASA patent policies for NASA-funded activities, as well as the procedures for implementing those policies, are based on Section 305 of the National Aeronautics and Space Act of 1958 as amended (42 U.S.C. 2457), and to the extent consistent with that Section, the Presidential Memorandum on Government Patent Policy of February 18, 1983. An exception is made for funding agreements with certain small business firms and nonprofit organizations, where NASA follows Public Law 96-517, as implemented by OMB Circular A-124, in the same manner as all other agencies.

Essentially, Section 305(a) of the Space Act provides that any invention conceived or first actually reduced to practice in the performance of any work under any NASA contract becomes the exclusive property of the Government unless the Administrator (of NASA) determines that the interests of the United States will be served by waiving all or any part of the Government's rights under the provisions of Section 305(f) of the Space Act. In making such determinations, NASA's waiver policy adopts the Presidential Memorandum of February 18, 1983, as a guide. Since this Memorandum, in turn, is based on the policy of Public Law 96-517, waivers are liberally granted. A similar result is achieved, albeit by a different procedure, by election of title by a small business firm or nonprofit organization under Public Law 96-517. Any waiver of title granted by NASA, or any election of title by a contractor, is subject to a royalty-free license for Governmental purposes and certain so-called "march-in" rights (as set forth in Public Law 96-517) in order to protect the Government and public interests.

NASA's policies regarding rights to data developed under, or used in, contract performance (including rights to trade secrets based on certain data developed at private expense to the extent such data is used in contract performance), are not covered by express statutory requirements, as are rights to inventions made under contract. There are, however, collateral statutory provisions such as Section 203(a)(3) of the Space Act (42 U.S.C. 2473(a)(3)) and the Freedom of Information Act (5 U.S.C. 552) relating to the public availability of some data involved in or resulting from NASA activities that must be considered in implementing and applying these policies. Thus it is NASA policy normally to acquire data first produced in the performance of a contract without restriction regarding its publication, use or disclosure (i.e., with unlimited rights). It is also NASA policy not to acquire certain "protectible" data

(i.e., trade secrets) unless necessary, but if necessary, to acquire such data under express agreement or understanding not to use or disclose it in a manner that would compromise its value as an intellectual property right (i.e., to acquire it with limited or restricted rights maintaining its confidentiality). Care is taken to agree to protect only that data which can be protected under law (such as the Freedom of Information Act), but once agreed to, maximum protection is assured. However, in order to minimize administrative burdens and legal risks, as an overriding consideration it is NASA policy not to acquire protectible data unless there is a real need for it.

NASA's policies with respect to copyright subsisting in data produced under contract are considered in conjunction with its data policies. As a general rule, permission is required for a contractor to assert or establish claim to copyright subsisting in data first produced under contract. Such permission is usually granted at the time of contracting for scientific and technical articles based on work performed under contract and published in academic or technical journals, and in other situations (except for computer software) is liberally granted upon request.

9. This policy is set forth in paragraph 6(a) of NMI 8610.8 (note 4 supra) and reiterated in the standard reimbursable launch agreement: "6. Patent and Data Rights – (a) NASA will not acquire rights to inventions, patents or a proprietary data privately funded by a user, or arising out of activities for which a user has reimbursed NASA under the policies set forth herein . . ."

10. The policy where the converse is true, that is, where work is performed for NASA and funded by NASA, is discussed in note 8, supra.

11. An extensive discussion which forms a basis for this policy is set forth in a memorandum by NASA's Office of Assistant General Counsel for Patent Matters, entitled "Applicability of Section 305 of the Space Act to Joint Endeavors" (June 19, 1979). This memorandum is part of the record in a Report on Patent Policy, Hearings on S. 1215, Ninety-Sixth Congress, First Session, before the Subcommittee on Science, Technology, and Space, of the Committee on Commerce, Science, and Transportation, United States Senate, July 23 and 27, and October 25, 1979 (Part 1, Serial No. 96-60, pgs. 186-199). In this memorandum a joint endeavor is defined: "A joint endeavor is an arrangement between NASA and a party or parties in which each undertakes to contribute to or participate in a project of mutual benefit, and which usually involves the use of equipment, facilities, services, personnel or information made available by one or more of the parties for use by the others. Such endeavors do not involve the transfer of funds or title to property between the parties, and are not considered a procurement or assistance transaction within the purview of P.L. 95-224. Services which may be involved do not constitute the employment of one of the party's employees by the other."

Given this definition, and an analysis of the legislative history of Section 305 of the Space Act and NASA's interpretation and application thereof over the years, this memorandum concludes that a joint endeavor is not subject to the legal constraints of Section 305, and that the allocation of property rights in inventions under any joint endeavor is a matter of agreement between the parties that must be specifically set forth in the joint endeavor.

12. Note 9, supra.

13. Note 7, supra.

14. This is based on the overall NASA policy to agree to protect only that data which can be protected under law, and to assure maximum protection for such data (Note 8, supra). As a practical matter this means providing the protection afforded under exemption (b)(4) of

the Freedom of Information Act (5 U.S.C. 552(b)(4)), which relates to (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential. The court decisions (particularly the principle announced in Chrysler Corp. v. Brown, 441 U.S. 281, 1979) regarding this exemption make it clear that agencies have no discretion to release information that is a trade secret; that is, such information must be withheld unless there is another law (other than the FOIA itself) that specifically authorizes its release (which is not the case for information qualifying as a trade secret obtained by NASA under a launch agreement). However, there is a tendency in some courts to limit trade secrets to "technical" information for FOIA purposes. As a result, the decisions in FOIA cases are not all that clear regarding the release of commercial or financial information that is not technical in nature, but the courts do afford some discretion for an agency to withhold such information if release could cause substantial harm to the submitter's competitive position or impair the agency's ability to obtain the information in the future (i.e., the tests announced in National Parks v. Morton, 498 Fed 765 (1974)). This limited interpretation by the courts as to what may constitute a trade secret for FOIA purposes creates an anomaly as compared with the common law, where trade secret protection may be afforded to commercial or financial information that is not necessarily technical in nature.

In situations where an FOIA request is not involved, one recent, significant decision (Megapulse, Inc. v. Lewis, 672 F.2d 959 (1982)), drawing a close analogy to the principle announced in Chrysler, also prohibits the release by the Government of "trade secrets" obtained from a private party. It is not clear whether a trade secret in this instance will be as narrowly defined as the tendency of the courts in FOIA cases, but since the situations where Megapulse may be invoked are founded on a question of "fair-dealing" rather than on the interpretation of an exemption to a disclosure-oriented statute such as FOIA, a broader interpretation as to what constitutes a trade secret may be possible.

15. The agreed-to categories of "Releasable Information" in a joint endeavor for materials processing in space are general in nature and sufficiently adequate for NASA to inform the general public and appropriate governmental organizations of the overall objectives and the results achieved, and as may be needed for interface verification, payload integration and check-out. It does not, however, extend to internal design and processing details of the payload.