

MUST-HAVE INTELLECTUAL PROPERTY CLAUSES IN INDUSTRY-SPONSORED RESEARCH AGREEMENTS

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ABSTRACT

Intellectual Property (IP) clauses in industry-sponsored research agreements determine the fate of any IP emerging out of a sponsored research project performed by an academic research institution. Generally, these clauses serve to protect the interests of the parties involved in the project and lay out the modalities for the seamless commercialization of project outcomes. The key IP clauses in industry-sponsored research agreements include confidentiality, prompt disclosure of IP, ownership determination, patent administration, and commercialization rights.

Keywords: commercialization, confidentiality, institution, intellectual property, invention, sponsors.

INTRODUCTION

The National Institutes of Health (NIH), USA, has defined a sponsored research agreement (SRA) as “a written document which describes the relationship between Recipients and commercial entities in which Recipients receive funding or other consideration to support their research in return for preferential access and/or rights to intellectual property deriving from Recipient research results”.¹ SRAs are powerful instruments to initiate symbiotic relationships between the academia and industry. Typically, a for-profit company approaches a non-profit organization (e.g., universities, academic research institutes) with a technical proposal detailing a problem definition, and bears the costs for the execution of the project by the non-profit entity. Cost-cutting and access to an innovative talent pool has forced the industry to work with academia on research projects of commercial interest. Most frequently, SRAs are employed to formalize such collaborations. The National Science Board’s *Science and Engineering Indicators 2012*,² USA, reported that industry funding of academic R&D had steadily increased since 2004, reaching \$3.2 billion in FY2009 (**Figure 1**). For instance, the industry-sponsored research expenditure at Ohio State University (USA), which ranks 3rd in the USA among all research universities in industry-sponsored research, was \$101 million in FY2012.³ The Association of University Technology Managers (AUTM),

USA reported in its licensing activity survey that industry-sponsored research expenditures reached \$4.1 billion in FY2012 in the USA, which represented a 2.4% increase compared to that in FY2011⁴. Globally, industry-sponsored research is gathering momentum. At the CSIR-National Chemical Laboratory (NCL), India, the research funding from industry doubled from ` 55.9 million in FY2011 to ` 110.3 million in FY2012.⁵

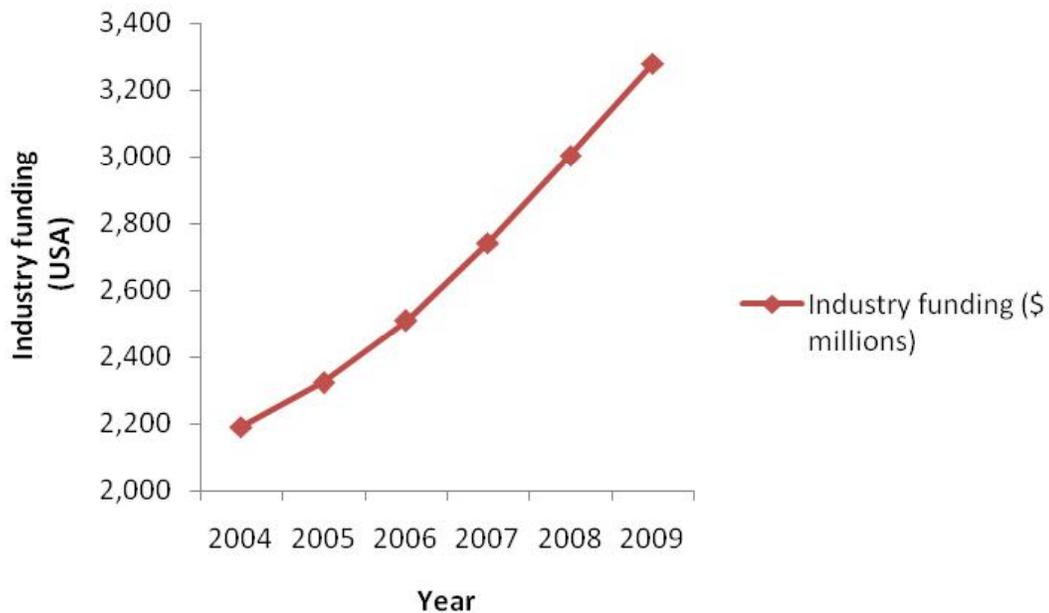
It has been widely acknowledged that the inclusion of intellectual property related clauses in SRAs is critical.⁶⁻⁷⁸⁹ More often than not, sponsored research projects focus on challenging real-world problems, the solutions to which have

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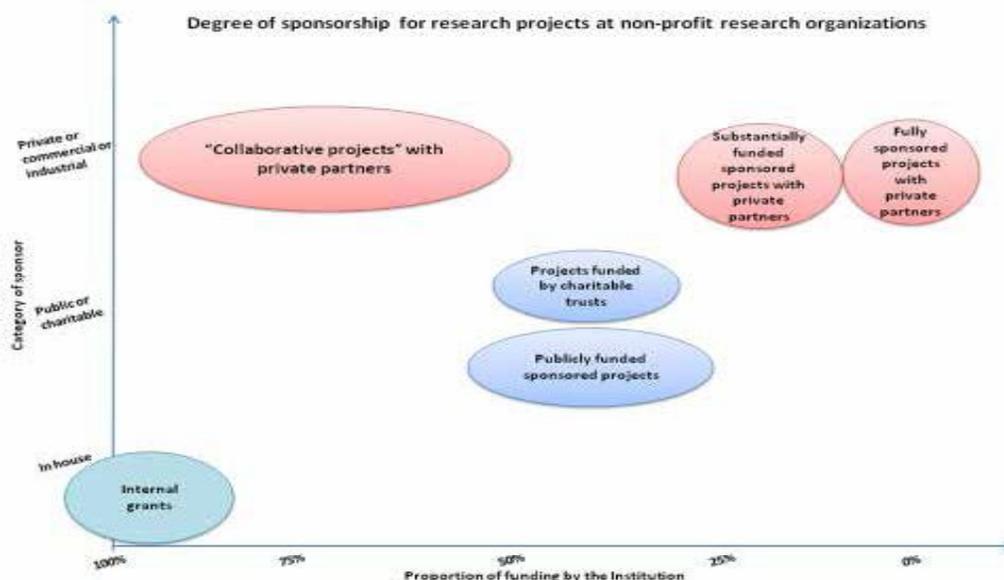
remained elusive hitherto. Therefore, any invention or know-how that emerges out of such problem-based research is bound to be promising, both scientifically and commercially. Sponsored research projects which yield innovative and patentable outcomes could potentially lead to license agreements with the sponsor and/or third parties. Consequently, the sponsor and academic research institution (hereinafter, "research institution") need to be upfront about each other's expectations regarding intellectual contributions to the project. Also, it is necessary to safeguard each party's rights to pre-existing and anticipated intellectual property assets.

Figure 1: Industry Funding for Academic R&D in the USA.²



As shown in **Figure 2**, the level of sponsorship varies significantly depending on the type of sponsor involved: in-house, public (government agencies), charitable (foundations, NGOs), and private (corporate entity). Typically, a corporate sponsor may provide either substantial or 100% of the funds required for the research project. "Substantial" funding may not cover all the overheads of the research institution. We surveyed a slew of templates¹⁰ for SRAs and determined that the following key intellectual property related clauses were indispensable. The ensuing discussion on such clauses, in this paper, is only applicable to those SRAs involving either substantial or full (100%) funding by the sponsor.

Figure 2. Spectrum of Sponsored Research Projects performed at not-for-profit Research Organizations.¹¹



1. Disclosure of Inventions

What does Sponsor gain?	What does Research Institution gain?
Prompt access to invention(s) and election of commercialization rights	Timely filing of patents and freedom to publish invention(s)

The sponsor would want the research institution to promptly disclose all inventions emerging out of the sponsored project. The purpose behind this requirement is to allow the sponsor to review the invention disclosure and determine if patentable subject matter is involved. Upon completion of the review, the sponsor and research institution will need to mutually agree on the following:

- a) strategy to protect business interests
- b) inventorship, ownership, and administrative responsibilities
- c) timeline for public disclosures and publications

In the event that the sponsor shares the inventorship and ownership with the research institution, one of the two outcomes is possible: i) sponsor agrees to patent the invention and elects to pay for the patent prosecution expenses; and ii) sponsor relinquishes its ownership of the invention. In the case of the first outcome, the sponsor may request the research institution to delay the publication of inventions to preserve the intellectual property rights. With regard to the second outcome, the sponsor would not receive a share of any futuristic commercialization revenues although the sponsor's inventors would receive a pre-determined percentage of the revenues when the research institution commences the distribution of such revenues based on its internal policies and regulations.

Sample clauses:

Election to manage IP

- *“University and Sponsor shall promptly provide a complete written disclosure to each other of any Intellectual Property. The Sponsor shall, upon reviewing the disclosure, determine whether to request the University to file and prosecute any patent application, domestic or foreign, or application for other protection directed to University Intellectual Property or to Jointly Owned Intellectual Property described in such disclosure.*
- *During the term of the Project, the University shall promptly disclose any Project IP to The Sponsor, which:*
 - *at The Sponsor's option, The Sponsor shall be entitled to manage the filing, prosecution and maintenance of any patent applications, issued patents and/or other forms of intellectual property protection relating to Project IP, at The Sponsor's cost;*
 - *should The Sponsor elect not to take responsibility for the management of Project IP as envisaged in 10.3.1 above, the University shall be given the option to do so, on terms to be agreed between the Parties;*
- *The University and The Sponsor shall be named as co-applicants on patent applications, unless agreed otherwise between the Parties.”¹²*

Non-election

- *“If Sponsor elects not to exercise its option in accordance with the provisions of this Agreement or decides to discontinue the financial support of the application for intellectual property protection, USC shall be free to file or continue prosecution and maintenance on any such application, at USC's sole expense. If Sponsor elects to discontinue the financial support of the application for intellectual property protection prior to issuance of a valid patent, Sponsor thereby waives and gives up any right it may have under this Agreement to license the USC Intellectual Property as provided in the agreement.”¹³*

2. Confidentiality Obligations

The protection of confidential information shared between the sponsor and research institution during the course of the sponsored research project is necessary in light of the financial and academic stakes for each party, respectively.¹⁴ Confidentiality obligations pertaining to invention disclosures, which the institute shares with the sponsor, have to be strictly maintained in order to avoid any leakage of the knowhow into the public domain prior to filing a patent. This protects the interests of the research institution and also prevents the loss of rights to patentable inventions. This section may also stipulate the benign use of the inventions by both the parties for internal research purposes only, without

jeopardizing the confidentiality aspects. Any exceptions to confidentiality obligations may be discussed and recorded beforehand in the agreement with the mutual consent of both parties.

Sample clause:

- “Sponsor shall retain all invention disclosures submitted by University in confidence and use its best efforts to prevent disclosure to third parties. Sponsor shall be relieved of this obligation only when this information becomes publicly available through no fault of Sponsor.”¹⁵

3. Publication Rights

What does Sponsor gain?	What does Research Institution gain?
Timely protection of proprietary rights prior to publication	Credibility, prestige, and branding

The dissemination of scientific discoveries and know-how through publications in peer-reviewed journals is the foremost mission of any research institution. On the other hand, for-profit sponsors are keen on protecting any proprietary rights to fully exploit the commercial potential of innovative science. Therefore, the section on ‘publication rights’ seeks to address the interests of both the parties. The practice of prepublication review serves to balance the restriction of timely disclosure of inventions by the research institution and the sponsor’s need for temporary secrecy of such inventions until the filing of patent(s).¹⁴ Delaying the public disclosure of research findings by 30 days, with further extension to a total of up to 60 days has been suggested to be a reasonable period for the sponsor to review the results furnished by the research institution.^{16,17}

As per the basic tenets of patenting, the filing date of a patent must predate the corresponding scientific publication. If the sponsor deems the disclosed invention to be patentable and subsequently, elects to pay for the patent prosecution expenses, the sponsor may request the research institution to delay the publication of the invention until after the patent application has been filed. On the other hand, if the invention is not patentable but only publishable, the sponsor would want the research institution to remove any of sponsor’s confidential information from the proposed publication to protect the sponsor’s business and scientific interests.

Sample clauses:

- “The University will submit to the Sponsor, in writing, details of any Results and any of the Sponsor’s Background that any employee or student of the University intends to Publish, at least [30][60] days before the date of the proposed submission for Publication. The Sponsor may, by giving written notice to the University (“a Confidentiality Notice”): require the University to delay the proposed Publication for a maximum of [] month(s) after receipt of the Confidentiality Notice if, in the Sponsor’s reasonable opinion, that delay is necessary in order to seek patent or similar protection for any of the Sponsor’s Background or any Results that are to be Published; or prevent the Publication of any of the Sponsor’s Background that is Confidential Information. The Sponsor must give that Confidentiality Notice within [15][30] days after the Sponsor receives details of the proposed Publication. If the University does not receive a Confidentiality Notice within that period, its employee or student may proceed with the proposed Publication, provided that, whether or not a Confidentiality Notice has been given, any of the Sponsor’s Background that is Confidential Information may not be published.” (IPO).¹⁸
- “Sponsor recognizes that under University policy, University shall have the right, at its discretion, to release information or to publish any material resulting from the Project. University shall furnish Sponsor with a copy of any proposed publication thirty (30) days in advance of the proposed publication date. Sponsor may request University to delay release of such proposed publication for a maximum of an additional thirty (30) days in order to protect Intellectual Property or Confidential Information described therein. No such delay shall be imposed on the filing of any student thesis or dissertation.”¹⁹

4. Ownership of Intellectual Property (IP)

What does Sponsor gain?	What does Research Institution gain?
An unencumbered licensing process	Advantage in the enforceability of patent rights

A research institution’s mission of bringing the fruits of science to the society, and a for-profit entity’s goal to make profits out of selling innovative products, are complimentary, rather than competing, objectives. This section needs to ensure that each party is able to execute its respective obligation, whether social or entrepreneurial, in an unencumbered manner. Laying out the ground rules, upfront, to establish clear and indisputable ownership of any intellectual property

emerging out of the research project is of paramount significance. Such rules will act as a blueprint for both the parties involved, and thereby minimize transaction costs, reduce the number of decision points, and hasten decision-making whenever required. Needless to say, a rule-based review process will help both the parties in achieving transparency and equity while protecting each other's disparate interests.

While inventorship is based on the inventive contributions of individuals to an invention, ownership is negotiable and mutually determined by the contracting parties. The ownership of intellectual property in a sponsored research project could manifest in two ways:

i) Inventorship directly corresponds to ownership: If an invention involves inventor A from organization X and inventor B from organization Y, then both X and Y are equal owners of the invention unless agreed upon otherwise through an agreement prior to a patent filing. Such an agreement could be based along the lines of the model Joint Invention Administration Agreement (JIAA) developed by The Massachusetts Association of Technology Transfer Offices.²⁰ The JIAA covers all the issues pertaining to inventions jointly owned by not-for-profit institutions.

ii) Inventorship does not directly correspond to ownership: If an invention involves inventor A from organization X and inventor B from organization Y, one of the two scenarios of ownership is possible: i) X and Y are joint owners; and ii) either X or Y assigns its rights to the invention to the other party, which then becomes the sole owner of the invention.

5. IP Administration and Management

The administration and management of IP assets primarily refers to patent filings and managing related expenses. In the context of a sponsored research project, this responsibility is typically shouldered by the research institution while the costs are reimbursed by the sponsor. The scope and content of the patent application(s) is usually determined by the research institution in consultation with the sponsor. Such an arrangement facilitates efficient management of paperwork pertaining to patent filings.

Sample clause:

- *“Sponsor may, at any time, request University to file a patent application on University IP or Joint IP.*
 - o *If such a request is made, Sponsor agrees to reimburse University for all patent costs.*
 - o *Sponsor has the right to review all filings and office actions related to the patent applications, provided, however, that in an emergency when immediate action is needed to protect University IP or Joint IP, documents may be filed prior to review by the Sponsor and in such event, telephone or facsimile notice shall be given promptly by University or University's counsel of such action.*
 - o *University will use reasonable efforts to avoid emergency situations in cases where they have control over the timing of steps involved in protecting University IP or Joint IP.”¹⁵*

6. Commercialization Rights

What does Sponsor gain?	What does Research Institution gain?
First in line to negotiate commercialization rights to inventions created during the course of the project	Commercialization revenues and societal recognition

The primary motivation of a sponsor in funding a research project at a non-profit research institution is to gain “first access” to inventions, which could potentially revolutionize the marketplace. On the other hand, the creation of exciting inventions from such sponsored projects lends credibility and prestige to the research institution. Given the foregoing dynamics, it is imperative that the sponsor be granted a fair opportunity to commercially advance the outcomes of the project while the research institution gets to associate its brand with the deliverables of the project. Therefore, it is essential for the research institution to foresee the challenges, which could potentially delay the commercialization of findings emanating from a sponsored research project. For instance, the NIH (USA) has noted that an industry-sponsored project involving a broad scope would result in a situation wherein a wide array of the research outcomes could be licensed to a single sponsor (under the terms of the sponsored research agreement). Consequently, other organizations from the industry would be effectively precluded from gaining access to the technology.²¹ Also, the sponsor might lack the ability and facility to realize the commercialization of the research outcomes. It has been suggested that a sponsor might request one or more of the following types of commercialization rights to the research institution: i) “time-limited evaluation license” spanning 3-9 months to evaluate the intellectual property (IP) developed during the course of the sponsored

research project; ii) "internal use license" to the sponsor for using the developed IP for internal research purposes only; and iii) option rights to negotiate either an exclusive or non-exclusive royalty-bearing, time-limited license with the research institution for the IP developed during the project.²²

We discuss hereunder, three possible commercialization pathways for the outcomes of an industry-sponsored research project: i) option; ii) license; and iii) assignment.

i) Option

Typically, a research institution would grant the sponsor *the right of first refusal* to any inventions created during the performance of the sponsored research project. In other words, the research institution will first offer the sponsor, before approaching any other party(ies), the right to commercialize the inventions coming out of the research project. The sponsor is offered such a privilege in consideration of its funding for the project. In this regard, the sponsor may be granted an evaluation period over the range of 30-365 days ("option period" or "first right period"¹⁹) to assess the commercial viability of the invention(s). Prior to the expiration of the option period, the sponsor will need to enter into an appropriate technology transfer agreement (typically, license) with the research institution. However, if the sponsor would like to pass up the right to use such an option, then the research institution shall be free to market the invention to other potential clients without any ongoing or future obligations to the sponsor, financial or otherwise.

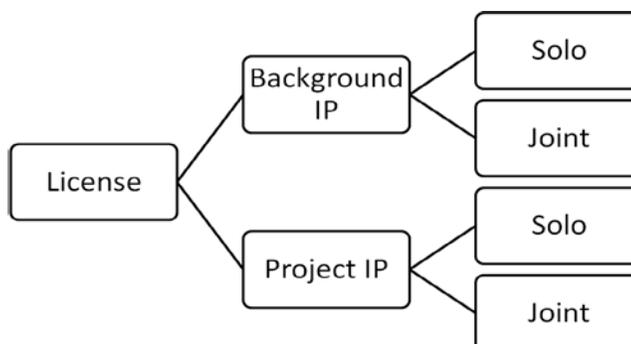
Sample clauses:

- *"Sponsor shall have a time-limited first right to negotiate a license to University Intellectual Property or to University's rights in Joint Intellectual Property. Sponsor's right shall commence the date Sponsor is notified by CCTEC in writing of a University Intellectual Property or a Joint Intellectual Property and shall expire six months thereafter ("First Right Period"). Any time during the First Right Period, Sponsor may notify CCTEC in writing its intent to secure a license, which may be exclusive or non-exclusive and for commercial or non-commercial use of the Project Intellectual Property in any fields of use and in any territory where Sponsor has an interest to commercialize the Project Intellectual Property. CCTEC shall negotiate in good faith with Sponsor upon Sponsor's notification during the First Right Period. If after the expiration of the First Right Period and no license results, University shall have no further obligation to Sponsor for the Project Intellectual Property."*¹⁹
- *"SPONSOR is hereby granted, without option fee other than the consideration of the research sponsored herein and the reimbursement of DUKE for all patent expenses incurred to the date of disclosure related to the INVENTION, an option to acquire an exclusive, worldwide, royalty-bearing license of DUKE'S rights to any INVENTION, which option shall extend for 30 days after SPONSOR'S receipt of an INVENTION disclosure. If SPONSOR notifies DUKE in writing of its exercise of the option within the option period, then the parties will proceed in good faith to negotiate a license agreement within 60 days after notification of exercise; and if SPONSOR does not exercise this option, or notifies DUKE that it will not exercise this option, or the parties fail to sign a license agreement within said 60 day negotiation period, then SPONSOR shall no longer own any rights in the subject INVENTION."*²³

ii) License

Assuming a favorable evaluation of the technology by the sponsor during the option period, a license usually follows. That said, it is quite likely that a sponsor may choose to bypass the "option" route and straightaway negotiate a license, if the technology holds tremendous market potential and the technology readiness level is considerably high.

Figure 3: Schematic showing possibilities of IP Ownership.



The sponsor may negotiate either an exclusive or a non-exclusive license agreement with the research institution for any and all of the inventions originating from the sponsored research project. The sponsor may also express interest in licensing any relevant background IP either solely owned or co-owned by the research institution. This happens if the sponsor determines that the background IP is essential for the development of a saleable product. As shown in **Figure 3**, the intellectual property assets of a research institution can be categorized into two buckets: a) background IP; and b) project IP. Background IP refers to the intellectual property owned by the research institution prior to the effective date of commencement of the sponsored research project. Such IP may be either solely or jointly owned. Examples of joint ownership of background IP include: i) co-ownership between the research institution and either a not-for-profit or for-profit entity; and ii) co-ownership between the research institution and sponsor through a previous collaboration. Project IP exclusively refers to the intellectual property created during the performance of the sponsored research project. Again, such IP may be either solely or jointly owned. Most commonly, the owners in the joint inventions are the research institution and sponsor, unless third parties get involved during the conception of the inventions.

In the case of an exclusive license agreement with a sponsor, the research institution will usually retain a non-exclusive license to make use of the subject inventions for internal, non-commercial research purposes only. This corollary is crucial in keeping with the research mission of universities and non-profit organizations. In countries such as the USA, license agreements would also delineate the march-in rights of the government ("Third Party Rights") if federal funding was utilized to create the inventions being licensed. This is a direct consequence of the Bayh-Dole Act enacted on December 12, 1980.²⁴ It is important to honestly highlight such third party rights in a license agreement. As mentioned above, another instance wherein a third party might get involved is when the sponsor expresses interest to license the research institution's background IP, which might be jointly owned with another party.

Sample clause:

- *"For each MIT Invention on which a patent application is filed by MIT, MIT hereby grants the Sponsor a non-exclusive, non-transferable, royalty-free license for internal research purposes. The Sponsor shall further be entitled to elect one of the following alternatives by notice in writing to MIT within six (6) months after MIT's notification to the Sponsor that a patent application has been filed:*
 1. *a non-exclusive, non-transferable, world-wide, royalty-free license (in a designated field of use, where appropriate) to the Sponsor, without the right to sublicense, in the United States and/or any foreign country elected by the Sponsor pursuant to Section 11.C. below, to make, have made, use, lease, sell and import products embodying or produced through the use of such invention, provided that the Sponsor agrees to demonstrate reasonable efforts to commercialize the technology in the public interest and reimburse MIT for the costs of patent prosecution and maintenance in the United States and any elected foreign country; or*
 2. *a royalty-bearing, limited-term, exclusive license (subject to third party rights, if any, and in a designated field of use, where appropriate) to the Sponsor, including the right to sublicense, in the United States and/or any foreign country elected by the Sponsor pursuant to Section 11.C. below, to make, have made, use, lease, sell and import products embodying or produced through the use of such invention. This option to elect an exclusive license is subject to MIT's concurrence and the negotiation of commercially reasonable license terms and conditions and conditioned upon Sponsor's agreement to reimburse MIT for the costs of patent prosecution and maintenance in the United States and any elected foreign country and to cause any products produced pursuant to this license that will be used or sold in the United States to be substantially manufactured in the United States. If the Sponsor and MIT do not enter into a license agreement within three (3) months after the Sponsor's election to proceed under paragraph 11.B.1. or 11.B.2. above, the Sponsor's rights under paragraphs 11.B.1. and 11.B.2. will expire."²⁵*

iii) Assignment

An assignment of rights implies a change of ownership. In the event that a sponsor provides 100% of the funds for a research project, a research institution could choose to assign its rights in any intellectual property, generated during the performance of the project, to the sponsor in consideration of its funding. Such assignments are generally subject to institutional regulations and national policies. In countries such as the USA, the assignment of intellectual property rights to the sponsor is generally discouraged.

CONCLUSION

Sponsored research projects strengthen and expand industry-academia partnerships. Since intellectual property is the foundation of such projects, a handful of terms that address the intellectual property related aspects of the partnership are inevitable in contracts delineating the sponsorship. While drafting intellectual property related clauses, it is important to weigh in on the symbiotic nature of the industry-academia collaboration. This can be achieved by balancing the for-profit interests of the industry with the research mission of academia. Both parties can prevent the triggering of disputes by maintaining transparent communication with each other and adhering to the mutually agreed upon reporting requirements.

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