

15.1 General Principles

The faculty and the administration of Kettering University recognize the desirability of having a clear and comprehensive intellectual property policy that relates to the faculty. To that end, the faculty (represented by the Faculty Senate) and the administration have developed this balanced intellectual property policy (herein referred to as IPP).

The IPP imposes balanced duties on faculty, students and Kettering University. It is expected that the employee handbook will contain an intellectual property policy for staff that is similar to the IPP. All of Kettering University's community should be familiar with the IPP and their duties under the IPP.

This intellectual property policy deals mostly, but not exclusively, with the ownership of intellectual property (IP) created by faculty and students of Kettering University. The primary purpose of the IPP is to deal with the financial interests of all parties. A secondary purpose is to facilitate giving credit and recognition to authors and inventors for their works and inventions. The IPP establishes procedures and processes for the determination of ownership of IP, and for the apportionment of costs and benefits attendant to the exploitation of IP.

Kettering University is a teaching institution. It is fundamental to the educational mission of the University that the creation of IP associated with teaching take place and be encouraged. The IPP places with the author the ownership of certain copyrightable instructional materials used at Kettering University, but with some exceptions found in section 5.5.

Kettering University also encourages professional development, research, consultation, developing new knowledge, and the dissemination of known and new knowledge. Such activities might result in new and useful devices, processes, software, or substances that might have commercial value. A part of the IPP deals with works or inventions having commercial value. The IPP is intended to foster creativity while protecting the legitimate rights of all parties.

The structure of the IPP is intended to allow a user easily to find the section or sections applicable to the user's situation. It is also a goal of the IPP to minimize uncertainty.

5.2 Administration of the IPP

Administration of the IPP is the responsibility of the Provost & Vice President for Academic Affairs.

The Provost will designate an office to manage the IPP. That office may be the Provost's office. Wherever located, that office will be called the Intellectual Property Office (IPO).

An Intellectual Property Policy Advisory Board (IPPAB) shall be established in accordance with policy established by the Faculty Senate. Except in the case of appeals (see 5.11), the IPPAB will report to the Provost through the IPO.

The IPO is intended to be the office that manages intellectual property at Kettering University, and the IPPAB is intended to be the body that assists the IPO.

5.2.1 Duties of the IPO - the office that manages IP at Kettering University

The duties of the IPO include:

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1. Seeking permission to use copyrighted materials as part of instruction when requested to do so by a faculty member;
2. Registering copyrights in works owned at least in part by Kettering University;
3. Registering trademarks or service marks owned by Kettering University and maintaining their validity;
4. Receiving the disclosures discussed in section 5.6. and 5.8 if they are proffered;
5. Receiving the reservations required by section 5.8;
6. Receiving copies of published works;
7. Receiving disclosure statements required by section 5.9, promptly deciding (with the assistance of the IPPAB) if Kettering University is to exploit the disclosed IP, ceding the IP to the inventors or authors if the IP is not to be exploited by Kettering University, and apportioning costs and benefits attendant to the exploitation of the IP if the IP is to be exploited by Kettering University;
8. Endeavoring to patent inventions owned at least in part by Kettering University when appropriate – (this is called “prosecuting a patent”);
9. Paying maintenance fees attendant to any patents issued to Kettering University as is appropriate;
10. Assisting with and monitoring the process that Kettering University effects to inform and educate the Kettering University community about IP, including keeping a log of such activities and retaining examples of any written materials used;
11. Negotiating contracts between faculty or staff and Kettering University or third parties when IP is involved or is expected to be involved;
12. Negotiating contracts between Kettering University and third parties when IP is involved or is expected to be involved;
13. Coordinating with Human Resources and other affected departments about any IP issues connected to the separation or absence of a faculty member from Kettering University; and
14. Determining when IP results from the use of more than usual or customary Kettering University facilities or resources, or when IP results from a specific assignment.

5.2.2 Duties of the IPPAB - the body that assists the IPO

The duties of the IPPAB include:

1. Assisting the IPO in resolving other-than-routine IP issues;
2. Assisting the IPO in interpreting the IPP;
3. Assisting the IPO in evaluating inventions or software for commercial viability;
4. Assisting the IPO in adjudicating disputes; and
5. Assisting the IPO in being the trier of facts in appeals from a determination by the IPO.

5.2.3 Duties of Faculty

Should IP result from a contract or from a specific assignment by Kettering University, its agent, or a third party, the terms of that contract or specific assignment will be binding. Absent a relevant

contract or specific assignment, duties are partitioned in the following sections by type of IP and by status:

1. Faculty are expected to reserve the right for use at Kettering University of any published works.
2. Faculty are prohibited from competing with Kettering University's educational activities. Their works will not be used, nor allowed to be used by others, in a way that competes with Kettering University's educational activities without prior written approval by the Provost.
3. When crafting works, faculty must limit their use of others' works to avoid violating fair-use principles. To that end, faculty must continually review works they craft, and they are encouraged to have colleagues assist in the task. Violation of fair-use principles constitutes unacceptable conduct.
4. Intentional violation of the IPP constitutes unacceptable conduct.

5.3 Effects of a contract or of federally funded research

If a person is subject to a contract (excluding an employment contract with Kettering University) and that contract implicitly or explicitly touches on a person inventing or creating works, then that contract supersedes the Intellectual Property Policy to the extent needed to fulfill the contract. (See sections 5.2.3 and 5.4.6)

Inventions that result from federally funded research will be dealt with according to the Bayh-Dole Act of 1980 (PL 96-517, PL 106-404) found codified in 35 USC 200 to 212 and in the Act's regulations found in 45 CFR 650.1 *et seq.* The IPPAB may be asked for advice regarding whether such inventions should be retained by Kettering University and how Kettering University should treat such inventions. Any income resulting from inventions retained by Kettering University under the Bayh-Dole Act will be dealt with in a manner that is consistent with the Act, and, to the extent possible, consistent with section 5.9 of this Handbook.

Work that involves security clearances must be performed under contract and is thus outside of the IPP. Therefore, disclosures required under the IPP should not involve security clearances.

5.4 Types of IP and definitions

Many types of IP exist. The Kettering University community is most likely to be interested in works that are copyrightable and inventions that might be either patentable or otherwise valuable.

5.4.1 Copyright

Article 1 of the United States Constitution provides the authority for law involving copyright. The copyright law statutes are found in 17 USC 100 *et seq.*, and the attendant regulations are found in 37 CFR 200 *et seq.* Copyrights are registered by the Registrar of Copyrights, a part of the Library of Congress. Presently, a new copyright registration by an author or by authors remains effective for 70 years after the death of the last dying author. However, if the work is a work-for-hire, the copyright usually remains effective for 95 years after the first publication of the work.

Copyright is literally that: the right to control copying of a work. That right exists as soon as the work is created and is fixed in a non-transient form. Registration of a copyright is required for certain damages, and is a way to prove when and by whom a work was authored. Registration requires a relatively small fee and exemplars.

5.4.2 Patents

Article 1 of the United States Constitution provides the authority for law involving patents. The patent law statutes are found in 35 USC 1 *et seq.*, and the attendant regulations are found in 37 CFR 1 *et seq.* After a successful prosecution, patents are granted by the United States Patent & Trademark Office (PTO). Presently, issued patents may remain in force for 20 years from the date an application is filed, if periodic maintenance payments are made. (Prosecution is the name of the complex process of applying for a patent.)

A patent is the right to prevent others from making or using a patented item or process. Prosecuting a patent application is an expensive, lengthy, and uncertain task. Not all patentable inventions have enough commercial value to warrant being prosecuted. However, some inventors wish to prosecute patents for their inventions because of noncommercial or other intangible reasons.

It is important to be aware that a prosecution of a patent must start in the United States within 12 months of a public disclosure, public use, or offer to sell. In most other countries, no public disclosure is allowed before filing an application for patent protection. Therefore, if public disclosure occurs too soon or if prosecution is not undertaken in time, patent rights may be entirely precluded!

5.4.3 Software

Computer programs (with or without associated hardware) constitute a class of IP (collectively: "software") that can receive aspects of copyright protection, patent protection, or both. Software could have value in multiple markets, including education.

5.4.4 Trademarks and Service Marks

The United States Constitution is silent about the ancient right to mark goods and services with an indication of their origin. Therefore, federal statutes dealing with trademarks and service marks (collectively "marks") derive their authority from the Commerce Clause of Article 1, and the individual states may, and usually do, have their own trademark and service mark statutes.

Policies dealing with the use of marks owned by Kettering University, their sponsors, and others will be adhered to.

5.4.5 Use of usual or customary Kettering University facilities

"Usual or customary Kettering University facilities or resources," or the like, is a term that is used in University policies, including this handbook. For each individual faculty member, "usual or customary Kettering University facilities or resources" are those routinely or commonly provided or made available to similarly situated persons. Such facilities include: (1) the usual use of provided office equipment, (2) ordinary use of one's office, (3) ordinary use of the library and the University's computer facilities, and (4) limited use of support staff and supplies. Such facilities also include the use of the University's video facilities to produce a small number of recordings to be used in an undergraduate course taught by the faculty member who produces the recordings. Conversely, if the use incurs an appreciable or unexpected expense, it is not a "usual or customary Kettering University facility or resource."

"Similarly situated persons" is a term indicating that the person's department and function affects what constitutes "usual or customary Kettering University facilities or resources." For example, a faculty member in the Mechanical Engineering Department will have available a different set of usual facilities and resources than those available to a faculty member in the Department of Liberal Studies or a faculty member in the Electrical & Computer Engineering Department. Kettering

University facilities that are not routinely or commonly provided or made available to similarly situated persons are not "usual or customary Kettering University facilities or resources."

5.4.6 Specific Assignments

Specific assignments are considered to involve other than the use of usual or customary Kettering University facilities. A specific assignment not including a specific contract that deals with the IP produced will default to being dealt with under section 5.9. Faculty are encouraged only to accept specific assignments that include a specific contract.

The University appears not to have a policy that provides a clear demarcation between customary or ordinary faculty assignments and extraordinary, specific assignments. Customary faculty assignments include teaching courses that have been approved by a department, approved by a University-wide curriculum committee, approved by the Faculty Senate, placed in the Catalog, and that are controlled by the Provost and his staff. Clearly, some faculty are assigned to perform tasks that are not customary faculty assignments and they sometimes receive supplemental compensation for performing those tasks. The IP attendant to specific assignments belongs to the University, absent a contrary contract.

Indicia of specific assignments include, but are not limited to, being assigned to:

- ?? teach a course other than on the Flint campus;
- ?? teach a course that has not been approved by the Faculty Senate or that is not controlled by the Provost;
- ?? teach a course where lectures (or the like) are recorded and where the recordings are performed for students other than those attending the recorded lecture; or
- ?? perform a non-teaching task other than as a member of a licensed profession.

Receiving supplemental compensation (other than overload pay) could be an indicator of performing a specific assignment.

Specific assignment does not include making recordings described in 5.4.5. Specific assignment does not include crafting materials that are provided to students enrolled in a face-to-face class held on the Flint campus even if a production charge is made for the materials.

IP issues attendant to a possible specific assignment disappear if a faculty member involved with a possible specific assignment enters into a contract that includes a clause that deals with IP.

5.4.7 Faculty

As used in the IPP, faculty include staff members who provide instruction.

5.4.8 University

As used in the IPP, references to KU or to the University are references to Kettering University.

5.4.9 Works used at Kettering University

As used in the IPP, the phrase "works used at Kettering University" includes past, present, and future use of works. The phrase is one of limitation. "Instructional materials and scholarly works used at Kettering University" is a noun.

5.4.1.0 Inventor or author - he or she

Where such terms are used they will be understood to include multiple persons when appropriate. In keeping with English usage, "he" (or the like) includes "she" (or the like).

5.5 Ownership of copyrightable instructional materials used at Kettering University - Limitations

Subject to the limitations of this section, the duties of Section 5.2, and in the absence of a specific contract covering a work, the University cedes ownership to the creating faculty member of the copyright in instructional materials and scholarly works used at Kettering University that are created by a faculty member at their own initiative with usual University resources. Instructional materials include those used in face-to-face instruction. Works referred to in the following are copyrightable works that have been, are, or will be used at Kettering University.

1. Ownership of works directly related to accreditation remains with the University. University ownership extends to the copyright in such works and to the related work product.
2. Ownership of all works directly related to the publishing of the University's catalog remains with the University. This includes course descriptions.
3. Ownership of works produced by faculty committees remains with the University. This handbook and the published minutes of the Faculty Senate are examples of this type of work. "Works produced" does not include communications between committee members or the like.
4. Ownership of works produced with other than usual or customary Kettering University facilities or resources remains with the University absent a specific contract indicating other conditions.
5. Ownership of works needed for continuity of instruction, such as when an instructor is absent, will remain with the University until the need ceases.

5.6 Ownership of other than instructional or scholarly copyrightable works used at Kettering University that are produced with no more than usual University facilities - duties

If a faculty member uses no more than usual University facilities to author a copyrightable work that is not used at Kettering University, then that faculty member is the owner of the work. However, the University reserves the right to recover actual, provable damages that result from assertion of such ownership (as by filing a copyright registration or by publishing) if more than usual University facilities were used or injury to the University results. Absent fraud, recovery of damages is precluded if, prior to the assertion of ownership, the faculty member truthfully discloses the nature of the work to the IPO and describes the facilities used in its authoring. Because such a work might be used someday at Kettering University, authors are expected to reserve the right of Kettering University to use and copy the work royalty-free for Kettering University's educational purposes. Authors are encouraged to provide the IPO with a copy of any published work in order to facilitate credit.

5.7 Ownership of works, inventions, and software produced with trivial or no use of University facilities

If a faculty member uses essentially only his or her own resources and facilities to invent or to author IP, then that faculty member is the owner of the resultant IP. A person availing themselves of this section may be required by the IPO, if probable cause of fraud is found, to prove that he or she used only his or her own resources and facilities to invent or author the subject IP.

5.8 Ownership of inventions or software produced with usual University facilities - duties and shop-right

If a faculty member uses essentially only usual University facilities to produce inventions or software, that faculty member is the owner of the IP if that faculty member reserves to Kettering University the right to use the IP at Kettering University royalty-free. That reservation must be provided to the IPO. Additionally, the University reserves the right to recover actual, provable damages that result from assertion of such ownership (as by filing a copyright registration or a patent application, or by publishing) if more than usual University facilities were used or injury to the University results. Absent fraud, recovery of damages is precluded if, prior to the assertion of ownership, the faculty member truthfully discloses details of the IP to the IPO and describes the facilities used in its production.

5.9 Ownership and apportionment of inventions, software, or copyrightable works not included in 5.5, 5.6, or 5.7 that are invented or authored with the use of more than usual University facilities

IP in this category is owned by Kettering University. This IP should be disclosed in detail to the IPO as early as possible and must include the names of all involved persons. It is expected that a sequence of disclosures will be made as the IP is developed and enhanced.

Mindful that the dual roles of the results of research are: (1) enhanced status accruing to the University in most cases of published IP and (2) income to the University in the case of some IP, it is incumbent on the inventor or author and the University reasonably to accommodate both roles. Early publishing of IP can reduce or eliminate potential future income from the published IP. Such publishing can enhance the University's status and chances for future outside support for research by more than the potential lost income. Balancing the roles requires prompt action. An inventor or author who files a request to publish part or all of IP that has been (or is being) disclosed to the IPO has permission to publish same unless a detailed denial is provided to the inventor or author within 10 working days. If a detailed denial is issued, the appeal process of section 5.11 applies. It is expected that each request to publish will provide a justification for why publication is preferred over possible exploitation as described in the following and that each request will note where publication is expected.

When the IP is sufficiently developed, the IPO, with the assistance of the IPPAB, will determine if the IP has commercial viability. If the IP does have commercial viability, the IPO will determine the likelihood of profiting from exploiting the IP. After those determinations, the IPO may select from the following actions:

1. The IPO may assign all of Kettering University's rights, except for the right to use the IP at Kettering University, to the inventor or author.
2. The IPO may require the inventor or author to assign all or part of his or her rights to Kettering University and proceed with the exploitation of the IP. The first \$20,000 of any resulting net income (definition of net income follows) will be distributed to the Office of the Provost for funding research and as a contribution to overhead or burden. Additional net income, if any, will be distributed as follows:
 - ?? one quarter to the Office of the Provost for funding research;
 - ?? one quarter to Kettering University's general fund; and
 - ?? one half to the inventor or author as self-employed income; if there are a plurality of inventors or authors, the income will be distributed according to their mutual contract or by assessment of contribution as determined by IPO when distribution is not provided for in a mutual contract.

Net income is income that exceeds the direct costs of patenting, copyrighting, or otherwise exploiting the IP. Direct costs are only costs paid to entities outside of Kettering University and include no overhead or burden.

3. The IPO may negotiate with the inventor or author to have the inventor or author substitute for Kettering University in the exploitation of all or part of the IP with a negotiated apportionment of costs and any income. A division of exploitation by countries where exploitation takes place might be desirable.

5.10 Student works, inventions, or software

5.10.1 Kettering University owns the copyright to works, including software, authored by students as the result of assignments by faculty, and that use no more than usual Kettering University facilities. However, that right is ceded to a student author, subject to the following:

1. Kettering University retains the right to keep a copy of such works, the right to compare such works with the works of others, and the right to assign the right to compare such works with the works of others.
2. Kettering University retains the right to keep a copy of such works as exemplars for evaluation of a course or its instruction, or for accreditation purposes.
3. Kettering University retains the right to copy theses to preserve or archive same. Kettering University retains the right to control the viewing of non-confidential theses.

5.10.2 Students who invent with trivial or no use of University facilities while attending Kettering University are encouraged to disclose confidentially the nature of the invention to the IPO and to describe the personal or Kettering University facilities used.

5.10.3 Students who invent using essentially only usual University facilities while attending Kettering University are subject to section 5.8 with the substitution of "student" for "faculty member."

5.10.4 Unless the provisions of section 5.3 apply, inventions, software, or copyrightable works that are invented or authored by a student with the use of more than usual University facilities will be treated in the manner specified in section 5.9. More than usual University facilities are used when

inventions, software, or copyrightable works are produced using University facilities in the course of work by a student paid by or through Kettering University.

5.11 Appeals

Persons who wish to appeal a determination by the IPO must present a written request for review to the IPPAB and to the IPO within two weeks of receiving such a determination. The request must include a detailed allegation of facts supporting a change in the determination of the IPO. The IPPAB will investigate the alleged facts as appropriate. The IPPAB will then schedule a meeting as trier of facts to hear from the requestor and the IPO. The IPPAB will prepare a report including what the IPPAB believes are the pertinent facts and present the report to the Provost. The Provost will then determine whether to overrule the determination of the IPO.

5.12 The use of copyrighted works of others in face-to-face instruction

The law allows the qualified use of copyrighted works in face-to-face instruction, scholarship, or research under the doctrine of “fair use.” The statutory basis for fair use is found in 17 USC 107. The following quotation from the statute must be kept in mind:

“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

The first factor favors fair use of another's work at Kettering University as a necessary part of face-to-face instruction. However, a use that impacts the other three factors could negate fair use. Faculty have a specific duty expressed in 5.2.3 to avoid the use of considerable portions of a work. Faculty must not make such extensive use of a work that it diminishes the work's market value. When a contemplated use of another's work appears adverse to the last three factors, faculty members must seek permission from the copyright holder (with the assistance of the IPO) for that use.

5.13 The use of copyrighted works of others in distance learning – Distance Learning Policy

With the goal of availing Kettering University of the benefits of the 2002 TEACH Act (Public Law 107-273; TITLE III; Subtitle C; herein called The Act), mindful that Kettering University is a qualified institution as defined by The Act, the Faculty Senate:

1. Requests that the Administration verify that policies exist regarding copyright that promote compliance with the laws of the United States relating to copyright;

2. Requests that the Administration provide at least once a year informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright including a prohibition of conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or unauthorized further dissemination of works used in distance learning;
3. Requests that the Administration (1) provide distance learning teachers with technological measures that reasonably allow only actual enrolled students to use distance learning materials; (2) provide distance learning teachers with technological measures that reasonably prevent retention of works used in distance learning in accessible form by student recipients for longer than a class session; and (3) provide distance learning teachers with technological measures that reasonably prevent unauthorized further dissemination of works in accessible form by such recipients to others; and
4. Establishes as policy that faculty who use copyrighted materials (without having obtained permission from the copyright holder) in electronic formats as part of distance learning do so only under these conditions:
 - a. The materials must be an integral part of the curriculum of an actual Kettering University course.
 - b. The materials must be specifically delineated by the course instructor.
 - c. The quantity of material provided must be comparable to that typically displayed in a live classroom session under established fair use standards.
 - d. Faculty must communicate to students that the materials may be subject to copyright protection and that students are not to make copies of the materials nor to permit others to use the materials.
 - e. Faculty must use technological measures provided by the Administration to have materials available only to actual enrolled students and only for a period of time commensurate with a class session.
 - f. Faculty shall not use the works of others that were specifically created for use as distance learning materials; shall not use works that the faculty member knows, or has reason to believe, are not lawfully made; and shall not convert works from analog to digital form unless no digital version of the work is available, or the digital version employs technological protection measures that prevent its use.

5.14 New IP

New IP or ways of using IP will appear in the future. The closest fit to existing sections of the IPP should be used until the IPP is modified to accommodate the new IP or way of using IP.