(Intellectual property at the UT – Oct 2016, document written by Examination Boards BMS in cooperation with Mr. Van der Zandt and Mr. Van Roosmalen)

How to deal with intellectual property rights within the University of Twente?

Intellectual property is the collective name for rights to intellectual creations, such as texts, software and inventions. Intellectual property is protected through laws such as copyright and patent law.

The focus in this document is on copyright law and patent law, which are the most relevant forms of intellectual property protection for our work within the University of Twente.

Copyright law

Article 1 of the Copyright Law 1912 defines copyright as follows:

"Copyright is the exclusive right of the creator of a work of literature, science or art, or his successors in title, to publish and reproduce this work, subject to limitations laid down by the law."

Examples are PhD theses, (graphic) designs, geographical maps, apps and software.

Importantly, a work must meet three general conditions in order to qualify for protection under copyright law: it must have an original (creative) character, it must be perceptible by the senses and it should not be significantly determined by an achievable technical effect.

In the first instance, the copyright to such a work goes to the creator, starting from the moment that he or she created the work .[1] The copyright, however, need not always remain in the creator's hands. The right can be transferred to someone else, for instance if the creator sells his or her copyright.

The holder of a copyright to a work possesses two exclusive rights: the exclusive right to publish the work and the exclusive right to reproduce the work. This means that no party other than the copyright holder can simply decide of his or her own accord to publish and/or reproduce the protected work. This requires the prior permission from the copyright holder, i.e. the person who has exclusive control over the work.

In addition to the abovementioned commercial usage rights, each creator of a work acquires certain personality rights. These rights, also known as 'moral rights', cannot pass into the hands of someone else and therefore remain with the creator, even if the creator sells his or her copyright (i.e. the publication and reproduction rights) to another party.

Copyright to a work created in employment

If a work has been created in employment and the creator was appointed or commissioned to create that work, the employer is deemed to be the creator and, as such, the copyright holder of that work.[2]

Copyright to an academic/scientific publication

However, in the case of an academic publication created in the employment of a university, such as a PhD thesis or scientific article, the copyright rests with the creator and not with the employer (the university).

Copyright to works made for educational purposes

The copyright to educational materials created in the employment of a university rests with the employer (the university).

Copyright to a work made under the direction and supervision of another person

If the work was created according to the design of another person and under his/her direction and supervision, the copyright rests with that other person.[3]

Copyright to a graduation report or thesis

The copyright to a graduation report rests with the graduating student, and not with the institution where he/she is graduating or his supervisor or, unless specifically agreed otherwise, the company where the research was performed. In the case of reports resulting from research performed at a company, it is important to make clear prior arrangements about who will become the copyright holder.

Copyright to a work made in a team

If the individual contributions can be clearly separated, each creator holds the copyright to his or her contribution. If the contributions cannot be clearly separated, the creators receive the joint copyright to the entire work.

Patent law

A "patent" is an exclusive right to an invention so that you can forbid another party to use the invention for commercial purposes in a certain jurisdiction during a specified period of time. A patent protects your invention of a technical product or process. The holder of a patent can forbid another party to copy, sell or distribute that invention – even if that other party has also invented the product or process entirely independently. The validity of a patent is always restricted to one or more countries and to a certain period of time. When the patent expires, everyone is free to use the technical product or process. To be eligible for patent protection, the technical invention must meet at least three material conditions.

A technical invention refers to a product or method in any technical or technological field. The material conditions are:

- **"novelty",** the product or process may not have been made public anywhere in the world before the date on which the patent application is submitted, not even by the inventor him/herself (e.g. in a company brochure or presentation at a trade exhibition);
- "**based on an inventive step** (**inventiveness)",** the invention must not be obvious to a professional expert; and
- **"industrial applicability",** the invention must concern a demonstrably functioning technical product or production process. In general, the person who makes an invention is entitled to apply for the patent (assuming that the invention is patentable). However, in some special circumstances this does not apply. For instance, the company where this person works may be entitled to apply for the patent or the inventor may have signed a contract surrendering his/her rights to another person or other party.

University of Twente Employees and Patent Law

Article 12, Section 3 of the State Patents Act reads as follows: *"If the invention has been made by a person carrying out research in the service of a university, university of applied sciences or research establishment, that university, university of applied sciences or research establishment shall be entitled to the patent."*

In addition, employees of the University of Twente are subject to the Collective Labour Agreement of the Dutch Universities ("CAO").[4] This CAO contains several provisions in relation to patent law and copyright law, notably:

Article 1.21 Section 1 CAO states that: *"An employee who, during or otherwise coinciding with the performance of his duties, creates a possibly patentable invention or, by means of plant selection work, isolates a new variety for which plant breeder's rights may be obtained, is obliged to report this in writing to the employer and must submit sufficient data to enable the employer to assess the nature of the invention or variety."*

Article 1.22 Section 1 CAO states: *"Without prejudice to the provisions in Article 12 of the State Patents Act, Bulletin of Acts & Decrees 1995, 51, Article 31 of the Seeds and Planting Materials Act, Bulletin of Acts & Decrees 1966, 455, and Article 7 of the Copyright Act, Bulletin of Acts & Decrees*

1912, 308, the employee, if and insofar he is entitled to other than moral rights to the invention, the variety or the work, for which the obligation to report in Article 1.21 exists, shall transfer these rights to the employer in whole or in part if so requested, in order to enable it to make use of them in the context of fulfilling its statutory duties within a term to be established later."

Article 1.23 Section 1 states: *"In the event the employer makes use of the rights transferred to it, the employee is entitled to fair reimbursement."*

This means in principle that an employee of the UT who makes an invention must inform the UT about this and that the UT is entitled to the rights to this invention.

Copyright

If a UT employee has created a work that is protected by copyright, such as designs, geographical maps, apps and software, and this employee was appointed or commissioned to create such works, the UT is regarded as the creator and therefore the copyright holder of that work.

Exceptions to the above are academic publications, such as PhD theses or scientific articles. The copyright to academic publications rests with the employee.

In the case of educational material made in the employment of the UT, the copyright rests with the UT.

Implementing Rules for UT Patents

A UT employee who suspects that he/she has made an invention with the aid of government, indirect or commercial funding, where the UT is owner or co-owner of the intellectual property rights to the results, is obliged to immediately report his/her invention to the UT Business Development Team and the Commercial Director of the research establishment to which the inventor belongs.

The income that the UT or Holding Technopolis Twente BV (the UT holding company) receives from the commercial usage of an invention made by a UT employee is divided as follows:

i. the costs paid from the Patent Fund and any costs paid by the relevant Chair for the application for the patent rights are deducted from the income payment. These amounts are credited to the Patent Fund and, if applicable, to the relevant Chair;

ii. any remaining income is divided as follows:

- 33⅓% for the individual inventor or joint inventors (to be shared as they see fit);
- 33⅓ % for the Chair to which the inventor(s) belong(s) for funding new research activities;
- 33⅓% for the Patent Fund.

This arrangement will, insofar as possible, be applied in the same manner to the commercial usage of copyright-protected works and/or know-how.

UT Students

UT students do not fall under the CAO. In principle, therefore, a student who creates an invention or copyright-protected work is entitled to the rights to that invention or the copyright to that work.

However, the State Patents Act 1995 does contain certain provisions regarding patent rights. Article 12 Section 2 State Patents Act 1995 states that: *"If the invention for which a patent application has been filed has been made by a person performing services for another party in the context of a training course, the party for whom the services are performed shall be entitled to the patent unless the invention has no connection with the subject of the services."*

This means, for instance, that if a student is working as an intern at a company and makes an invention that is connected with the subject of his/her activities as an intern, then the company where he/she is doing the internship is in principle entitled to the patent. This, however, also depends on the arrangements made in the internship agreement.

Student participation in UT-based or UT-assisted research

Students working on their Bachelor's or graduation assignment regularly take part in research that is carried out by or with the assistance of UT employees.

In virtually all cases, the UT concludes a research agreement for such research with the funders or co-funders of the research, such as funding bodies, government institutions or companies. This research agreement will normally contain provisions about intellectual property rights.

In cases where the UT undertakes in the research agreement to transfer its intellectual property rights to the research results, the UT must obviously be capable of transferring these rights. This is not a problem regarding rights to results generated by UT employees, but it is a problem regarding rights to results generated by UT students.

For this reason, before allowing a student to participate in UT-based or UT-assisted research, it is advisable to contractually agree with the student that he/she transfers all his or her rights to the results generated during the research to the UT. Where applicable, the UT can opt to pay this student a fee for transferring his/her rights to the results in the same way as with a UT employee (see UT Patent Rules). The UT has developed a model contract for this purpose.
[1] Article 4 Copyright Law; [2] Article 7 Copyright Law; [3] Article 6 Copyright Law.
http://wetten.overheid.nl/BWBR0001886/

[4] http://www.vsnu.nl/cao-universiteiten.html