

The State of Kansas Information Technology Executive Council

Information Technology Policy #1500

- 1.0 TITLE: Ownership of Software Code and Related Intellectual Property
 - 1.1 EFFECTIVE DATE: July 27, 2000, 2000 (As 8010)
 - 1.1.1 REVISED: Revised January 24, 2008
 - 1.2 TYPE OF ACTION: Update
- 2.0 PURPOSE: To establish a common, uniform policy for state entities regarding ownership and distribution of Software Code and related Intellectual Property developed by state employees or (contract) personnel, or contractors, on behalf of the state. To provide guidance for entities in their pursuit of this policy.
 - 2.1 Legal Advice Disclaimer–The information contained in this policy is for general guidance to support the policy. The application and impact of laws can vary widely based on the specific facts involved. Given the changing nature of laws, rules and regulations, there may be omissions or inaccuracies in information contained in this policy. Accordingly, the information in this policy is provided with the understanding the authors and publishers are not herein engaged in rendering legal advice and services. As such, the information should not be used as a substitute for consultation with professional legal advisers. Before implementing this policy, or pursuing any of these Intellectual Property approaches, always consult your agency's counsel.
- 3.0 ORGANIZATIONS AFFECTED: All divisions, departments and entities of the state, with exceptions identified below. Exempt entities should consider this policy's content when contracting with non-state entities.
 - 3.1 Kansas Regents' Institutions are exempt from this policy.
 - 3.2 America's Workforce Technologies Solutions (AWTS) AJLA-TS, formerly ESSI, of the Kansas Department of Commerce is exempt from this policy.
 - 3.3 The Information Network of Kansas (INK) is exempt from this policy.
- 4.0 REFERENCES:
 - 4.1 K.S.A. 2006 Supp. 75-7203 authorizes the Information Technology Executive Council (ITEC) to adopt information resource policies and procedures and provide direction and coordination for the application of the state's information technology resources for all state agencies.
 - 4.2 K.S.A. 45-221(A)(16) Public records not required to be disclosed.
 - 4.3 "An Intellectual Property Law Primer for Multimedia and Web Developers" Copyright 1996 by J. Dianne Brinson and Mark F. Radcliffe (<http://www.eff.org/pub/CAF/law/ip-primer>).
 - 4.4 United States Copyright Act (Title 17 United States Code).
 - 4.5 United States Patent Law (Title 35 United States Code).
 - 4.6 United States Trademark Law (Title 15 United States Code).
 - 4.7 State of Kansas ITEC Policy 1100 – Software Use and Licensing.
- 5.0 DEFINITIONS:
 - 5.1 Software Code - Programming statements created and saved in a file. Programming statements typically conform to the structure and syntax rules of a particular programming language. The definition includes derivative products, such as source code, object code, run time modules, etc.

- 5.2. Intellectual Property - An umbrella term for a variety of legal entitlements which attach to certain products of the human intellect, including copyrights (original works of authorship fixed in a tangible medium of expression) and patents (exclusive rights granted by the government for inventions that are useful, novel, and non obvious).
- 5.3 Copyright - Legal protection arises automatically when an original work of authorship is fixed in a tangible medium of expression. Registration with the United States Copyright Office is optional. However, registration is required before an infringement lawsuit may be filed. Registering timely makes the copyright owner eligible to receive attorney's fees and statutory damages in an infringement lawsuit.
- 5.4 Ownership of Software Code - Receiving compensation for Software Code and/or relinquishing rights to Software Code results in one of the following circumstances of ownership.
 - 5.4.1 Freeware (Sharing) - State relinquishes ownership, thus allowing other state entities, other states, or other public and private sector entities the use of the Software Code.
 - 5.4.2 Unrestricted License - State retains ownership but allows designated parties rights unrestricted use, distribution and modification rights with no expectation of compensation.
 - 5.4.3 Restricted License - State retains ownership and allows designated parties to use, distribute or modify software with specific permission and potential compensation to the state. Includes prior agreement on rate and distribution of licensing fees.
 - 5.4.4 Exclusive Ownership - State retains all rights of ownership. Includes right to sell Intellectual Property and thus relinquish ownership.

- 6.0 POLICY: This document establishes a common, uniform policy for all state entities regarding the protection of Software Code and related Intellectual Property developed by or for these entities. Chapter 45, Article 2 of the Kansas Statutes, "Public Records, Documents and Information -- Records Open to Public", describes certain records not required to be open. Specifically K.S.A. 2006 Supp. 45-221(a) provides a list of records public agencies shall not be required to disclose. Subpart (16) states, "Software programs for electronic data processing and documentation thereof, but each public agency shall maintain a register, open to the public, that describes: (A) The information which the agency maintains on computer facilities; and (B) the form in which the information can be made available using existing computer programs."

- 6.1 Unless explicitly covered in a Contract executed by an authorized state official, all computer Software Code and related Intellectual Property developed by state employees or (contract) personnel, or Contractors, on behalf of the state is the sole property of the state. The Software Code may not be distributed for sale or shared with other entities outside the state without authorization from the Chief Information Technology Officer (CITO) from the appropriate branch of state government. The CITO will report such authorizations to the Information Technology Executive Council (ITEC) on a quarterly basis.
- 6.2 Software Code and related Intellectual Property written by state employees, on non-state owned equipment, on behalf of the state is the property of the state, and all state ownership, copyright, security, and access policies and standards apply.
- 6.3 Contracts for programming services or computer personnel services shall clearly identify the state's position on ownership of the Software Code and related Intellectual Property.
- 6.4 When Software Code and related Intellectual Property is being shared, a disclaimer shall be attached to the Software Code and related Intellectual Property disavowing any responsibility for incidental or consequential damages, maintenance or upgrading of the Software Code and related Intellectual Property.

- 7.0 PROCEDURES:
 - 7.1 State entities shall publish and distribute the Ownership of Software Code and Related Intellectual Property policy to all IT managers and employees responsible for the development and maintenance of software, of the respective entity, within 30 days of adoption of this policy by ITEC.

- 7.2 State entities may not sell or share Software Code and related Intellectual Property unless the sale or sharing of the asset has been approved by the Branch CITO. The Branch CITO will report such authorizations to the ITEC on a quarterly basis.
- 7.3 State entities shall receive approval for the sale or sharing of software by first preparing a disclosure of intent to sell or share Software Code and Intellectual Property. This intent document shall be submitted to the CITO for the affected branch of government. The CITO must approve sale or sharing before any action is taken. If multiple branches of government are affected the CITO for each branch must be notified and approve the transaction. The affected state entity and the appropriate CITO must take into account any security ramifications, as well as restrictions and conditions applied to the software by the federal government.
- 7.4 State entities shall identify Software Code and Intellectual Property involved with mission critical applications, which if compromised could affect the entity's operation.
- 7.5 All transactions of Software Code and related Intellectual Property shall be documented. The documentation shall include provisions for ownership of Software Code and Intellectual Property and any limitations of use by acquiring parties.
- 7.6 When sharing Software Code and Intellectual Property with a source outside of a state entity, a disclaimer shall be attached specifying the state shall not be responsible for any incidental or consequential damages, maintenance or upkeep of the software by the state. (See Attachment A for disclaimer.)
- 7.7 When federal funding is involved, pursuant to 45CFR95.617(a), "the State or local government must include a clause in all procurement instruments that provides that the State or local government will have all ownership rights in software or modifications thereof and associated documentation designed, developed or installed with Federal financial participation under this subpart".
 - 7.7.1 GUIDANCE – Note that other provisions of 45CFR95.617 provide, "Federal license. The Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and to authorize others to use for Federal Government purposes, such software, modifications, and documentation."

8.0 RESPONSIBILITIES:

- 8.1 Heads of divisions, departments, agencies, boards, commissions, and other state entities, are responsible for establishing procedures to ensure their organization's compliance with the requirements of this policy. Before implementing this policy, or pursuing any of these Intellectual Property approaches, always consult your agency's counsel.
- 8.2 The Kansas Information Technology Office is responsible for the maintenance of this policy.

9.0 CANCELLATION: ITEC Policy 8010, Ownership of Software Code and Related Intellectual Property

ATTACHMENT A - Information Technology Policy #1500

Boilerplate Statement of Ownership for Software Code and Intellectual Property for procurement instruments and contracts where the state retains sole ownership (and the entity has not received approval from the CITO for use of shared ownership provisions):

1. All original software and Software Code and related Intellectual Property developed or created by the Contractor in the performance of its obligations under this Contract or any Task Order issued under this Contract, shall become the sole property of the state of Kansas. The Contractor will surrender all original written materials, including any reports, studies, designs, drawings, specifications, notes, documents, software and documentation, computer-based training modules, electronically or magnetically recorded material, used to develop this software and/or Software Code and related Intellectual Property to the state entity for which it was developed.
2. All rights inherent to property ownership, such as, but not limited to copyrights, trademarks, and patents shall be vested solely with the state.
3. The work product ownership provisions of any subcontract or any Task Order issued under this Contract shall be substantially similar to the provisions of this section.

Boilerplate Statement of Ownership and Disclaimer of Liability for Contracts, where Contractor and state share ownership (and the entity has received prior written approval from the CITO for use of shared ownership provisions):

1. All original written materials, including any reports, studies, designs, drawings, specifications, notes, documents, software and documentation, computer-based training modules, electronically or magnetically recorded material, not including Confidential Information as set forth in this Contract ("Materials") herein developed or created by Contractor in the performance of its obligations under this Contract or any Task Order issued under this Contract, shall belong to the state and Contractor, each having the right to use Materials in its business without any obligation to account to the other. The state agrees it shall not advertise or market the Materials. However, Contractor shall be free to sell, market, or transfer the materials outside of this Contract.
2. Nothing in this Contract shall preclude Contractor from developing for itself, or for others, Materials or Deliverables that are competitive with those products as a result of the Services provided under this Contract or any Task Order issued under this Contract. Contractor shall be free to use ideas, concepts, know-how, methodologies, techniques, and the like related to the scope of Contractor's consulting and used in providing its Services to Customer under this Contract or any Task Order issued pursuant to this Contract.
3. In the course of its performance under this Contract or any Task Order issued under this Contract, Contractor may use or deliver products, materials, or methodologies that are proprietary to Contractor or a third party. The state shall not have or obtain any rights in such proprietary products, materials, or methodologies except pursuant to a separate written agreement executed by the state and the Contractor.
4. Work product ownership provisions of any subcontract shall be substantially similar to the provisions of this section.
5. The state owns this Software Code and related Intellectual Property jointly with and is granting Contractor the free use of any and all parts of the software. Use of the software and its Software

Code and related Intellectual Property may be used as Contractor sees fit. This Software Code and related Intellectual Property may not be used to develop software or any derivative works that result in Kansas state government entities being charged compensation for the use of that software or related Intellectual Property or any derivative works.

6. The state is not responsible for any maintenance, upgrade, correct performance, error correction, enhancements, or adaptability of this software to Contractor's programs or processes. The use of this software is entirely Contractor's responsibility, including any maintenance, upgrades and adaptability. The state entity sharing this software may assist with adaptability provided that arrangements are made in advance for such assistance and for compensation of their time. In no event shall the state be liable to the Contractor or any third party for any incidental or consequential damages, including but not limited to indirect, special, punitive, or exemplary damages for loss of business, loss of profits, business interruption, loss of data, or loss of business information, that may arise from the use or implementation of this software in whole or in part, even if the Contractor or third party has been advised of the possibility of such damages.

NOTE: Entities may elect to draft additional language that describes arrangements where the state receives compensation for Software Code and related Intellectual Property or derivative works marketed by the contractor.