

Employees' Intellectual Property Rights in Switzerland

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Abstract

In today's knowledge-based global economy, most inventions are made by employed persons through their employers' research and development activities. However, methods of establishing rights over an employee's intellectual property assets are relatively uncertain in the absence of international solutions. Given that increasingly more businesses establish entities in different countries and more employees co-operate across borders, it becomes essential for companies to be able to establish the conditions under which ownership subsists in intellectual property created in employment relationships in various countries. This comparative law publication describes and analyses employers' acquisition of employees' intellectual property rights, first in general and then in depth as manifested in 33 jurisdictions worldwide. The book was developed within the framework of the International Association for the Protection of Intellectual Property (AIPPI), a non-affiliated, non-profit organization dedicated to improving and promoting the protection of intellectual property at both national and international levels. Among the issues and [...]

Reference

BENHAMOU, Yaniv, RIEDER, Cyrill. Employees' Intellectual Property Rights in Switzerland. In: Sanna Wolk / Kacper Szkalej. *Employees' Intellectual Property Rights*. Alphen aan den Rijn : Wolters Kluwer, 2015. p. 367-393

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1. BACKGROUND

In Switzerland, the legal framework for employees' intellectual property rights is provided by both intellectual property law as well as general rules of law.

Swiss intellectual property law is governed by the *creator principle*: the creator is placed in the foreground, independently of their status as an employee or independent creator, and only the person who has actually created the work becomes the *original holder* of the right.² An employee-creator thus has the same intellectual property right as other non-employed creators, and their employer may only receive a derivative right from the employee by means of an agreement in order to exploit the product and become a *derivative holder* (except where a specific legal transfer to the employer is provided by law, i.e. for service inventions and designs, and for computer programs).

Whether an agreement entails provisions affecting transfer of rights (express or implied), as well as what the scope of such transfer (by means of an assignment or a licence) is, will be interpreted according to the general *rules of contract law* (subjective and objective interpretation) and by the specific interpretation of rules of intellectual property law (in particular the *theory of the finality* for copyright).³ This interpretation plays a crucial role in intellectual property law because it applies to all IPR and to all relationships, i.e. it applies not only to employment contracts but

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1. The authors wish to thank Prof. Jacques de Werra and Dr. Konrad Becker for their fruitful comments, as well as James Walker for his reading of the text.
 2. For copyright, Ivan Cherpillod, *Commentaire romand de la propriété intellectuelle* (de Werra/Gilliéron ed., Basel 2013), LDA 6 N 5. For patents, Nathalie Tissot, *Commentaire romand de la propriété intellectuelle* (de Werra/Gilliéron ed., Basel 2013), LBI 3 N 3.
 3. See section 2.1.

also to agency contracts and contracts for work and service.⁴ It also plays a crucial role because it determines the scope of the transfer, i.e. whether the transfer will be a licence or an assignment, the latter being larger in scope as it allows the recipient the right to transfer to third parties. Moreover, in the case of an employer's bankruptcy, the right belongs to the employer's assets with an assignment, while it remains the employee's asset in the case of a licence.⁵

Agreements affecting the transfer of rights are treated differently by the various intellectual property regulations. For copyright, there are no special provisions, i.e. there is no legal transfer to the employer (except for computer programs). Thus, the creator-employee is always deemed to be the original holder of copyrights, and the employer can only acquire a derivative right by means of an agreement.⁶ However, for inventions, designs, semiconductor chips, and plant varieties, there is a specific provision providing for a legal transfer to the employer. The employer is deemed to be the original holder of rights for works produced by the employee in the performance of contractual obligations, and the derivative holder of rights for works produced by the employee through the performance of their contractual obligations.⁷

Moreover, employment relationships under private law are regulated by the Code of Obligations (CO),⁸ within the employment law section (Articles 319-362 CO), which outlines the respective duties of the parties. The main duties of the employer include paying the agreed or customary salary (Articles 319(1), 322(1) CO) and safeguarding the employee's health and personal rights (Article 328 CO). The main duties of the employee are to assume the tasks personally, according to the employer's instructions, to exercise due care and loyalty, and to hand over any work produced in the course of his/her contractual activities (Article 321b CO).⁹

However, employment law only applies to employment contracts, i.e. those contracts characterised by four criteria (a subordinate relationship, effort to be provided, against salary, and with duration, the first criterion being the most important), and does not apply to other contracts.¹⁰ Thus, the legal transfer for service inventions and designs provided in employment law does not apply to other contracts, such as agency contracts or contracts for work and service (although legal transfers are

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4. See Roland von Büren, *Der Übergang von Immaterialgüterrechten, Schweizerisches Immaterialgüter und Wettbewerbsrecht* vol. 1/1, 269 (Basel/Geneva/Munich 2002); and Tissot, *supra* n. 2, LBI 3 N 22, who notes that the *theory of the finality* applies to 'all contracts regarding the creation and the transfer of rights related to intangible assets'.
 5. Reto M. Hilty, *Lizenzvertragsrecht: Systematisierung und Typisierung aus schutz- und schuldrechtlicher Sicht* 754 et seq. (Zurich 2001).
 6. See section 2.
 7. See sections 4 and 6.
 8. Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (RS 220), <http://www.admin.ch/opc/en/classified-compilation/19110009/201401010000/220.pdf> (accessed 23 May 2014).
 9. Regarding due care and loyalty, one can think of the obligation to keep confidentiality about the invention and to collaborate for the registration procedure, see Tissot, *supra* n. 2, LBI 3 N 36. Regarding hand-over the work produced, one can think of the obligation to deliver the source code programmed by the employee, see Jacques de Werra, *Commentaire romand de la propriété intellectuelle* (de Werra/Gilliéron ed., Basel 2013), LDA 17 N 6.
 10. Ivan Cherpillod, *Protection des logiciels et des bases de données: la révision du droit d'auteur en Suisse*, in RSPi/SMI 49, 56 et seq. (1993).

sometimes provided elsewhere).¹¹ Moreover, employment law only applies to the private sector. The situation of employees in the public sector is principally regulated by the Federal Personnel Act¹² and cantonal and municipal regulations. In this area, each public institution (i.e. an institution that is financed by public resources) can regulate IPR through its own provisions (e.g. specific Regulations for IPR of researchers at universities). Thus, there are different solutions for employees of public institutions: some regulations provide that principles of private law, in particular employment law, apply *mutatis mutandis*; others provide that IPR belong to the creator-professor (or creator-researcher) or that they belong to the public institution (e.g. ETH Regulation, Act of the University of Geneva).¹³

2. EMPLOYEES' COPYRIGHT

2.1 The Legal Framework

For copyright, there are no special provisions regarding employment relationships. The Federal Act on Copyright (CopA)¹⁴ determines who is the author, co-author or performer according to the Creator Principle, but provides no legal transfer to the employer (except for computer programs).

The creator-employee is always deemed to be the original holder of copyrights and the employer can only acquire a derivative right by means of an agreement. Thus, employee-employer relationships, and in particular agreements affecting the transfer of copyright, are governed by the general rules of contract law and by certain rules of interpretation of the CopA.

2.2 Ownership of Rights

2.2.1 Employees' Copyright and Performers' Rights

According to the CopA, the author is the natural person who has created the work (Article 6 CopA), while works created by several persons belong jointly to all co-authors (Article 7(1) CopA). This is known as the *creator principle*: only the creative contribution by an individual entitles that person to hold copyright (*original rightholder*).¹⁵ Apart from computer programs, Swiss Law contains no instances where

11. For instance the agency contract provides a legal transfer to the client (Art. 401 CO), but the client is the derivative holder, and the inventor the original holder (Tissot, *supra* n. 2, LBI 3 N 26).

12. Federal Personal Act of the Confederation of 24 March 2000 (RS 172.220.1)

13. See Art. 18 of the Federal Act on the Federal Institutes of Technology of 4 October 1991 (RS 414.110), <http://www.admin.ch/opc/en/classified-compilation/19910256/201307010000/414.110.pdf> (accessed 23 May 2014); Art. 15(1) of the cantonal Act of the University of Geneva of 13 June 2008(C 1 30), http://www.geneve.ch/legislation/rsg/f/s/rsg_C1_30.html (accessed 23 May 2014).

14. Federal Act on Copyright and Related Rights of 9 October 1992 (RS 231.1), <http://www.admin.ch/ch/e/rs/2/231.1.en.pdf> (accessed 23 May 2014).

15. Cherpillod, *supra* n. 2, LDA 6 N 5 and LDA 7 N 6.

copyright is bestowed on legal entities from the start; only a transfer by contract can give the legal entity the whole or part of the copyright (*derivative rightholder*).¹⁶

The rights of performers follow the same principles: the performer is the natural person who performs or participates artistically in the performance of the copyrighted work (Article 33(1) CopA).¹⁷ Thus, the rights of performers belong to the performer (*original rightholder*) and only a transfer by contract can give the employer the whole or part of those rights (*derivative rightholder*).¹⁸

For works made for hire by an employee, the employee is deemed to be an author as soon as he/she contributes to the work in a creative way. The sole criterion is that it is the creative contribution of the employee; the status of the employee being irrelevant (auxiliary, assistant, manager, director, professor, etc.).¹⁹

For instance, in the case of audio-visual works, where the legislator did not want a special provision entitling the producer to all the rights and depriving the other participants of their rights, Swiss practice distinguishes between main authors (art director, scriptwriter, scenario writer, composer of the music) and the ancillary contributors who are not entitled to any rights (camera man, cutter, hair stylist, dress and set designers).²⁰ However, an ancillary contributor may be considered to be a co-author if their contribution is creative and subject to copyright protection (e.g. the person in charge of visual effects or dress and set designers creating a copyrighted work),²¹ or considered as a performer if their contribution participates artistically in the performance of the copyrighted work (e.g. a comedian). The use of pre-existing music or scenario for a film is in principle a derivative work, not a joint work. It is however considered to be a joint work when the music is specifically created for the film or the scenario is adapted during the filming and requires collaboration with the persons in charge of that pre-existing work.²²

In the case of scientific works, one can also distinguish between authors or co-authors, who contribute to the work in a creative way (e.g. collaborator, assistant, professor, student), and the ancillary contributors (e.g. a collaborator who just collects data, does some experiments, writes summary reports, corrects mistakes or reads critically).²³ Furthermore, a person who merely gives starting ideas or general topics is not categorised as an author, because copyright protects the expression of the idea, not the idea itself. And only those persons who influence the concrete work are considered to be co-authors, e.g. the persons whose instructions influence

16. François Dessemontet, *Intellectual Property Law in Switzerland* 43 (Zurich 2012); Cherpillod, *supra* n. 2, LDA 6 N 5.

17. The provision is based on the international law, in particular on Art. 2(a) WPPT that gives the following definition of performers: 'actors, singers, musicians, dancers, and other persons who ... otherwise perform literary or artistic works or expressions of folklore'.

18. Catherine Mettraux Kauthen, *Commentaire romand de la propriété intellectuelle*, (de Werra/Gilliéron ed., Basel 2013), LDA 33 N 11.

19. Cherpillod, *supra* n. 2, LDA 7 N 8-9.

20. Dessemontet, *supra* n. 16, 44.

21. Willi Egloff, *Urheberrecht und Urhebervertragsrecht in der audiovisuellen Produktion* 17 (sic! 1998); Cherpillod, *supra* n. 2, LDA 7 N 14.

22. Supreme Court, 699 (sic! 2003). Cherpillod, *supra* n. 2, LDA 7 N 15-16.

23. Cherpillod, *supra* n. 2, LDA 7 N 10.

the work in the structure, the choice of examples, and the structure of the reasoning can be deemed to be co-authors.²⁴

Once the original holder has been determined, the next step is to determine whether any copyrights have been transferred to a derivative holder. According to Article 16(1) CopA, the following copyrights may be assignable to third parties: (in particular the rights listed in Article 10(2) CopA, i.e. the right of reproduction (lit. a), the right of distribution (lit. b), the right of execution (lit. c), the right of broadcasting (lit. d), the right of retransmission (lit. e), the right of diffusion (lit. f), in whole or in part).²⁵

The transfer of copyright is governed by the general rules of contract law and by certain rules of interpretation within the CopA.

The transfer of copyright is governed by the general principle of *freedom of contract* and the *freedom of form*.²⁶ However, there are some restrictions. According to Article 27(2) CC, the privacy rights limit the transfer of right against the risk of excessive engagements, such as the transfer of the whole future works.²⁷ According to Article 19(2) CO, some moral rights may not be transferable, depending on certain factors, such as the nature of work (classic or industrial) and the circumstances of the work's creation (individual or joint work, independent creation or made for hire).²⁸

As a result of freedom of contract, disputes frequently come up regarding the existence, the nature, or the scope of copyright transfer. This is particularly an issue when the agreement has been concluded orally. In these situations, the contract has to be interpreted.²⁹ The scope of assignment of copyrights is determined both on the basis of general rules of contract law and on the basis of the real intention of the involved parties (subjective interpretation); or, if the latter cannot be determined, on the basis of what the parties would have agreed to in good faith and based on the specific circumstances of the agreement (objective interpretation). If the objective interpretation is uncertain, then the scope of assignment of copyrights is determined on the basis of the specific rules of interpretation of copyright.³⁰

The first rule is provided by Article 16(2) CopA which stipulates: 'The assignment of a right subsisting in the copyright does not include the assignment of other partial rights, unless such was agreed.' This rule works to help interpret the scope of the transfer of a right. For instance, an assignment of the right of reproduction (Article

24. Cherpillod, *supra* n. 2, LDA 7 N 6-7.

25. de Werra, *supra* n. 9, LDA 16 N 6.

26. Some authors plead for the introduction of the written form, see authors quoted by de Werra, *supra* n. 9, LDA 16 N 34.

27. de Werra, *supra* n. 9, LDA 16 N 13.

28. de Werra, *supra* n. 9, LDA 16 N 17-21: The jurisprudence and the traditional approach consider that moral rights are not transferable: Supreme Court, 526 c. 3.3 (sic! 2010). Denis Barrelet/Willi Egloff, *Le nouveau droit d'auteur* (Bern 2008), LDA 16 N 6. A more liberal approach is for the transfer of moral rights based on the commercialisation of personal rights, such as the right of image and of name: Hilty, *Urheberrecht* 161 et seq., 186 et seq. (Bern 2010); Christian Laux, *Vertragsauslegung im Urheberrecht* 10 et seq. (Berne 2003); François Dessemontet, *Le droit d'auteur* 604 (Lausanne 1999).

29. de Werra, *supra* n. 9, LDA 16 N 37.

30. de Werra, *supra* n. 9, LDA 16 N 38-39.

10(2)(a) CopA) and of distribution (Article 10(2)(c) CopA) does not automatically include the right to modify (Article 11(1)(b) CopA).

The second rule is provided by Article 16(3) CopA which stipulates: 'The assignment of the ownership of a copy of a work does not include the right to exploit the copyright, even in the case of an original work.' Accordingly, the sole disposal of the copy of a work does not lead to a transfer of copyright, and thus the copyright and the copy of the work remain separate from each other.

These rules reflect a broader third rule, the so-called *theory of the finality* (*Zweckübertragungstheorie, théorie de la finalité*), under which the transfer of rights is limited to the purpose of the contract.³¹ Parliament did not follow the provision proposed in the 1989 Bill according to which, in the absence of a covenant to the contrary, the copyright on works made for hire by an employee during their activities for the employer and in performance of their contractual obligations would be transferred to the employer. This provision was advocated as a restatement regarding employee-employer relationships and the prevailing legal theory of the finality.³² However because the provision was not passed, the current state of the law reflects the *theory of finality*.

The *theory of the finality* is considered by the doctrine to be the first rule of copyright contract law³³ and has recently been expressly recognised by the judiciary.³⁴ This theory applies only if the objective interpretation of the agreement is too uncertain to be determined.³⁵ When it does apply it has a broader scope of application than the rule provided in Article 16(2) CopA, because it is not limited to the interpretation of the scope of transfer, but also applies to the existence, the nature (assignment or license), and the duration of transfer.³⁶ Furthermore, some authors are in favour of a further reaching approach and propose that this rule should apply not only to the field of copyright, but to all contracts regarding the creation and the transfer of rights related to intangible assets.³⁷ However, this extended approach is not currently the settled law, and the courts tend to apply the general rules of contract law in fields other than copyright, i.e. to determine the scope of assignment according to the subjective and the objective interpretation.

According to the *theory of the finality*, if there is a doubt about the transfer of right, only the transfer of those rights necessary to obtain the purpose of the contract

31. Supreme Court, 23 April 2013, 4A_643/2012, c. 3.1; de Werra, *supra* n. 9, LDA 16 N 40.

32. Dessemontet, *supra* n. 16, 45.

33. Dessemontet, *supra* n. 28, 598. Its application is however contested and criticised, see Hilty, *Urheberrecht*, 239 et seq., 265 et seq.; Dessemontet, *supra* n. 16, 45: 'in Switzerland, the theory is not conceived as a limitation to the transfer of rights, but as its justification: the purpose of the contract may imply that a transfer has taken place.'

34. Supreme Court, 23 April 2013, 4A_643/2012, c. 3.1; Supreme Court, 8 May 2008, 4A_104/2008 c. 4.2; Supreme Court, 30 April 1997, 4C_442/1996, c. 4 bb. The theory was applicable for a long time without being explicitly quoted ATF 101 II 102, JdT 1976 I 525; Roland von Büren/Michael A. Meer, *Der Urheber*, in SIWR vol. II/1, 171 (von Büren/David ed., Basel 2006).

35. de Werra, *supra* n. 9, LDA 16 N 41.

36. de Werra, *supra* n. 9, LDA 16 N 42.

37. Tissot, *supra* n. 2, LBI 3 N 22; Roland von Büren, *Übergang*, p. 269.

will be deemed to have taken place (*in dubio pro auctore*).³⁸ For example, courts have determined that an advertising agency keeps all copyrights; the client can only use it once.³⁹ However, it has been judged that a journalist who made reports for radio broadcasts of the Swiss public broadcasting organisation (SRG) without expressly addressing the issue of copyright, assigned his copyright to the SRG because the purpose of the contract was broadcasting, and re-broadcasting reports could not be achieved without assignment of copyrights.⁴⁰

In the case of an employment relationship, the *theory of the finality* plays a crucial role because, unlike design or patent rights, there is no legal transfer of copyright to the employer (except for computer programs), and the employer can only acquire the copyrights to their employee's work by means of an employment contract or a separate agreement.⁴¹ This usually leads to the conclusion that the employer can use the copyrighted work as usual and that the employee retains only moral rights, as well as residual rights to uses of the work that fall in the ordinary exploitation of the work by the employer. New uses of the work belong to the employee.

For works made by the employee during their activities and in performance of their contractual obligations (and in the absence of a covenant to the contrary), the copyrights are deemed to be transferred to the employer to the extent required by the employment contract, in particular the right to use and the right to modify the work.⁴² Indeed, the employer supports the whole costs and economic risk of creation and must be able to use, continue, terminate or improve the works made by their employees.⁴³

For works made by the employee during the performance of their contractual obligations, a licence or an assignment may be established since the *theory of the finality* does not automatically lead to the conclusion of the transfer of right.⁴⁴

For works made by scientific researchers and within their contractual obligation, the professor (or research team leader) is deemed to have the rights on the research outcome of the collaborators;⁴⁵ they can use and modify the outcome as well as decide whether it has to be published under their name and their responsibility.⁴⁶ For works made under an employment contract but out of the contractual obligation, an express assignment of right has to be made.⁴⁷

38. Supreme Court, 23 April 2013, 4A_643/2012, c. 3.1; von Büren/Meer, p. 169; CR PI-de de Werra, *supra* n. 9, LDA 16 N 41.

39. Cantonal Court Basel, BJM 1995, p. 248

40. Supreme Court, 23 April 2013, 4A_643/2012, c. 3.1.

41. de Werra, *supra* n. 9, LDA 16 N 44.

42. District Court Zurich 227 c. 3-1 (sic! 2011); Manfred Rehbindler/Adriano Viganò, LDA 11 N 3; de Werra, *supra* n. 9, LDA 16 N 45.

43. Edgar Philippin, *Commentaire romand de la propriété intellectuelle* (de Werra/Gilliéron ed., Basel 2013), LDA 11 N 23.

44. District Court Zurich, 227, c. 3.1 (sic! 2011); de Werra, *supra* n. 9, LDA 16 N 46.

45. Martina Altenpohl, thesis, p. 265 et seq., who applies the rule even when the scientific collaborator is the sole author, with reference to Rehbindler, *Festschrift Hubmann*, p. 371.

46. Cherpillod, *supra* n. 2, LDA 7 N 12.

47. de Werra, *supra* n. 9, LDA 16 N 44-46.

However, two cases must be distinguished if a scientific collaborator has contributed to the work in a creative way.⁴⁸ When the scientific collaborator and their superior (generally a professor) intend to publish the work under both of their names and responsibilities, the work is a joint work governed by Article 7 CopA; the collaborator has the right to be named as co-author (paternity right) and to accept or not accept modifications of the work.⁴⁹

When the work has to be published under the sole name and responsibility of the superior, the work provided by the employee can be considered a 'service work' (i.e. a work that has been produced by the employee in the course of their work and in performance of their contractual obligations and accordingly belongs to the employer, see Article 332 CO). The creative contribution of the collaborator is at the professor's disposal, even if it is protected by copyright, the collaborator has been hired to provide assistance to the superior and, according to the *theory of the finality*, the superior must have full disposal of the work made through the fulfilment of contractual obligations. Thus, the professor can modify and publish the work under their sole name and responsibility (in that case, there is an implied waiver of the employee's paternity right and of the remuneration right).⁵⁰

A third case may apply for public institutions, since they are regulated by public regulations; some of them provide the obligation to mention the name of the persons who take part in the work subject to the publication (see e.g. Article 18 of the ETH-Federal Act: 'Scientific publications must list all those who have made a scientific contribution').⁵¹ Finally, the more the collaborator takes part in the creation of work, the more likely they are to be deemed a co-author. Inversely, the smaller their contribution is, the more they are to be deemed an auxiliary, and it may be usual to consider that they transferred their copyrights and waived their moral rights.⁵²

2.2.2 *Employees' Computer Programs*

For employees' computer programs, a special provision provides a legal transfer to the employer. Article 17 CopA states that an employer has the exclusive right to use software made by their employee within the framework of their activities for the employer and in conformity with their contractual obligations. The provision has been integrated in order to harmonise Swiss Law with EU Directive 91/24.⁵³

Article 17 CopA, as a dispositive provision, only applies in the absence of an agreement to the contrary. Thus, the parties may exclude its application. In that

48. Cherpillod, *supra* n. 2, LDA 7 N 10.

49. Cherpillod, *supra* n. 2, LDA 7 N 11.

50. Cherpillod, *supra* n. 2, LDA 7 N 12.

51. Federal Act on the Federal Institutes of Technology ('FIT Act') (RS 414.110), <http://www.admin.ch/opc/en/classified-compilation/19910256/201307010000/414.110.pdf> (accessed on 16 June 2014).

52. Cherpillod, *supra* n. 2, LDA 7 N 13.

53. In particular Art. 2(3) of Directive 91/24, see de Werra, *supra* n. 9, 17 N 2.

case, the question of transfer of right will be interpreted according to the principles of contract law and the *theory of the finality*.⁵⁴

Article 17 CopA refers to a ‘computer program [that] has been created’, i.e. to the copyrights on the computer program, not to other adjacent copyrighted works, such as the user’s guide.⁵⁵

Article 17 CopA only applies where a computer program has been created ‘under an employment contract’.⁵⁶ Thus, Article 17 CopA shall neither apply when a computer program has been created by an independent programmer, nor when it has been created within a public relationship (in the latter case, one must refer to the public regulations).⁵⁷ Moreover, Article 17 CopA shall only apply to a computer program created during the employment relationship. Thus, the employee who leaves the company before achieving the computer program needs the agreement of their former employer to use the unachieved computer program.⁵⁸ The same applies to a computer program that has been created before the beginning of contract; the employee retains the right to that computer program and the employer needs a transfer of rights if they want to commercialise it.⁵⁹

Finally, Article 17 CopA applies to computer programs that have been created ‘in the course of discharging professional duties or fulfilling contractual obligations’. This formulation corresponds to Article 332 CO, which relates to inventions and designs produced by the employee. The first condition, *in the course of discharging professional duties*, requires a logical link between the creation of the computer program by the employee (or their participation in the creation) and their activity in the company.⁶⁰ The second condition, *fulfilling contractual obligations*, requires that the employee had an obligation via express or implied provisions to provide a creative activity according to their position within the company.⁶¹

In the employer’s interest, it is advisable to adopt a contractual provision that precisely defines the scope of activity, in particular that the creation of computer program is covered under *professional duties and contractual obligations*. It is even more advisable to adopt a global transfer of rights related to computer programs

54. Emil F. Neff/Mathias Arn, *Urheberrechtlicher Schutz der Software*, in SIWR vol. II/2, 278 (Basel/Frankfurt/München 1998); de Werra, *supra* n. 9, LDA 17 N 4.

55. de Werra, *supra* n. 9, LDA 17 N 7.

56. Cherpillod, RSPI 1993, p. 56.

57. de Werra, *supra* n. 9, LDA 17 N 8. However, see Stutz/Ambühl, *Rechte an Computerprogrammen, geschaffen im öffentlich-rechtlichen Arbeitsverhältnis – eine Schweizer Sonderlösung?*, GRUR Int 667 et seq. (2010), who consider that the European Directive 2009/24/EG does not differentiate between employment under private or public law and that Art. 17 CopA shall thus apply to public and private law.

58. Neff/Arn, *supra* n. 54, 281.

59. Neff/Arn, *supra* n. 54, 281; de Werra, *supra* n. 9, LDA 17 N 13.

60. Supreme Court, 382, 387 (sic! 1997); whether the computer program has been created at work or during working time is irrelevant. de Werra, *supra* n. 9, LDA 17 N 10.

61. ATF 72 II 270, p. 273 et seq. Whether this obligation has been explicit or not is irrelevant; it all depends on whether parties could reasonably wait for such an activity. Thus, Art. 17 does not apply if an employee did not have such an obligation and created a computer program outside their contractual obligations in order to facilitate their work, such as a compatibility program, Briner, PJA 577 (1993).

created under the employment contract and excluding in that way the application of Article 17 CopA.⁶²

There are discussions about the nature of the transfer, i.e. whether the provision entails an assignment of copyright or an exclusive licence.⁶³ According to a teleological and systematic interpretation, it provides a legal transfer to the employer and is thus similar to Article 332 CO in that it provides original ownership to the employer.

There are also discussions about the scope of the transfer, i.e. whether the provision refers only to the economic rights or whether it also covers moral rights as well. According to a teleological and systematic interpretation, it refers to all rights needed for the use of the computer program by the employer, in particular the right of modifying and adapting the computer program.

2.2.3 Neighbouring Producer's Rights

With regard to neighbouring rights of phonogram and audio-visual fixation producers, Article 36 CopA provides that:

'[a] producer of phonograms and audiovisual fixations has the exclusive right:
a. to reproduce the fixations and to offer, transfer or otherwise distribute the reproductions; b. to make the fixations available through any kind of medium in such a way that persons may access them from a place and at a time individually chosen by them.'

The original holder of a producer right may be the natural or legal person that provides services of a certain complexity in charge of the first and the whole fixation process.⁶⁴ When several natural persons or legal entities jointly provide these services, the CopA does not expressly contain a provision for joint work, such as Article 7 CopA. Thus, the general rules of co-ownership apply, in particular that each co-producer can alienate and pledge their share (Article 646 (3) Civil Code). In practice, co-producers generally include a co-production contract that governs their relationships and, in the absence of a specific provision, the court shall decide in accordance with the rule that it would make as a legislator (Article 1(2) CC).⁶⁵

Nevertheless, the general rules of contract law (subjective and objective interpretation) and the specific interpretation rules of intellectual property law (in particular the *theory of the finality*) also apply to performer rights. Thus, according to the *theory of the finality*, if an employee is considered to be the initial holder of a

62. For a template, see Urs Egli, *Softwareentwicklung im Arbeitsverhältnis*, ArbR 15 et seq., 32 (2007); de Werra, *supra* n. 9, LDA 17 N 12.

63. See Roland von Büren, *Der Werkbegriff*, in *Schweizerisches Immaterialgüter und Wettbewerbsrecht* ('SIWR') vol. II/1, 228 (Basel/Genf/München 2005); Barrelet/Egloff, *supra* n. 28, LDA 17 N 6.

64. Mettraux Kauthen, *supra* n. 18, LDA 36 N 12, who observes that this definition is similar to Art. 2(d) WPPT.

65. Mettraux Kauthen, *supra* n. 18, LDA 36 N 13. Another doctrine proposes referring to the provisions regarding the *société simple* Egloff, 543 (sic! 1999).

producer right, the right is transferred to the employer if the recording was produced as part of the employee's duties or as a result of instructions given by the employer.⁶⁶

2.2.4 Neighbouring Broadcasting Rights

With regard to neighbouring broadcasting rights, Article 37 CopA provides that:

'[a] broadcasting organisation has the exclusive right ... c. to offer, transfer or otherwise distribute copies of the fixations of its broadcast; ... e. to make its broadcasts available through any kind of medium in such a way that persons may access them from a place and at a time individually chosen by them.'

The original holder of a broadcasting right may be the legal entity that organises, plans and collects the whole program until its broadcast, independent of the control of the technical broadcasting process.⁶⁷

In the case of an employment relationship, the employee will not be considered to be the original holder, since he/she is either a natural person or a legal entity that is not in charge of the whole program until broadcasting.

2.3 The Parties' Duty to Inform

An express provision providing a positive duty to give notice to an employer of the creation of intellectual property, other than for inventions and designs, does not exist (see sections 4 and 5). However an employee is by implication still required to give notice to their employer, despite the lack of express provisions, as a result of the loyalty principle in employment law (Article 321a CO).⁶⁸

2.4 Employee's Remuneration Right

Special rules regulating an employee remuneration right, other than for inventions and designs, do not exist (see sections 4 and 5). If and to what extent creators of other intellectual property are entitled to remuneration depends instead on any agreement that has been entered into by the employer and the employee.

In the absence of a covenant to the contrary, the employment relationship is interpreted according to the general rules of contract law (subjective and objective interpretation) and, if the latter are uncertain, according to the *theory of the finality*. The agreement and the salary provided are deemed to cover the employee's copyrights needed for the purpose of the contract, so that the employee is not entitled to a supplemental remuneration. In a recent case, relating to a freelance journalist who made reports for the Swiss public broadcasting organisation (SRG) based on an oral agreement that did not address copyrights, the Federal Court held that the agreement and the payment covered the assignment of the freelancer's copyright to the SRG

66. See section 2.2.1.

67. Mettraux Kauthen, *supra* n. 18, LDA 37 N 6.

68. See section 1 under employees' duties.

because the purpose of the contract, which was to broadcast reports, could not be achieved without assignment of copyrights.⁶⁹

For completeness, a doctrine, based on the general rule of contract law *clausula rebus sic stantibus*, is for an adaptation of the contract providing an additional remuneration's right, when a copyrighted work exceeds the projections made by the parties at the time of the assignment.⁷⁰

3. EMPLOYEES' SEMICONDUCTOR CHIPS

3.1 The Legal Framework

Semiconductor chips are mainly governed by the Federal Act on the Protection of Topographies of Semiconductor Products (Topographies Act, ToA),⁷¹ which protects three-dimensional designs of semiconductors provided they are not commonplace at the time of development (Article 1(1) ToA). For a design to be protected, a certain degree of intellectual work must be involved. However, neither an inventive step (as required for patents), nor individual character (as is necessary for copyright protection) is needed.⁷² Even a design composed of known elements is protectable if the combination by itself is unusual (Article 1(2) ToA).

The scope of protection provided by the Topographies Act is limited to the design of a semiconductor and does not include its electronic function or coding.⁷³ In addition to the protection under the Topographies Act, use of semiconductor designs may also infringe copyright or unfair competition law. However, once the ten-year term of protection under the Topographies Act has expired, free use cannot be restricted by any other right or title, given that the Topographies Act as *sui generis* protection will override any other provisions.⁷⁴ The significance of the Topographies Act is limited: only 17 semiconductor designs have been registered since 1993.⁷⁵

3.2 Ownership of Rights

The rights to semiconductors come into existence as soon as their design is created and expire ten years after registration or first publication (Article 9(1) ToA). The right to register a design expires two years after first distribution (Article 9(2) ToA).⁷⁶ Unlike

69. Supreme Court, 23 April 2014, 4A_643/2012.

70. For patents, see Adrian Staehelin/Frank Vischer, *Obligationenrecht*, V 2c, Der Arbeitsvertrag, Art. 319-362 OR, (3rd ed., Zurich 1996), CO 332, N 11; Supreme Court, 20 March 2009, 4A_595/2008 consid. 6 and the ref.

71. Swiss Federal Act on the Protection of Topographies of Semiconductor Products of 9 October 1992 (SR 231.2).

72. Swiss Federal Journal, BBL, 1989, p. 572 and 574. Comparison between German and US law: Gert Lüick, *Halbleiter-Topographieschutz*, in SIWR vol. II/2, 363 et seq.

73. Swiss Federal Journal, *supra* n. 72, at 572.

74. Swiss Federal Journal, *supra* n. 72, at 508.

75. <https://www.ige.ch/de/service/datenbanken/topographien-register.html>.

76. Swiss Federal Journal, *supra* n. 72, at 577.

copyright law, which aims to protect a personal creation,⁷⁷ the Topographies Act is guided by the idea of investment protection. All rights to a semiconductor design are originally acquired by its producer, which is defined as the person or entity who developed the design at its own expense and risk (Article 3 ToA). Thus, as a general rule, the original owner of an employee's design is the employer.⁷⁸

3.3 The Parties' Duty to Inform

Swiss law does not stipulate an express duty of disclosure regarding employees' semiconductor designs. However according to the employee's general duty of loyalty, they are obliged to inform their employer about all key aspects of their professional activity (Article 321a Code of Obligations).⁷⁹ Thus, the employer has to be immediately informed about newly created semiconductor designs.

3.4 Employee's Remuneration Right

Neither the Topographies Act nor Swiss labour law mention any right to payment for producing semiconductor designs. Accordingly, unless otherwise agreed, the employer does not have to pay the employee anything extra.

4. EMPLOYEES' INVENTIONS

4.1 The Legal Framework

The Federal Act on Patents for Inventions (Patent Act, PatA)⁸⁰ has no specific provisions on employee inventions. However, as a general rule and in accordance with the creator principle,⁸¹ the Patent Act accords the right to be granted a patent to the inventor, their successor in title, or a third party who owns the invention under another title (Article 3(1) PatA). Accordingly, the employee originally acquires all rights to their inventions unless the law assigns these rights to a third party. However, they may be under a contractual obligation to transfer the rights to the invention to their employer.

4.2 Ownership of Rights

4.2.1 Employees in the Private Sector

Private employment relationships are mainly governed by the Code of Obligations (CO), which distinguishes three categories of employee inventions: *service inventions*, *reservable inventions* and *other inventions* (Article 332 CO).

77. See *creator principle*, section 1.

78. Swiss Federal Journal, *supra* n. 72, at 574; Wolfgang Portmann, BSK, Art. 332 N 4.

79. Portmann, *supra* n. 77, at n. 12; Streiff/von Kaenel/Rudolph, *Arbeitsvertrag*, Art. 321a n. 2.

80. Federal Act on Patents for Inventions of 25 June 1954 (SR 232.14).

81. See section 1.

Service inventions are created in the course of work for the employer and in performance of contractual obligations (Article 332(1) CO). These inventions are often made when employees are instructed to solve a technical problem, so they arise from activities that fall under the employee's contractual obligations.⁸² Express instructions to carry out research, however, are not essential for inventions to be considered service inventions. These inventions may also arise when employees, although not directly instructed, could reasonably have been expected to take the steps required to create the invention in order to solve a problem, given the circumstances as a whole. Thus an obligation to carry out research may arise not only as a result of the instructions given or the contract of employment, but also due to the responsibilities and position of the employee.⁸³ The employer is the original holder of all rights to service inventions.⁸⁴ Employees retain a (waivable) right to be named as creator (Article 5 PatA).⁸⁵

Reservable inventions are created in the course of work but not in performance of contractual obligations. Unlike service inventions, the employee in question is not obliged, nor expected, to create an invention as part of their work.⁸⁶ Neither service inventions nor reservable inventions have to be created during working hours or by using the employer's resources.⁸⁷ What is required, however, is a material link both to the employer's field of activity and to the employee's job description.⁸⁸ While the employee is the original holder of all rights to reservable inventions, the employer may reserve in writing the option to acquire such inventions as a successor in title (Article 332(2) CO).⁸⁹ Most legal experts agree that the employee may agree to assigning such rights beforehand, effectively giving the employer sole discretion to

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82. Supreme Court: BGE 4A_691/2011 E. 3.1, BGE 100 IV 167 E. 1 and BGE 72 II 270 E. 4; Streiff/von Kaenel/Rudolph, *Arbeitsvertrag*, CO Art. 332 n. 7.
 83. Supreme Court: BGE 4A_691/2011 E. 3.1, BGE 2A.204/2006 E. 7.1 and BGE 100 IV 167 E. 1; Decision of the Cantonal Court of Nidwalden of 11.3.2008, E. 4.3, in: sic! 2010, p. 41 ff.; Decision of the Commercial Court of St. Gallen of 13.3.2001 E. 2, in: GVP 2001, No. 41; Peter Heinrich, PatG/EPÜ, Art. 3 N 9.
 84. Decision of the Cantonal Court of Nidwalden of 11.3.2008, E. 4.3, in: sic! 2010, p. 41 ff.; Thierry Calame, *Die Berechtigung an der Erfindung*, in SIWR vol. IV, 195 et seq.; Heinrich, *supra* n. 83, at Art. 3 n. 9.
 85. Decision of the Commercial Court of Zurich of 28.8.2007, E. 3.2, in: ZR 2008, p. 55 ff.; Decision of the Cantonal Court of Nidwalden of 11.3.2008, E. 4.3, in: sic! 2010, p. 41 ff.; Streiff/von Kaenel/Rudolph, *supra* n. 79, at n. 9; Heinrich, *supra* n. 83, at Art. 5 n. 1.
 86. Decision of the Commercial Court of St. Gallen of 13.3.2001 E. 2, in: GVP 2001, No. 41; Heinrich, *supra* n. 83, at Art. 3 n. 13.
 87. Supreme Court: BGE 4A_691/2011 E. 3.1 and BGE 72 II 270 E. 4; Decision of the Commercial Court of St. Gallen of 13.3.2001 E. 2, in: GVP 2001, No. 41; Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 10.
 88. Supreme Court: BGE 4A_691/2011 E. 3.1 and BGE 72 II 270 E. 4; Calame, *supra* n. 84, at 195. Material link between an invention and employee's work is assumed if the invention incorporates the employer's knowledge: Decision of the Cantonal Court of Nidwalden of 11.3.2008, E. 4.3, in: sic! 2010, p. 41 ff.
 89. Decision of the Commercial Court of St. Gallen of 13.3.2001 E. 3, in: GVP 2001, No. 41; Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 11.

acquire the rights to a reservable invention once it has been created.⁹⁰ Even if no written reservation of rights to a reservable invention was agreed by the parties, the employee may nevertheless be obliged to offer his/her invention to the employer based on their duty of loyalty (Article 321a CO).⁹¹

Other inventions are inventions that are neither produced in the course of work nor in performance of contractual obligations, and thus have no connection to the employee's work. Accordingly, the employee is the original holder of all rights to other inventions (Article 3(1) PatA).

4.2.2 *Employees in the Public Sector*

In Switzerland, there is no specific body of regulations on employment in the public sector, and public sector employers at all governmental levels can simply make use of the private law legislation or create their own regulations. When deciding who holds the rights to employee inventions under public law, the relevant federal, cantonal or municipal public labour law has to be consulted. However, many of these regulations contain similar rules to the Code of Obligations or even expressly refer to its provisions.⁹² In public sector employment relationships, it is also the case that employees often assign certain rights, including those to their inventions, to the public entity in question. However, if the relevant public labour regulations contain no specific rules on employee inventions, all rights are immediately acquired by the employee (Article 3(1) PatA).⁹³

In Switzerland, the legal regulation of the university sector is generally as fragmented as that in the public sector. However, in order to stimulate technology transfer between the public and the private research sectors, most universities have adopted new regulations in the past decade assigning the rights to employee inventions to the university.⁹⁴ Although there is no absolute harmonisation, as a general rule, we

90. Supreme Court: BGE 57 II 304 E. 1; Calame, *supra* n. 84, at 199; Heinrich, *supra* n. 83, at Art. 3 N 13; Mondini/Bürge, *Zuordnung der Ergebnisse gemeinsamer Forschung und Entwicklung in der Praxis*, AJP 16 (2008); Mosimann/Graf, *Arbeitnehmererfindungen*, in *Schweizerisches und europäisches Patentrecht* 170 (Bertschinger/Münch/Geiser eds., Basel 2002); Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 10. Different opinion: Münch/Herzog, *Berechtigung an der Erfindung*, in *Schweizerisches und europäisches Patentrecht* 170 (Bertschinger/Münch/Geiser eds., Basel 2002).

91. Adrian Andermatt, *Das Recht an im Arbeitsverhältnis geschaffenen immaterialgüterrechtlich geschützten Erzeugnissen*, p. 298 et seq.; Calame, *supra* n. 84, at 195; other opinion e.g.: Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 14.

92. For federal officials: Art. 6(2) Bundespersonalgesetz (SR. 172.220.1). For cantonal officials see e.g. Art. 4 Personalgesetz of the Canton of Basel or Art. 60 Personalgesetz of the Canton of Bern.

93. Supreme Court denies analogous application of Art. 332 CO: BGE 74 II 106 E. 4a; Calame, *supra* n. 84, at 195; Cyrill Rieder, *Eigentum an Hochschulerfindungen* 196 et seq., 245 et seq. (Bern 2010). Different view: Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 4.

94. E.g. Art. 36 Bundesgesetz über die Eidgenössischen Technischen Hochschulen (SR 414.110); Art. 10a UniG of the Canton of Fribourg; Art. 12a UniG of the Canton of Zurich; Art. 70 UniG of the Canton of Waadt; Art. 73 UniG of the Canton of Neuenburg; Art. 30 UniG of the Canton of Genéve; Art. 4; Art. 60 Personalgesetz Canton of Bern and Art. 70 UniG of the Canton of Bern. Overview: Rieder, *supra* n. 93, at 187 ff.; Calame, *supra* n. 84, at 203 ff.

can assume that the university acquires *ex lege* all rights to inventions which have been produced in the course of researchers' work. This definition covers both service inventions and reservable inventions.⁹⁵

4.3 The Parties' Duty to Inform

In private law employment relationships, an employee who has created a reservable invention must notify their employer in writing and the employer then must inform the employee within six months whether they wish to acquire the invention (Article 332(3) CO). Apart from this, the law does not expressly stipulate any duty to inform. However, there is an implied obligation to disclose inventions under the employee's general duty of loyalty, which requires an employee to inform the employer of all key aspects of his/her professional activity (Article 321a CO).⁹⁶ Thus, an employee must immediately inform their employer of any inventions created within the employer's field of activity, in order that the legal situation can be clarified.⁹⁷

4.4 Employee's Remuneration Right

Unless otherwise agreed, in private law employment relationships the employer generally acquires the rights to service inventions without having to pay for them.⁹⁸ However, some authors⁹⁹ argue that additional financial compensation is due if the efforts made by the employee exceed what reasonably could be expected, or if the service invention brings in income that exceeds what was expected.

An employer is obliged to make a payment for reservable inventions, the amount of which depends on factors such as the economic value of the invention, the degree to which the employer contributed, any reliance on other staff and on the employer's facilities, the expenses incurred by the employee and their position in the company (Article 332(4) CO). This mandatory right to payment cannot be modified to the employee's disadvantage (Article 362 CO).¹⁰⁰

In public sector employment relationships, any payment is governed by the relevant federal, cantonal or municipal public labour regulations.¹⁰¹ Special provisions on payments for inventions are specified in university researchers' contracts. As a

95. Calame, *supra* n. 84, at 203 ff.; Rieder, *supra* n. 93, at 187 ff.

96. Cantonal Court of Nidwalden, 41 et seq. (sic! 2010), E. 4.2; Wolfgang Portmann, BSK, 5th ed., CO Art. 321a N 12; Streiff/von Kaenel/Rudolph, *supra* n. 79, at Art. 321a N 2.

97. Wolfgang Portmann, *Die Arbeitnehmererfindung* 101 (Bern); Mosimann/Graf, *supra* n. 90, at 977; Andermatt, *supra* n. 91, at 298.

98. Calame, *supra* n. 84, at 197 f.; Portmann, *supra* n. 78, at 76 f.; Wyler/Martin, *Droit du travail* 375 (2nd ed.).

99. Staehelin/Vischer, CO 332 N 11; Manfred Reh binder, BK OR-331-355, CO Art. 332 N 8; Henneberger-Sudjana/Henneberger, *Gesonderte Honorierung von Dienst erfindungen als Beitrag zur (besseren) wirtschaftlichen Entwicklung*, Diskussionspapier Nr. 128 der Reihe des Forschungsinstituts für Arbeit und Arbeitsrecht an der Universität St. Gallen.

100. Andermatt, *supra* n. 91, at. 294 ff.; Calame, *supra* n. 84, at 200.

101. For the Canton of Zurich and Canton of Bern: Calame, *supra* n. 84, at 202 f.

general rule, payments made to employees are around a third of the licensing revenues generated by the invention in question.¹⁰²

5. EMPLOYEES' UTILITY MODELS

Swiss law does not protect utility models.

6. EMPLOYEES' DESIGN RIGHTS

6.1 The Legal Framework

The Federal Act on the Protection of Designs (Design Act, DesA)¹⁰³ does not make any specific provision for an employee's designs, but assigns the right to a design to its creator,¹⁰⁴ their successor in title, or to a third party who owns the design under another title (Article 7(1) DesA). Thus, as in case of inventions, the employee acquires all rights to their design unless a provision of the law assigns these rights to another person. However, it may be that the contract of employment places an obligation on the employee to transfer the design to their employer.

6.2 Ownership of Rights

6.2.1 *Employees in the Private Sector*

Employment in the private sector is governed by the Code of Obligations, which stipulates identical rules for designs and for inventions (Article 332 CO) and thus distinguishes three categories of employee designs: *service designs*, *reservable designs* and *other designs*.¹⁰⁵ Unlike inventions, designs may also enjoy copyright protection,¹⁰⁶ which is governed by separate rules.¹⁰⁷

All rights to service designs, which are defined as designs created in the course of work and in performance of contractual obligations, are originally acquired by the employer (Article 332(1) CO). Reservable designs, which have also been created in the course of work but not in performance of contractual obligations, as well as other designs, basically belong to the employee. However, by written agreement the employer may reserve the right to acquire reservable designs as a successor in title (Article 332(2) CO). Most legal experts are agreed that the employee may agree to assign their rights beforehand, giving the employer sole discretion to demand the

102. E.g. Art. 6 Verordnung des ETH-Rates über die Immaterialgüter im ETH-Bereich und die Beteiligung an Unternehmungen (SR 414.172); Calame, *supra* n. 84, at 203 ff.

103. Federal Act on the Protection of Designs of 5 October 2001 (SR 232.12).

104. See *creator principle*, section 1.

105. Stutz/Beutler/Künzi, Designgesetz DesG, Art. 7 DesG, N 49 ff.; Peter Heinrich, *Schweizerisches Designgesetz/Haager Musterschutzabkommen*, DesG 7 N 11; Markus Wang, *Entstehung und Bestand des Designrechts*, in SIWR vol. VI, 151 et seq.; Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 7 ff.

106. Wang, *supra* n. 105, at 153; Stutz/Beutler/Künzi, *supra* n. 105, at Art. 7 N 78.

107. See section 2.

transfer of rights once a reservable design has been created.¹⁰⁸ Even if no written reservation has been agreed with regard to reservable designs, the employee may nevertheless be obliged to offer their invention to the employer based on their duty of loyalty (Article 321a CO).¹⁰⁹

6.2.2 *Employees in the Public Sector*

In Switzerland, there is no specific body of regulations on employment in the public sector, and public sector employers at all governmental levels can simply make use of the private law legislation or create their own regulations. When allocating the rights to employee designs under public law, the relevant federal, cantonal or municipal public labour law has to be consulted. However, many of these regulations contain similar rules to the Code of Obligations or even expressly refer to its provisions.¹¹⁰ In public sector employment relationships, it is also the case that employees often assign certain rights, including those to their designs, to the public entity in question. However, if the relevant public labour regulations contain no specific rules on employee designs, all rights are immediately acquired by the employee (Article 7(1) DesA).¹¹¹

6.3 *The Parties' Duty to Inform*

In private law employment relationships, an employee who has created a reservable design must notify the employer in writing and the employer then must inform the employee within six months whether they wish to acquire the design or leave it to the employee (Article 332(3) CO). Apart from this, the law does not expressly stipulate any duty of disclosure. However, there is an implied obligation to disclose designs under the employee's general duty of loyalty, which requires an employee to inform the employer of all key aspects of their professional activity (Article 321a CO).¹¹² Thus, an employee must immediately inform their employer of any newly created designs, in order that the legal situation can be clarified.

108. Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 13; Stutz/Beutler/Künzi, *supra* n. 105, at 66; Wang, *supra* n. 105, at 152.

109. Andermatt, *supra* n. 91, p. 230; Wolfgang Portmann, BSK, 5th ed., CO Art. 332 N 13 f.; for other opinion see e.g.: Streiff/von Kaenel/Rudolph, *supra* n. 82, at 14.

110. With regard to federal officials: Art. 6 para. 2 Bundespersonalgesetz (SR. 172.220.1). For cantonal officials e.g. Art. 4 Personalgesetz of the Canton of Basel or Art. 60 Personalgesetz of the Canton of Bern.

111. Supreme Court denies analogous application of Art. 332 CO: BGE 74 II 106 E. 4a; Stutz/Beutler/Künzi, *supra* n. 105, at 77; Different view: Streiff/von Kaenel/Rudolph, *supra* n. 82, at 4.

112. Wang, *supra* n. 105, at 152 f.; Portmann, *supra* n. 78, at Art. 321a OR N 12; Streiff/von Kaenel/Rudolph, *supra* n. 79, at CO Art. 321a N 2.

6.4 Employee's Remuneration Right

Unless otherwise agreed, in private law employment relationships the employer generally acquires the rights to service designs without having to pay for them.¹¹³ An employer is obliged to make a payment for reservable designs, the amount of which depends on factors such as the economic value of the invention, the degree to which the employer contributed, any reliance on other staff and on the employer's facilities, the expenses incurred by the employee and their position in the company (Article 332(4) CO). This mandatory remuneration right cannot be modified to the employee's disadvantage (Article 362 CO).¹¹⁴ In public sector employment relationships, any payment is governed by the applicable federal, cantonal or municipal public labour regulations.

7. EMPLOYEES' PLANT VARIETIES

7.1 The Legal Framework

The Federal Act on the Protection of Plant Varieties (Plant Varieties Act, PVA)¹¹⁵ implements the International Convention for the Protection of New Varieties of Plants ('UPOV Convention')¹¹⁶ and other international treaties (Article 4 PVA). In Switzerland, a plant variety protected under the Plant Variety Act may not be additionally patented as an invention because of the general prohibition of double protection.¹¹⁷

7.2 Ownership of Rights

The Plant Varieties Act assigns the right to protect a variety to the breeder or their successor in title and expressly refers to Article 332 Code of Obligations with regard to employees' plant varieties (Article 9(1) PVA). Thus, as in the case of employee's inventions or designs, three categories of employees' plant varieties can be distinguished: *service plant varieties*, *reservable plant varieties* and *other plant varieties*.

All rights to service plant varieties that have been created in the course of work and in performance of contractual obligations are originally acquired by the employer (Article 332(1) CO). Reservable plant varieties, which by definition have been created in the course of work but not in performance of contractual obligations, and other plant varieties belong to the employee. However, by written agreement the employer may reserve the right to acquire reservable plant varieties as a successor in title

113. BGE 4A_691/2011 E. 4.1; Stutz/Beutler/Künzi, *supra* n. 105, at 61; Heinrich, *supra* n. 105, at 18; different opinions: Manfred Rehbinder, BK, OR-331-355, CO Art. 332 N 8.

114. Streiff/von Kaenel/Rudolph, *supra* n. 79, at n. 11; Stutz/Beutler/Künzi, *supra* n. 105, at N 68; Heinrich, *supra* n. 83, at N 14.

115. Federal Act on the Protection of Plant Varieties of 20 March 1975 (SR 232.16).

116. Switzerland has been a member State of the UPOV since 10 July 1977 (SR 0.232.163). The Convention was adopted in Paris in 1961 and revised in 1972, 1978 and 1991.

117. See decision of the Swiss Supreme Court: BGE 121 III 125.

(Article 332(2) CO).¹¹⁸ Even if no written reservation was agreed by the parties with regard to reservable plant varieties, the employee may nevertheless be obliged to offer their invention to the employer based on their duty of loyalty (Article 321a CO).¹¹⁹

As a general rule, Article 332 CO applies exclusively to employment relationships under private law. In the public sector, the allocation of rights to the results of an employee's work is governed by federal, cantonal or municipal public labour law.¹²⁰ However, the fact that the Plant Varieties Act expressly refers to Article 332 CO suggests that this provision applies to all kinds of employee plant varieties including those created by employees working in the public sector. This view is supported by an explanatory statement by the Federal Council on plant varieties bred by federal employees.¹²¹ However, to date the question remains undecided by the courts.

7.3 The Parties' Duty to Inform

An employee who has produced a reservable plant variety must notify their employer in writing and the employer then must inform the employee within six months whether they wish to acquire the rights to the plant variety in question or leave it to the employee (Article 332(3) CO). Apart from this, the law does not expressly stipulate any duty to inform. However, there is an implied obligation to disclose new plant varieties under the employee's general duty of loyalty, which requires an employee to inform the employer of all key aspects of their professional activity (Article 321a CO).¹²² Thus, an employee must immediately inform their employer of any newly created plant varieties, in order that the legal situation can be clarified.¹²³

7.4 Employee's Remuneration Right

While the employer is not required to pay an employee anything for service plant varieties (Article 332(1) CO),¹²⁴ they have to pay for reservable plant varieties, the amount of which depends on factors such as the economic value of the plant variety, the degree to which the employer contributed, any reliance on other staff and on the employer's facilities, the expenses incurred by the employee and their position

118. Decision of the Commercial Court of St. Gallen of 13.3.2001 E. 3, GVP 2001, No. 41; Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 11.

119. Andermatt, *supra* n. 91, p. 298 ff.; Thierry Calame, *Die Berechtigung an der Erfindung* in SIWR vol. IV, 195; different opinions e.g.: Streiff/von Kaenel/Rudolph, *supra* n. 82, at n. 14.

120. Peter Heinrich, *Schweizerisches Designgesetz/Haager Musterschutzabkommen*, DesG 7 n. 24; Streiff/von Kaenel/Rudolph, *supra* n. 79, at n. 4;

121. Swiss Federal Gazette, BBl, 2004, p. 4182.

122. Cantonal Court of Nidwalden, sic! 2010, p. 41 f, E. 4.2; Wolfgang Portmann, BSK, 5th ed., CO Art. 321a, n 12; Streiff/von Kaenel/Rudolph, *supra* n. 79, at n. 2.

123. Cantonal Court of Nidwalden, 41 et seq. (sic! 2010), E. 4.2; Streiff/von Kaenel/Rudolph, *supra* n. 79, at n. 2.

124. Supreme Court: BGE 4A_691/2011 E. 4.1; Wyler/Martin, *Droit du travail* 375 (2nd ed.); Wolfgang Portmann, *Die Arbeitnehmererfindung*, p. 76 f.; Other opinions: Manfred Rehbinder, BK, OR-331-355, CO Art. 332 n. 8.

in the company (Article 332(4) CO). This mandatory right to payment cannot be modified to the employee's disadvantage (Article 362 CO).¹²⁵

8. INSTANCES FOR DISPUTES

Since 1 January 2011, civil proceedings related to employee ownership are regulated nationally by the Civil Procedure Code ('CPC') and the Federal Act on the Federal Patent Court ('PatCA').¹²⁶ Disputes related to employees' IPR are heard either by a Labour Court as an action relating to employment law (Article 34(1) CPC), by the Cantonal Court as a dispute in connection with IPR (Article 5(1) a CPC), or by the Federal Patent Court as a dispute concerning employees' inventions (Article 26(2) PatCA). Disputes arising from public institutions are subject to Administrative Courts. The decisions of those Courts can be challenged before the Federal Supreme Court.

8.1 Dispute Concerning Employees' IPR

Disputes related to employees' IPR (with the exception of inventions) are heard by a Labour Court or by a Cantonal Court.

The Labour Court has jurisdiction for disputes related to employment law, such as termination of contract. The *territorial jurisdiction* is where the defendant has its domicile or registered office or where the employee normally carries out their work (Article 34 CPC). The *material jurisdiction* depends on the legal situation in each canton (e.g. Arbeitsgericht in Zurich, Tribunal des Prud'homme in Geneva). Decisions of the Labour Court may be objected first at a Cantonal Court (Article 308 and 319 CPC) then at the Federal Supreme Court (Article 75(1) LTF).¹²⁷

The Cantonal Court has jurisdiction for disputes related to IPR, including disputes concerning the ownership of IPR (Article 5(1)a CPC). The *territorial jurisdiction* is where the service has to be provided, i.e. where the defendant has its domicile or registered office (Article 36). Nevertheless, the appellant could argue that the dispute concerns employment law rather than IPR and that only the Labour Court has jurisdiction rather than the Cantonal Court for IPR disputes. The *material jurisdiction* depends on each Cantonal Court (e.g. Handelsgericht in Zurich, Cour de Justice in Geneva).¹²⁸ Decisions of the Cantonal Court may be contested directly before the Federal Supreme Court (Article 75(2) LTF).

125. Andermatt, *supra* n. 91, at 294 ff. Calame, *supra* n. 84, at 200.

126. Civil Procedure Code of 19 December 2008 ('CPC') (RS 272) <http://www.admin.ch/ch/e/rs/2/272.en.pdf> (accessed 23 May 2014). Federal Act on the Federal Patent Court of 20 March 2009 (PatCA), <http://www.admin.ch/opc/en/classified-compilation/20071763/201212010000/173.41.pdf> (accessed 23 May 2014).

127. Federal Act on Supreme Court, <http://www.admin.ch/opc/fr/classified-compilation/20010204/201401010000/173.110.pdf> (accessed 23 May 2014).

128. See the list of Cantonal Courts: Michael Widmer/Timo Leis, *Zuständigkeit gemäss ZPO im Immaterialgüterrechtsprozess* 363, 374 (sic ! 2013).

8.2 Disputes Concerning Employees' Inventions

Disputes concerning employees' inventions are heard by the Federal Patent Court (Article 1(1) PatCA; Article 76 LBI; Article 5(1)a CPC), since it has jurisdiction in civil actions with a connection to patents, in particular actions that concern the right to patents or their assignment (Article 26 (2) PatCA). Decisions of the Federal Patent Court may be challenged before the Federal Supreme Court (Article 75(1) LTF).

The Federal Patent Court, which began operations on 1 January 2012, is composed of judges with expert knowledge of patent law (Article 8(1) PatCA) and is situated in the canton of Saint-Gall.¹²⁹ For proceedings, provisions of the CPC apply *mutatis mutandis* (Article 27 PatCA), with some particularities, such as that the language of proceedings can be English with the consent of the parties and the Court (Article 36 PatCA).

8.3 Disputes Concerning Public Institutions

Disputes arising from public institutions are subject to Administrative Courts. For federal public institutions, the decisions can be challenged first before the Federal Administrative Court (Article 31 LTAF),¹³⁰ then before the Federal Supreme Court (Article 75 LTF). For cantonal public institutions, the decisions can be contested first before Administrative Cantonal Courts, then before the Federal Supreme Court (Article 75 LTF).

8.4 Competing Jurisdiction between IPR and Labour Courts

Questions may arise concerning competing jurisdiction. A dispute regarding copyright ownership between the employer and the employee could be heard either by a Labour Court as an action relating to employment law (Article 34(1) CPC) or by the Cantonal Court (Article 5(1) a CPC) or the Federal Patent Court (Article 1(1) PatCA), as a dispute in connection with IPR.

While several authors give priority to the IPR Courts which may entertain all questions arising from the case, which is particularly true for a procedural economy,¹³¹ the Federal Supreme Court seems to admit both jurisdictions without priority: in a recent case regarding an employee's inventions, after a cantonal decision rejected the request of an employee, the employee raised the question before the Cantonal Court as an appeal relating to employment law, and at the same time before the Federal Supreme Court as an objection in connection with IPR. Finally, the Cantonal Court

129. Other special locations in other cantons are possible according to the circumstances (Arts. 6-7 PatCA).

130. Federal Act on Administrative Supreme Court, <http://www.admin.ch/opc/fr/classified-compilation/20010206/201307010000/173.32.pdf> (accessed 26 May 2014).

131. Rainer Wey, *Kommentar ZPO* (Sutter-Somm/Hasenböhler/Leuenberger ed., 2nd ed., Zurich/Basel/Geneva 2013), 5 N 8; Widmer/Leis, *sic!* 2013, 363, 373 seq.; Christian Hilti and Sarah Hennenberger-Sudjana, *Kompetenzattraktion vor Bundespatentgericht in Fällen objektiver Klagenhäufung und/oder Anspruchsgrundlagenkonkurrenz?* 84 et seq. (*sic!* 2013).

ruled on the case in the capacity of an appellate court relating to employment law, while the Federal Supreme Court suspended the proceedings because the disputes could be considered as a dispute in connection with IPR.¹³²

9. CONCLUDING REMARKS

9.1 Overlapping Intellectual Property Rights

Thus far, each type of intellectual property has been discussed separately. However, the boundaries between the different types of intellectual property rights can blur and sometimes even overlap. It is therefore possible that the product of an employee's work is protected by more than one type of intellectual property right (e.g. a design of a semiconductor may also enjoy copyright protection).

This 'belt and braces' protection does not generally lead to any specific legal difficulties. However, given that each type of intellectual property right is governed by its own rules, some intellectual property rights to a specific product of an employee's work may be transferred to the employer, whilst other rights remain with the employee. Accordingly, the employer may enjoy design protection (e.g. pursuant to Article 332(2) CO), while the employee enjoys copyright protection (e.g. in accordance with the creator principle¹³³). In such cases, both the employer and the employee may be restricted by the other's intellectual property rights. However, given their duty of loyalty (Article 321a CO), the employee must not unreasonably impede the employer's exploitation of rights. Depending on the interests involved, the employee may therefore be obliged to offer their intellectual property right to the employer in return for a reasonable payment. However, it would seem that these potentially conflicting intellectual property rights are of no practical relevance; the authors are unaware of any court decisions concerning such scenarios.

9.2 Discrepancy in IPRs

It appears that there is a discrepancy in employees' IPRs: for copyright no legal transfer to the employer is provided (except for computer programs), while for other intellectual property rights there is a legal transfer to the employer for works made in performance of contractual obligations. The difference is, however, more theoretical than factual because *the theory of finality*, as applied by the judiciary, leads to an objective interpretation rather than to a specific interpretation in copyright law and accordingly most of the time to the conclusion that the copyright of works made for hire is transferred to the employer. Thus, the result seems equal either with a legal transfer provided or with *the theory of the finality*.

Another discrepancy within IPRs is that *the theory of the finality*, under which the transfer of rights is limited to the purpose of the contract and which determines the existence, the nature, and the duration of transfer, applies to copyright, while the general rules of contract law (subjective and the objective interpretation) apply

132. Supreme Court, 6 November 2012, 240, 242 (sic ! 2013).

133. See section 1.

to other intellectual property rights. Such a discrepancy does not appear justified since other IPRs face the same challenges as copyright issues, in particular the need to determine the existence, the nature, and the duration of transfer. Moreover, there is no legal basis for such a determination (the *theory of the finality* has a broader scope of application than the rule provided in Article 16(2) CopA and arises from the jurisprudence), so that there is no reason to treat copyright differently from other IPRs and vice versa. Finally, it appears appropriate to have a transversal approach and to consider that this rule shall apply to all contracts regarding the creation and the transfer of rights related to intangible assets.¹³⁴

9.3 Adaptation of the Contract Once Transfer Has Been Made

Once the transfer has been made, there shall be no additional compensation (either for service works by means of legal transfer or for copyright by means of an employment contract or a separate agreement, the employer acquires the work). However, the general rules of contract law allow the court to adapt the contract if the initial contractual obligations appear disproportionate due to a substantial change of circumstances. Thus, the court may have discretionary power according to the *clausula rebus sic stantibus* theory to provide the employee with additional compensation based on the economic value of the work, if the transferred work leads to income that exceeds the parties' forecasts or when the efforts provided exceed that which could be reasonably expected.¹³⁵

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134. Tissot, *supra* n. 2, LBI 3 N 22.

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