



National/Regional Group: Switzerland

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Questions

I. Current law and practice

- 1) Please describe your Group's current law defining ownership of an invention made by an inventor employee and identify the statute, rule or other authority that establishes this law.

The ownership of an invention made by an inventor employee is regulated by Art. 332 of the Swiss Code of Obligations (CO).

An invention produced by an employee alone or in collaboration with others in the course of his work for the employer and in performance of his contractual obligations automatically and *ab initio* belongs to the employer by virtue of the employment. Accordingly, the employer obtains the right to the legal position of an applicant or patentee without a particular assignment.¹

On the other hand, if the invention is performed in the course of the employee's work but not in performance of his contractual obligations, the employer may reserve the right to acquire such an invention.² In this case, the employee must notify in writing the employer of such invention and the employer must inform the employee within six months if he wishes to acquire the invention or release it to the employee.³ An employer who acquired the invention is in that particular case required to remunerate the employee.⁴

If the invention has no connection with the working activity, it belongs to the inventor employee as a free invention.

The inalienable right of the inventor to be mentioned always remains with the inventor employee.

- 2) Does your Group's current law relating to ownership of an invention made by an inventor employee distinguish between types of employees, for instance between academic staff in universities and in for-profit organizations, or whether they are employed "to invent" (e.g., do research)?

¹ Art. 332(1) CO

² Art. 332(2) CO

³ Art. 332(3) CO

⁴ Art. 332(4) CO

As already described at point 1) above, the Swiss law distinguishes between employees who “invent” in performance of their contractual obligations and employees who “invent” in the course of their work, but not in performance of their contractual obligations. In the former case, inventions belong to the employer from the outset and without any special compensation to the employee. In the latter case, inventions belong to the employee, unless the employer acquires it and is obliged to remunerate the employee beyond his salary.

Special provisions apply to employees at universities, which are subject to the law of the corresponding university. For example, according to the ETH Law, inventions created by academic staff in the exercise of their duties belong to the ETH⁵. Moreover, according to a regulation of the ETH Board, a portion of the profit from the exploitation of such inventions goes to the inventors (usually one third, except where particular conditions are present).

- 3) If your Group's current law prescribes that employers own inventions made by inventor employees, does your law impose an obligation on employers to offer to employees the right to file a patent application, or entitlement to a patent application already filed, in the event the employer does not pursue patent protection?

No.

- 4) Does your Group's current law provide in any statute or other regulation that an inventor employee is entitled to receive remuneration beyond their salary for an invention made by the inventor owner but owned by the employer? If yes, please briefly describe the entitlement.

Yes, it does under the rare occasion stipulated under Art. 332(4) CO and outlined at point 1) when the invention is performed in the course of the employee's work but not in performance of his contractual obligations and when the employer acquires the invention. This is a mandatory provision which cannot be derogated to the detriment of the employee by individual agreement, standard employment contract or collective employment contract.⁶

- 5) Under your Group's current law, is there any other basis, e.g. common law principles, upon which an inventor employee may claim a right to remuneration beyond their salary for an invention made by the inventor employee but owned by the employer?

No, there is not.

If your answer to question 4) or 5) is 'yes', please answer remaining questions 6) to 8). If no, please go to question 9)

- 6) To what extent do the following factors determine whether an inventor employee is entitled to remuneration?

a) Nature of employment duties;

⁵ Art. 36 ETH Law

⁶ Art. 362 CO

Only applicable under the rare occasion of Art, 332(4) CO. No particular experience or ruling available in Switzerland.

- b) Extent to which the invention is relevant to the business of the employer;

Only applicable under the rare occasion of Art, 332(4) CO. No particular experience or ruling available in Switzerland.

- c) Use of employer time/facilities/resources in generating the invention; and

Only applicable under the rare occasion of Art, 332(4) CO. No particular experience or ruling available in Switzerland.

- d) Terms of the employment agreement or collective agreement.

As already stated at point 4) above, Art. 362 CO does not allow modifying the remuneration rules set forth by Art. 332(4) CO to the detriment of the employee. As a consequence, there are no terms in employment agreements or collective agreements changing the remuneration rules set forth by Art. 332(4) CO.

- 7) When does any right to remuneration arise? What stage(s) during the process for invention creation through to patenting, commercialisation or licensing trigger any right to remuneration?

Under the rare occasion of Art, 332(4) CO the right to remuneration arises with claiming an invention by the employer. Claims in connection with work carried out by employees for their employers is subject to a five-year limitation period as stipulated in Art. 128(3) CO.

- 8) Is the amount of remuneration codified or variable? If variable, how is it determined? For example, what circumstances affect the amount of remuneration? If the amount of remuneration is based on revenue related to the patent (e.g., licensing revenue), how is that amount determined? What impact, if any, does the number of co-inventors have on the amount of remuneration to which any one of the inventors is entitled?

Under the rare occasion of Art. 332(4) CO the amount of remuneration is foreseen to be variable. In the Swiss law, there are no guidelines setting forth the criteria for the calculation of the remuneration for the employees' inventions. However, all pertinent circumstances of the individual case and in particular 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 his position in the company must be taken into account for determining the amount of remuneration.

The amount of remuneration per invention is usually distributed to the co-inventors in accordance with their individual shares in the invention.

- 9) Does contract law (e.g., company employee contracts requiring assignability of inventions to the company) affect any remuneration payable by an employer to an inventor employee?

Yes, it does.

Remuneration of the inventor employee is subjected to the contract law. This means that the employee and the employer are allowed to make a number of arrangements concerning the remuneration and compensation issues, which are not regulated by the CO. However, Art. 362 CO does not allow to modify the remuneration rules set forth by Art. 332(4) CO to the detriment of the employee by individual agreement, standard employment contract or collective employment contract.

In general, contracts between an employer and an employee regarding rights to intellectual property which the employee has created in the course of his employment are governed by the law applicable to the employment contract ⁷.

- 10) Does your Group's current law provide for any entitlement to additional remuneration after an employee inventor has already accepted remuneration for the invention? For example, this could arise where the patent value has increased after any initial remuneration entitlement has been paid, and the inventor employee seeks additional compensation for the increased value arising from the issuance of a patent or later commercialisation.

No, it does not.

- 11) If remuneration is based on the contribution each inventor made to the invention, how is that contribution determined and how is the remuneration then calculated?

There is no specific guidance in the Law. As indicated at point 8) above, the amount of remuneration per invention is usually distributed to the co-inventors in accordance with their individual shares in the invention.

- 12) Does any right to remuneration under your Group's current law apply to inventors located outside your jurisdiction if the employer is located in your jurisdiction?

Intellectual property rights shall be governed by the law of the State in which protection of the intellectual property right is sought ⁸. Accordingly, with respect to an invention that shall be protected in Switzerland, the Swiss law determines who shall be considered an inventor regardless of where the contributions to the invention have been made.

However, with respect to remuneration, what counts is the jurisdiction where the work (i.e. the invention) has been performed. If this is Switzerland, the Swiss law applies irrelevant of the jurisdiction where the employer is located.

- 13) Does any right to remuneration under your Group's current law apply to inventors located in your jurisdiction if the employer is located in another jurisdiction?

See point 12) above.

- 14) If an employee inventor in your jurisdiction is a co-inventor with one or more inventors outside your jurisdiction, does the number of co-inventors or whether they are entitled to remuneration impact the inventor employee's entitlement to remuneration? Does it matter if the employer is in your jurisdiction or outside your jurisdiction?

⁷ Art. 121 of the Swiss Federal Code on Private International Law

⁸ Art. 110(1) of the Swiss Federal Code on Private International Law

No, it does not matter, see point 12) above.

II. Policy considerations and proposals for improvements of the current law

15) If your Group's current law provides inventor employees with a right to remuneration for their inventions:

a) is the law sufficiently clear as to the circumstances under which the right to remuneration arises? *Yes, it is, though remuneration under the rare occasion stipulated under Art.332(4) CO has no practical relevance in Switzerland.*

b) does the law provide sufficient guidance as to how the remuneration is to be determined? *See a). There are no specific guidelines setting forth the criteria for the calculation of the remuneration for the employees' inventions.*

c) are there aspects of your law that could be improved to address remuneration of inventor employees? *No. See a). Remuneration has no practical relevance in Switzerland.*

d) are there any proposed reforms of your law with respect to such remuneration? *No.*

16) If your Group's current law does not presently provide inventor employees with a right to remuneration for their inventions:

a) Should it do so? *Though it does under the rare occasions discussed above, the Swiss Group is not in favor of expanding the remuneration of inventions to inventions produced by employees in performance of their contractual obligations towards their employer.*

b) Are there any proposals to introduce such rights? If yes, please describe such proposals. *No.*

III. Proposals for harmonization

17) Is harmonization in this area desirable? *Yes, it is. However, the Swiss Group is not in favor of expanding the remuneration of inventions to inventions produced by employees in performance of their contractual obligations towards their employer.*

If yes, please respond to the following questions without regard to your Group's current law.

Even if no, please address the following questions to the extent your Group considers your Group's current law could be improved.

18) Please propose a standard for remuneration for employee inventors that your Group considers would be an appropriate international standard, addressing both the circumstances that give rise to remuneration and to the basis for determining it.

The Swiss Group has no specific standard to propose.

19) Please provide a standard that your Group considers would be an appropriate international standard for handling issues where employee inventors are located in different countries and the countries have differing laws relating to the remuneration of inventor employees.

The Swiss Group has no specific standard to propose.

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