Euro-Balkan Law and Economics Review

Data di pubblicazione: 24 giugno 2022

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Challenging ownership of copyright of the employee-author

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1. Introduction

The work is an original intellectual creation in literature, art, and science, which carries individual characteristics, regardless of the mean or form of its expression, objective, or importance. According to the Albanian Law on Author's Right (from now on ALAR) principle of presumption of authorship unless there is evidence to the contrary, any individual or group of individuals whose name appears in work, regardless of the manner of presentation, is presumed to be the author of the work, implying with "name" even a mark, a pseudonym, code or signature of the author. The Berne Convention does not define "author" but accepts as sufficient the name of who is entitled to bring an action to assert the

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copyright in work, to appear on the work in the usual manner.[1] Another principle, the free formality principle, requires only the realisation of the work without additional registration or any other formality. ALAR, Art.3(1) stipulates that the author's rights belong, by nature, to the natural person who created the work. Kosovo Law on Author's Right (from now on KLAR) Art.6(1) states that the author's rights are inseparable rights from the author. In general, countries (not only Berne Convention countries) that unconditionally adhere to the "creator as author" concept do so on the premise that authors can only be natural persons.[2] Thus, the human who "has marked" the creation is presumed its author from the moment the design is completed and consequently thoroughly enjoys the author's rights. Broadly known as the attribution right, this moral right is the *alpha* of enjoying any other right, a moral or economic one. This right identifies to whom the work belongs. The binomial author-work implies undoubtedly that *ab initio,* all the rights for the particular work are in the hands of its author. Even though there is no direct or *in extenso* reference to Intellectual Property and with a potential contradiction with the first paragraph of Art.27,[3] Universal Declaration of Human Rights Art.27(2) significantly proclaims that:

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[1] WIPO. *Guide to the Berne Convention for the Protection of Literary and Artistic Works*. WIPO Publication, No. 615, Geneva, 1978, 93 ss, in https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf

[2] R. A. Jacobs, *Work-For-Hire and the Moral Right Dilemma in the European Community: A U.S Perspective,* Boston College International and Comparative Law Review 16 (1), 1993, 37 ss,
in https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1318&context=iclr

[3] R. Uszkai*, Are Copyrights Compatible with Human Rights?* The Romanian Journal of Analytic Philosophy (VIII), 2014, 6 ss, in https://philarchive.org/archive/USZACC

"Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

Since the authorship is a legal status, a broader concept that includes the narrower idea of ownership, ALAR recognises the right holder, who, according to agreements, may acquire some economic rights temporarily without compromising authorship. This paper will analyse from the Albanian legal perspective how the "employed" status of the author affects the ownership of the rights deriving from work, according to Law on Author's Right and Labour Law, thus examining the implication of the employer as a temporary right's holder. The paper will explain the different legal approaches to exercising economic rights depending on the type of work deriving from the employment relationship, further comparing to Kosovo Law on Author's Rights.

2. Employee-Author

The Albanian Constitution guarantees the right of everyone to earn a living by lawful, accepted, and selected work, based on freedom of economic activity and the prohibition of forced labour. The Constitution has dedicated an article to promote scientific research and artistic creativity and ensure its use and economic benefits. The recognition of creative activity and its benefits by Labour Law indicates its nature as a form of work. The Albanian Labour Law (from now on ALL) does not define the concept of the employee, except for art. 12, which, while

explaining the meaning of the employment contract, sheds light on the employee's role: *"… the employee undertakes to offer his work or service for a fixed or indefinite period, within the organisation and orders of another person, called the employer, who undertakes to pay a reward".*

Nowadays, many companies are aware of the value of the intellectual property. The ownership and control of intellectual property rights are crucial to the success of any business.[4] Recent decades have brought an upsurge of interest in the legal ownership of intellectual property rights created by employees. There are many situations where it is evident that an employee has done the work in the course of his employment. The employment contract is essential to understand the manifested expectations of the employee and his employer.[5] However, as there are no international solutions regarding employees' intellectual property rights, the nature of both employee's and employer's rights is defined by national legislation.[6] Art.136(1) of ALL provides that when the employee generates work during his activity in the employer's service and under his contractual obligations, the employer may use it to the extent permitted by the purpose of the employment contract. ALAR has a provision with similar content, which explicitly regulates the creative activity of the employee as an author. As a result of both provisions, the general rule is

[4] S. Wolk, *EU Intellectual Property Law and Ownership in Employment Relationships, Property and Ownership*, Hyderabad India, 2008, 1 ss, in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557603

[5] C. O. Nwabachili and C. C. Nwabachili, *Authorship and Ownership: A Critical Review,* Journal of Law, Policy and Globalization 34, 2015, 1 ss, in https://www.iiste.org/Journals/index.php/JLPG/article/view/20321

[6] S. Wolk, op. cit. 1-2 ss

that the first ownership of the work may be handed over to its author's employer. This general rule can be better explained in economic terms, according to which ownership of copyright should go to the party in a better position to exploit the value of the disputed work by bringing it to the public's attention. With greater experience, resources, or better market position, this party could more cheaply distribute the work to the public.[7]

1.1. The work is expected to be created

ALAR has dedicated its Art.69 to explain how copyright is owned if an employee creates the work under the terms of the employment contract during the execution of the duties and instructions given by his employer. This provision refers to the employment contract, according to which the work is expected to be created by the employee. The employee must comply with the directions and instructions issued from the employer, which logically fall within the scope of his activity, so being subsumed into the identity of his employer.[8] As the creation of works, which he realises during working hours, is not an accessory activity of the employee but his primary contractual obligation, ALAR

[7] I. T. Hardy, *An Economic Understanding of Copyright Law's Work-Made-for-Hire Doctrine,* William & Mary Law School Scholarship Repository, 1988, 181 ss, in https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2120&context=facpubs

[8] C. L. Fisk, *Authors at Work: The origins of the Work-for-Hire Doctrine,* Yale Law Review and Humanities 15, 2001, 1 ss, in https://www.semanticscholar.org/paper/Authors-at-Work%3A-The-Origins-of-the-Work-for-Hire-Fisk/5a29b038fcd38c1a9d9e0a844567ab19f70700d6

pays special attention to the individual employment contractual terms. In this perspective, the employment contract sets the rules to follow for the circulation and transfer of the author's rights. Unless otherwise is agreed upon in the employment contract, the author's rights are *ex-lege* automatically transferred to the employer. Art.126(1) of KLAR recognises not only the employment contract but also any written act that can be used by the parties to agree otherwise. In the decision, the Intellectual Property Enterprise Court in the UK,[9] referring to Clause 2 headed "Job Title and Duties" and Clause 15 "Intellectual Property", decided that the ownership over the VFC software created by the employee belongs to the employer as it was the central task Mr Penhallurick was being paid. But this decision is essential for its interpretation for the "course of employment", explaining that creating the work in employee's time, at his home and on its personal computer are such factors that did not make a difference when the nature of the work in question falls within the scope of duties for which the employee is paid.[10]

ALAR does not establish a list of works whose economic rights may be transferred to the employers, not excluding any of the works mentioned by Art.12. It does not distinguish between public and private sector employees, to determine like Copyright laws of other European

[9] Penhallurick v MD5 Limited, EWHC 293, 2021, in https://www.bailii.org/ew/cases/EWHC/IPEC/2021/293.html

[10] J. Blum and J. Palmer, *What happens if an employee writes code in his "personal time" Penhallurick v MD5*, Kluwer Copyright Blog, 2021, in http://copyrightblog.kluweriplaw.com/2021/03/08/what-happens-if-an-employee-writes-code-in-his-personal-time-penhallurick-v-md5/

countries that all economic rights over copyrighted works of public sector employees are *ipso jure* transferred to the employer unless otherwise agreed.[11] ALAR does not contain any explicit rules on any duty to inform of the creation of a copyright-protected work, too. But the employer has an implied responsibility to accept the work created by the employee, and the employee must submit the work for acceptance. However, such duties may arise from the employment regulations or employment contract.[12]

The employment contract that does not contain any clause different from the content of Art.69(1) will also serve for the transfer of copyright. In the employer-employee context, the employer need not secure a separate transfer of copyright since he acquires the economic component of copyright by virtue of the employment contract.[13] It is pretty clear that only the economic rights leave the hands of the author, which by nature are legally transferrable to third parties. In this case, it will be considered that the work's economic rights and other rights have passed exclusively to the employer for three years from the date the work was delivered to the employer. Regardless of the duration of the employment contract or in the event of earlier termination of the

[11] A. Sotiropoulou, *Copyright ownership in workplace. The example of Greece,* International Lawyers Network, 2018, in https://www.ilnipinsider.com/2018/03/copyright-ownership-in-workplace-the-example-of-greece/

[12] K. Szkalej, *Poland* in S. Wolk and K. Szkalej (eds.), *Employees' Intellectual Property Rights*, Kluver Law International BV, The Netherlands, United States of America, United Kingdom, 2018, 2nd edition, 303 ss, in https://uu.diva-portal.org/smash/get/diva2:1275028/FULLTEXT01.pdf

[13] R. A. Jacobs, op. cit. 52 ss

employment contract, the author's economic rights temporarily "belong" to the employer, who for the next three years is the exclusive right holder, excluding its simultaneous use from the author.

The term "*and other rights*" used by ALAR Art.69(1) and KLAR Art.126(1) should not be understood to be "the moral rights" which are *inter vivos* inextricably linked to the author. ALAR recognises exclusive economic rights and other economic rights, and the other rights mentioned must be implied to be the other economic rights. The exclusive use of economic rights from the employer also constitutes a legal impediment for the employee to exercise his moral right as an author to withdraw the permit for the use of the work, whether a computer program or other genre of work. According to ALAR Art.24(4), the employee-author may only request that his name not be mentioned in copies of the work or any use thereof. As for other moral rights, they remain with the employee-author and must be respected by the employer and any third person who uses the copyrighted work, taking care not to violate them. The existence of moral rights provisions also limits the extent to which an employer could freely exploit a work.[14] Unlike the traditional Work-for-Hire doctrine, the employer is never considered the author, but the holder of the economic rights of the copyright, as ALAR recognises "the human-creator-author" conformity. The notion of authorship is freighted with connotations of genius and

[14] *Ibid*, 54 ss

moral entitlements that flow from it, so the employer's consideration as the "author" of a work is legal fiction.[15]

Furthermore, the use of the author's rights from the employer is not only time-limited, but its exploitation for economic benefits must be within the scope of the employer's activity, which is expressed in terms of the employment contract. The content of the employer's activity indirectly establishes which economic rights are automatically transferred. This automatic and no-authorization use from the employee-author creates the impression that it is "free". The transfer of economic rights over the work created during the performance of the employment contract is a *quid pro quo* for the salary. In other cases, the written consent of the employee-author is required, who also enjoys the right to fair remuneration. Usually, the employer cannot transfer the economic rights over the work to third parties for economic benefits purposes. Still, if the transfer of rights is expressly defined in the employment contract, the third parties can use the work, and the employee-author enjoys the right to receive a proportional remuneration based on the realised profit. According to ALAR, despite his salary, the employee-author has the right to benefit only if the work is used from the employer outside his business's scope or when the rights are transferred to third parties. KLAR Art.126(4), the employee as the author enjoys the right to claim additional compensation from the employer if his salary is at significant disproportion to the profits or savings realised due to the use of the

[15] C. L. Fisk, op. cit. 5 ss

work. ALAR, through Art.111, grants the same treatment to employed performers and executors concerning their neighbouring economic rights provided by Art.109(1). In case of an interpretation and execution given by the interpreter and the executor, in the clauses of an individual employment contract, the economic rights can be transferred to the employer under the condition that each transfer must be explicitly mentioned in the employment contract.

The expiration of three years period of use of the work exclusively and with(out) compensation by the employer means the automatic return of the rights to the creator of the work to the employee. On the other hand, KLAR Art. 126(1)(2)(3) provides for a longer term of use of the work from the employer. The economic rights will be returned to the employee-author before the expiration of a ten-year term, in case of death of the employer or in case of liquidation of the employer as a legal person. The use of the work from the employer may be terminated unilaterally at the request of the employee if the employer does not use the rights over the work at all or uses them to a negligible extent.

However, according to ALAR, the employer can claim a new contract to transfer exclusive economic rights over the work in exchange for a just remuneration. This last contractual relationship is different from the employment contract. The work is the same, but the previous relationship has as a legal basis an individual employment contract, the second one has a typical copyright contract which fully reflects the author's (not employee) will to transfer a third party (not his employer) one or some rights over the work.

1.1.1. Audio-visual works

The way ALAR determines the transfer of economic rights of co-authors, authors of contributions, and performers to the producer has similar characteristics with the transfer of copyrights from employee to employer. Audio-visual works, according to ALAR Art.95, are cinematographic or television films, animated, commercial, or other films, short music videos, documentaries, shows, and television graphics, as well as other audio-visual works, expressed by sequences of moving interconnected images, with or without sound, regardless of the nature of the mean in which they are fixed. Audio-visual works are the product of the joint creative input of authors, such as the principal director, the screenwriter, the author of the dialogues, the composer of the musical work (with or without text), created especially for the audio-visual work, the author of the adaptation of the work and the director of photography. ALAR also recognises the authors of contributions, who enjoy copyright for their contributions. Audio-visual works are usually created based on two main types of contracts provided by Art.96 and Art.99 of ALAR. The first serves to transfer the right of audio-visual adaptation. The second, named the audio-visual production contract regulates the relationship between the producer of the audio-visual work (film), co-authors, and authors of contributions and the relationship between the authors of an audio-visual work.

According to the Berne Convention Art. 14bis (2) (a): "*Ownership of copyright in a cinematographic work shall be a matter for legislation in the country*

where protection is claimed." The Convention expressly provides that the ownership of the film's copyright is a matter for the country where protection is claimed. This may be the maker in his own right, as under the "film copyright" system, or the maker because of a legal assignment, or the various artistic contributors to the film. National legislation is free to adopt any of the systems.[16] Art.99(2) and Art.109(6) of ALAR stipulate that unless otherwise provided by the contract, it will be considered that co-authors and interpreters and performers, who participate in the production of an audio-visual work, have transferred through the film production contract to the producer, exclusively and without restrictions, all their economic rights to the audio-visual work, its translation, audio-visual transformations and photographs taken in connection with this work. According to Art.99(3), the producer of the film acquires all the economic rights of authors of contributions to use their contributions to the necessary extent of the scope of the contract, unless otherwise provided by the contract. KLAR reflects the same approach towards transferring economic rights to the producer.

In both cases, the automatic transfer of economic rights favouring the producer is easily understood, except when expressly prohibited by any contractual clause. ALAR does not set a time limit for the use of economic rights from the producer, implying that no restitution of rights to co-authors or authors of contributions can be applied. There is a proportional transfer of rights to the producer: the co-authors'

[16] WIPO, op. cit. 85 ss

contribution is more significant, and the transferred economic rights are full, exclusive, and unrestricted, while in the case of the authors of the contributions, the transfer of economic rights is limited by the scope of the contract. This legal solution is very well-suited for the audio-visual entertainment industry because it "solves" the problematic issues of copyright ownership over a work with numerous creative contributors. It represents a rational economic response to an art form in which production and distribution present significant logistical and financial challenges.[17] Co-authors of the audio-visual work enjoy the right to remuneration for any way the work is used, calculated in proportion to its total revenue unless agreed otherwise. The transfer of economic rights is practical and facilitates the economic exploitation of the work by consolidating ownership in a single entity,[18] even though authors of audio-visual works are legally considered co-authors and not mere employees. They retain the exclusive right to further transform the audio-visual work into another art form and the right to a fair remuneration from the film producer for each rental of videograms of the audio-visual work. The authors of the contributions retain the right to individually use their contributions to the audio-visual work, provided that this use does not infringe the rights of the film producer.

[17] J. L. Schwab, *Audiovisual Works and the Work for Hire Doctrine in the Internet Age,* Columbia Journal of Law & the Arts 35, 2012, 145-146 ss, in https://journals.library.columbia.edu/index.php/lawandarts/article/view/2186/1122
[18] *Ibid.*

1.1.2. Computer programs

Computer programs play an increasingly important role in a broad range of industries. According to the Directive 2009/24/EC of the European Parliament and the Council "On the legal protection of computer programs", §2 and §7 the term "computer program" shall include programs in any form, including those which are incorporated into hardware. This term also includes preparatory design work. The Albanian legal definition for the word "computer program", provided both by ALAR Art.88(1) and by ALAR Definition Manual §61, also comprises "*application programs and operating systems expressed in any language*" and "*user manuals*". The development of computer programs requires the investment of considerable human, technical and financial resources.[19]

Unlike for other works, ALAR Art.89 states that if a computer program is created by an employee in the execution of his duties or after instructions given by his employer, the employer, exclusively, is entitled to exercise all economic rights to the created program, unless otherwise provided in the contract. This Albanian legal provision is identical to Art.2(3) of Directive 2009/24/EC, which requires the E.U. Member States to allocate the exclusive economic rights to the programmer's employer unless the contract provides otherwise.[20] KLAR, Art.120,

[19] *Ibid.*

[20] P. Goldstein and P. B. Hugenholtz, *International Copyright. Principles, Law and Practice*, Oxford University Press, New York, United States of America, 4th edition, 2019, 237 ss, in https://books.google.it/books?id=IvarDwAAQBAJ&pg=PA237&lpg=PA237&dq=ownership+of+employer+on+employee+software+in+eu&source=bl&ots=8ewQMlQt

regarding computer programs guarantees all the economic rights are given exclusively and "without restriction" to the employer, not only for the work created during the employment relationship but also when the computer program is created based on a contract for the commission of the work. The first difference between computer programs and other copyrighted works is quantitative. The transfer of one or more economic rights over other works to the employer is imposed on its business scope. In contrast, all the economic rights over computer programs are automatically transferrable. The other difference is time-related. The automatic transfer of copyrights over other works is applied for a three-year or ten-year term.

The rules provided by KLAR for computer programs also apply to databases and collective works. Art.106 of KLAR defines collective works as *"the work created in cooperation of several authors, by combining their contribution separately into a work such as encyclopaedias, lexicons, database, computer programs, collections, and other similar works, with the initiative and guidance of a natural person or legal person as a requester of work."* To create a collective work, a particular contract shall be concluded. If not provided otherwise, it is considered that the requester has been assigned with all unlimited and exclusive property rights and other author's rights of the collective work. KLAR Art.128 states that there is no need for a particular contract if the collective work is created during the

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employment relationship because it is considered that economic rights were assigned to the employer exclusively and without limitations.

1.2. The work is not expected to be created

The background seems to be the same. There is an employed person who creates a work on his initiative, but he is not hired for that purpose, for example, a physician who is employed in a hospital and he carries out a study of scientific value over a disease or in the case of a teacher who inspired by the story of his pupil writes a poem. ALAR is silent regarding the creative activity of the employee-author if his employment contract does not contain any obligation to create. The simplest and quickest answer would be that the author and not the employer would have all the rights to the work. If the natural person makes a work outside of working hours, a creation that does not conflict with any clause provided in his employment contract, the author of this work is that natural person.[21] (Semini, 2016)

The above examples do not have the same implication of the author with his employment. Even if the teacher is inspired by his pupil, there is no connection between a teacher who writes a poem and his employment contract. Employed or not, the author is the sole owner of the whole author's rights since the moment the poetry is created. The teacher has no obligation to let his employer know about the poetry. In

[21] M. Semini, *E Drejta e Detyrimeve dhe e Kontratave. Pjesa e Përgjithshme dhe e Posaçme*, Skanderbeg Books, Tiranë, Albania, 2016, 359 ss

contrast, there is an indirect connection between the physician, his study, and his employment. The physician has used data, means, and knowledge from the hospital. In this situation, one cannot at least ignore the opportunity given to the employee-author to create a work, which means that it might have been impossible for him to develop such work if he were not employed. The creative process and the work as its result is an extra-contractual consequence that can create ambiguity as to the vesting of copyrights in new materials[22] and can turn into a cause for copyright dispute. In *King v SA Weather Services* (2008),[23] the South African Supreme Court of Appeal found that the computer programs written in King's home to assist him in his performance as an employee were developed in King's course of employment, even though as a meteorological technical officer he did not have any duty to write computer programs. Among other elements favouring "assigning" ownership to the employer, his employment and the need to increase his performance encouraged him to write the programs. A prudent practice could require all key creative employees to sign agreements assigning the company the copyright on any work created while employed as a condition for employment. The agreement must be signed before the

[22] J. M. Garon and E. D. Ziff, *The Work Made for Hire Doctrine Revisited: Startup and Technology Employees and the Use of Contracts in a Hiring Relationship*, Minnesota Journal of Law, Science and Technology 12(2), 2011, 505 ss, in https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1137&context=mjlst

[23] King v SA Weather Services, 2008 in http://www.saflii.org/za/cases/ZASCA/2008/143.html

employee is hired or, if offered to a current employee, it must be coupled with an increase in pay or responsibilities.[24]

A possible solution to the lack of special regulation might be an addition to Art.69 of ALAR. The Art.15 of the Albanian Law on Industrial Property (from now on ALIP) can be an example. It regulates an analogous situation, but when an employee has come up with an invention. The provision controls not only the rights of an employee-inventor who has come up with an invention within the course of employment but even when an employee, although the employment contract does not oblige him to deal with inventive activity, makes an invention, using tools and other data, made him known through his employment. In the second scenario, the law obliges the employee inventor. He must immediately submit a written report on the invention to the employer. The employer, within six months from the date when the information has been presented to him, or from the date the employer was notified about the invention in other ways (the earliest date of them), must inform the employee inventor through a written statement that he is interested in his invention. If the employer states interest, then the patent rights belong to him from the beginning. Depending on the salary, the economic value of the invention, and the profit from the invention, the employee is entitled to the proper compensation. After the expiration of six months period and the lack of

[24] D. V. Radack, *Who Owns Copyrighted Work- Employer, Employee, Consultant? JOM* 48(8), 1996, 61 ss, in https://www.tms.org/pubs/journals/JOM/matters/matters-9608.html

interest of the employer, there is no doubt that the employee-inventor is also the holder of the patent rights.

2. Conclusions

Determining the author or authorship of a work is of particular importance. It identifies the affiliation of the work and makes possible the birth of all rights, economic ones or not. However, authorship and ownership over the work do not always fully coincide with the same person. Authorship is a status, an immutable quality for the creator, while third parties can hold copyright ownership. In this perspective, authorship and ownership belong to the same person when creating the work unless an employee realises the work.

The employed status of the author is of importance but not decisive. First, ALAR is *quasi* mandatory regarding the transfer of economic rights to the employer, leaving room for the employee's will to "modify" the result of Art.69(1) through the employment contract. Second, Art.69(1) refers to works created according to the employer's instructions during employment. It means that the employment relationship is based on the expectation that the employee will create from the beginning. This approach is supported by the rest of Art.69, which stipulates that no authorisation is required when the use by the employer falls within the scope of his activity. Therefore, the employee is hired specifically for his creative skills, such as a journalist employed in a newspaper, a

photographer in a fashion magazine, or a choreographer in a music show company. When his skills and talents are materialised in a work, the employer could easily use it within his field of activity. Accordingly, for works created in the above conditions and used by the employer without authorisation, no additional remuneration is paid to the author, as he is periodically paid as an employee. He is a salaried author.

Art.69 has as its target and applies to most employment contracts based on the employee's talent and skills. But it is insufficient to regulate ownership over works, which are an extra consequence of an employment relationship. In these cases, it is presumed that all the rights, economic and moral ones, belong to the author, even though the author's employment has contributed to the creation of the work. As far as the Albanian legal framework provides, the current solution would be to previously determine ownership over copyright through a contractual clause on the employment contract or a specific agreement if the employer believes that there is potential to create a work to reduce the risk of dispute.

In this regard, for copyrighted works created with the "indirect contribution" of tools and data obtained and made known from employment, especially when created during working hours, it may be suggested to add the content of Art.69 of ALAR, taking in example Art.15 of ALIP. If the work is created in addition to the performance of employment duties, let the transfer of economic rights be subject to the employer's evaluation and interest. In this sense, the employer has priority over any third party, and the employee immediately benefits

from a contract to use his work. The potential possibility that the employer is interested in using the work is an opportunity for a fair remuneration over the usual salary and an incentive for the employee to create.

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