

# Copyright and Second Publication Right Regulatory Framework

---

Lugano - Zurich - Lausanne, June 2023

Suzanna Marazza & Anna Picco-Schwendener  
CCdigitalLaw c/o Università della Svizzera italiana

# Agenda

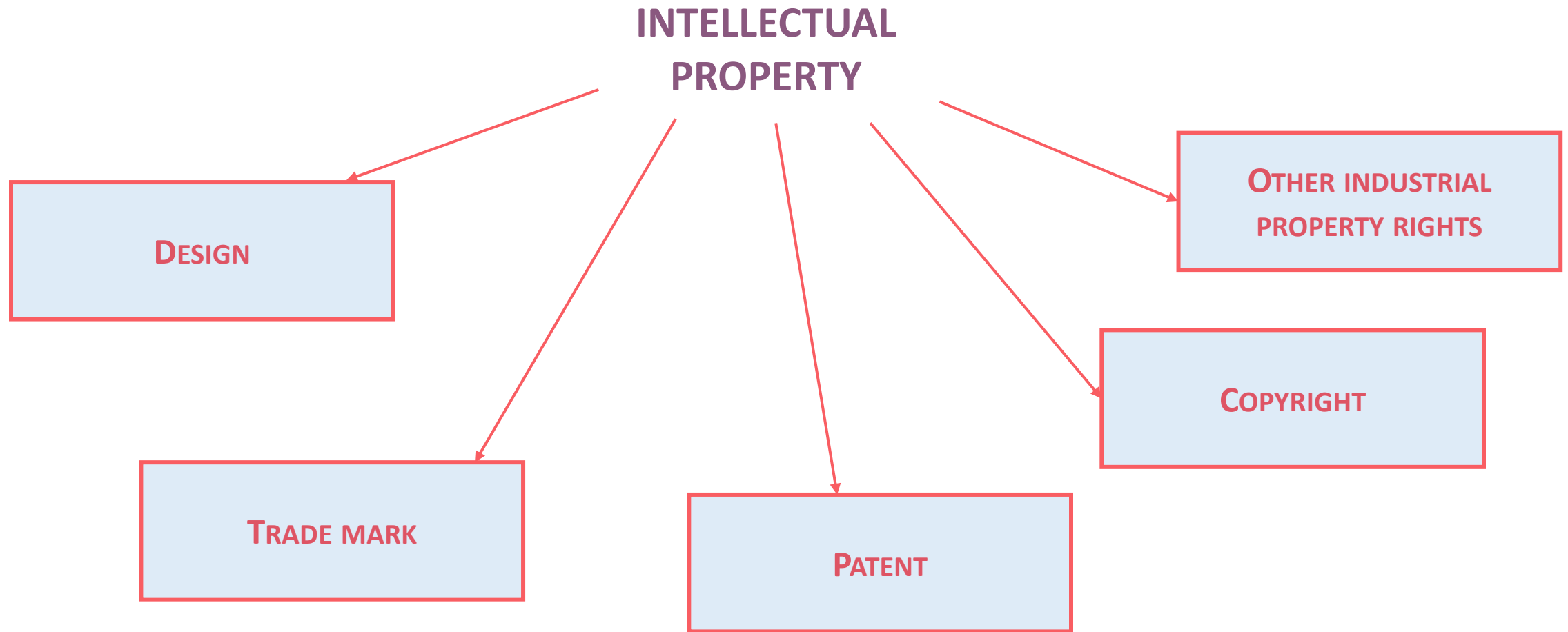
---

- ❑ **Introduction**
- ❑ **Requirements** for a work to be protected by copyright
- ❑ **Length** of protection
- ❑ Who are the **Author** and the **Right holder**
- ❑ The role of the 5 **Swiss collecting societies**

*15' break*

- ❑ **Publishing** contract and **Second publication right**
- ❑ **Creative Commons licenses**
- ❑ **Exceptions** of Copyright

# Introduction



## Intellectual property rights of a smartwatch

Technical invention:  
**PATENTS RIGHTS**  
**KNOW-HOW, TRADE SECRETS**

Design of the watch  
**DESIGNS RIGHTS**

Website  
**COPYRIGHT**



AI models and codes  
**COPYRIGHT**  
**EU: DATABASE directive**

Logo  
**TRADE MARKS RIGHTS**

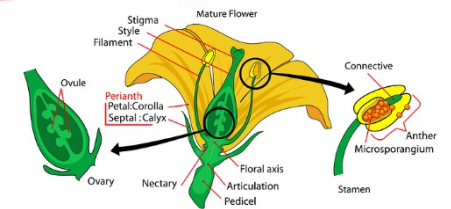
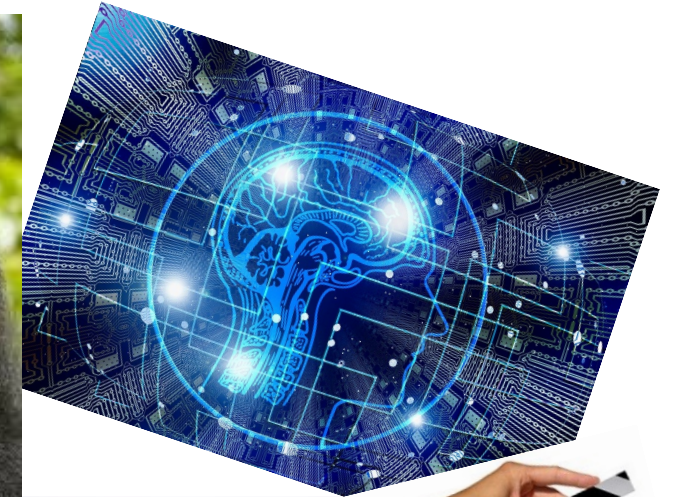
Author of smartwatch image: Nikin

Source: Pixabay, <https://pixabay.com/de/illustrations/smartwatch-apfeluhr-afel-2845072>

# What is protected by Copyright?

## Works

- ✓ Made by a person (Intellectual creation)
- ✓ Form of expression
- ✓ Individual character / originality



## Photos

- ✓ Made by a person (Intellectual creation)
- ✓ Form of expression
- ✓ Three-dimensional object





## Derivative works

- ✓ *Intellectual creations **with individual character***
- ✓ ***based upon pre-existing works***
- ✓ *individual character remains identifiable*
  
- Translations
- Adaptations
- Modifications
- ...



<https://pixabay.com/de/photos/salvador-dali-gegeben-uhr-zeit-2615717/>

## Collected works

- ✓ *Individual character with regard to their **selection** and **arrangement***
- ✓ *Works included in a collected work may be protected **individually**.*

- Newspaper
- Dataset
- CD
- ...



# How long is a work protected for?

# HOW LONG IS A WORK PROTECTED FOR?



Author's lifetime



+ 70 years

Non-original photos:  
50 years from creation

Creation of the work

→ Copyright protection starts **automatically** from the moment of creation.  
No registration required.

Author's  
death date



→ Public Domain Day

01.01.2081

01.01.2025

# HOW LONG IS A WORK PROTECTED FOR?



+ 70 years

Author's lifetime

Non-original photos:  
50 years from creation

Date of creation:  
27.10.1975

Author's death date:  
05.03.2010

Protection lasts until:  
**31.12.2080**



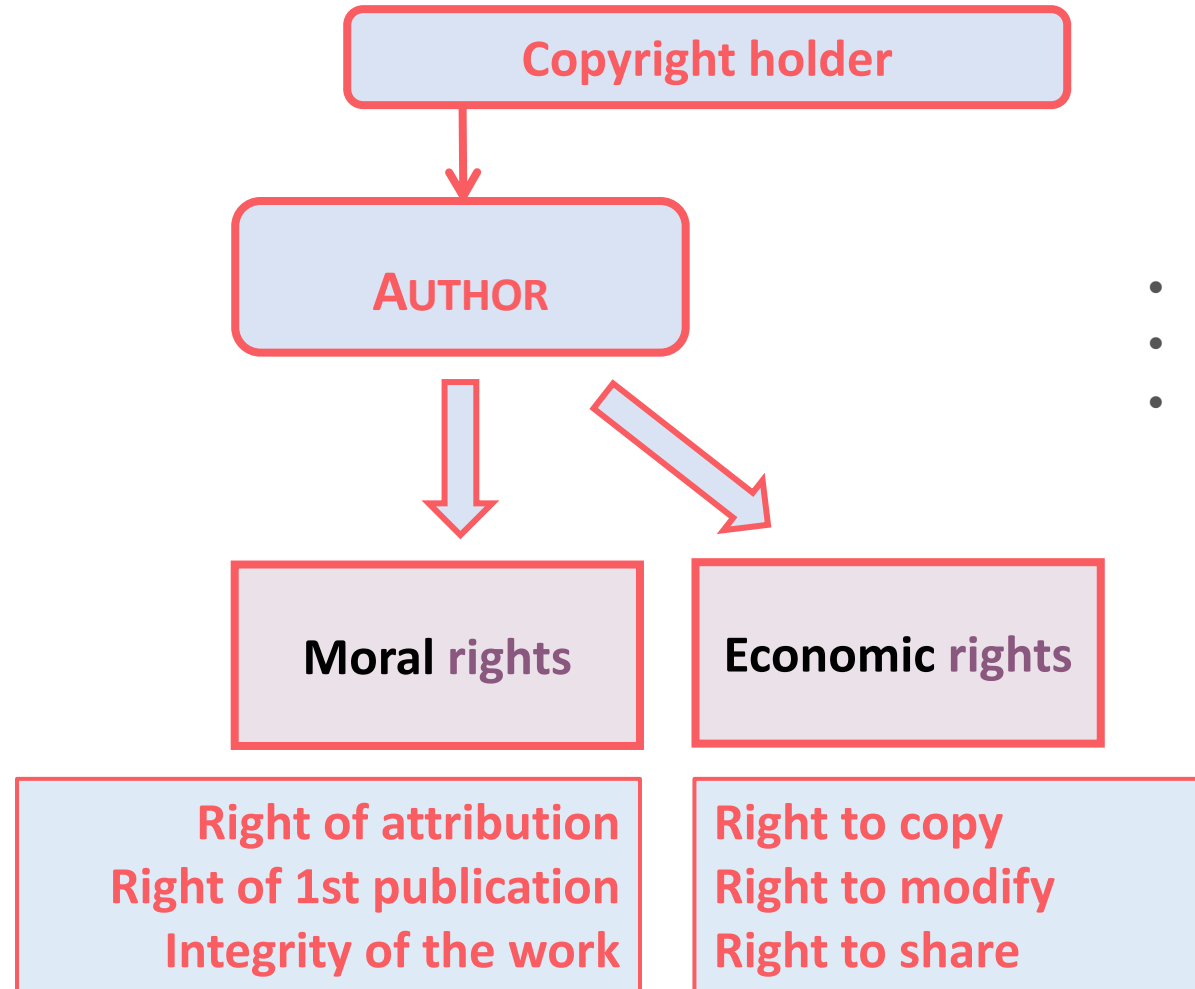
→ Public Domain Day

**01.01.2081**  
**01.01.2025**

---

# Who is the Author and who is the Right holder?

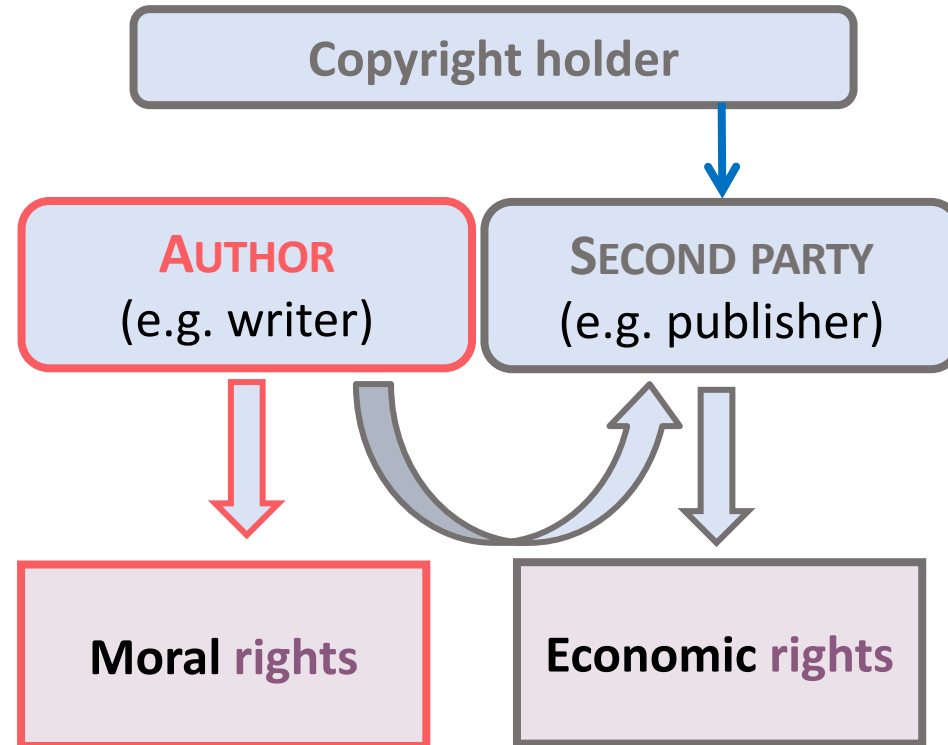
## THE AUTHOR



- Joint authors
- Executor
- Possessor

# WHO IS THE AUTHOR AND WHO IS THE RIGHT HOLDER?

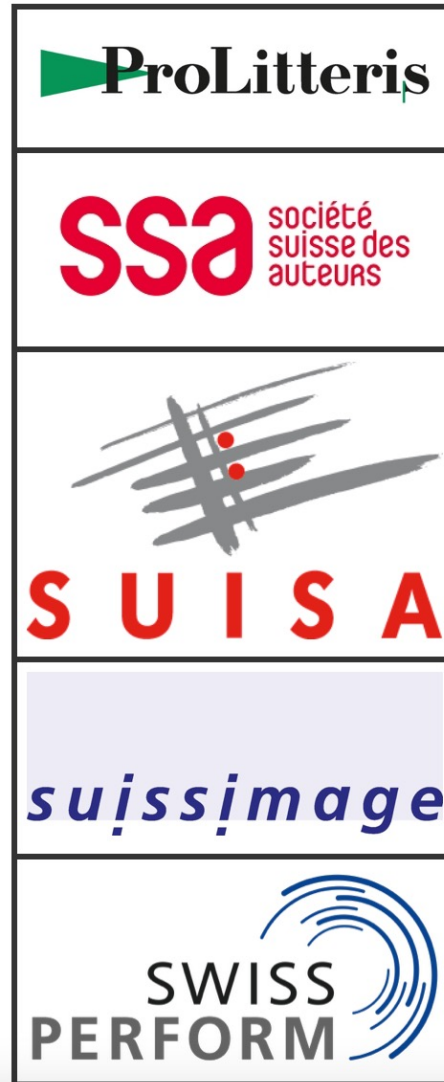
## THE RIGHT HOLDER





# The 5 Swiss collecting societies

## THE 5 SWISS COLLECTING SOCIETIES



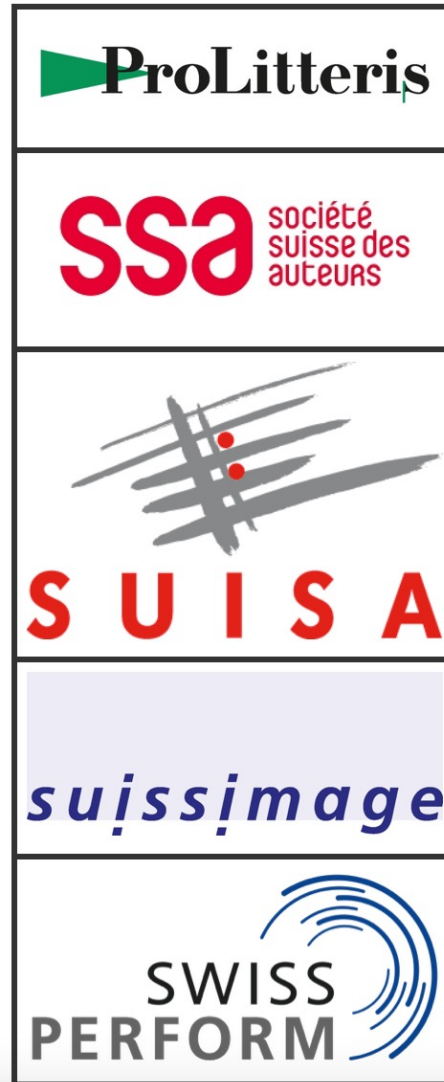
Literature and images

Theatrical, theatrical-musical, choreographed and some audiovisual and multimedia works

Music

Audiovisual works

Related rights



### Their role

- ✓ Grant legal authorization to the users of the works
- ✓ Collect royalties
- License for 1 work
- Extended Collective Licenses

It's not mandatory for the right holder to be member

# RECAP QUIZ

---



**1. The author of the famous story “Le Petit Prince” died during a mission in 1944. Am I allowed to distribute the whole original French text to the citizens of Geneva?**

- a) No, it’s a work protected by copyright and I can’t distribute it without the permission of the right holder.
- b) Yes, because it’s a famous story already published long ago.
- c) Yes, because it entered into the public domain in Switzerland.

# RECAP QUIZ

---



**1. The author of the famous story “Le Petit Prince” died during a mission in 1944. Am I allowed to distribute the whole original French text to the citizens of Geneva?**

- a) No, it’s a work protected by copyright and I can’t distribute it without the permission of the right holder.
- b) Yes, because it’s a famous story already published long ago.
- c) Yes, because it entered into the public domain in Switzerland.

# RECAP QUIZ

---



**2. I want to do the same in Zurich with the German translated version, am I allowed to do so?**

- a) No, because the translation is still protected by copyright even if the original text already entered into the public domain in Switzerland.
- b) Yes, because the story itself entered into the public domain.
- c) Yes, I can distribute the copies as long as I have purchased them.

# RECAP QUIZ

---



**2. I want to do the same in Zurich with the German translated version, am I allowed to do so?**

- a) No, because the translation is still protected by copyright even if the original text already entered into the public domain in Switzerland.
- b) Yes, because the story itself entered into the public domain.
- c) Yes, I can distribute the copies as long as I have purchased them.

# 15' break





---

# Publishing contract and Second publication right

## Publishing contract



## Second Publication Right



## Why is it important?

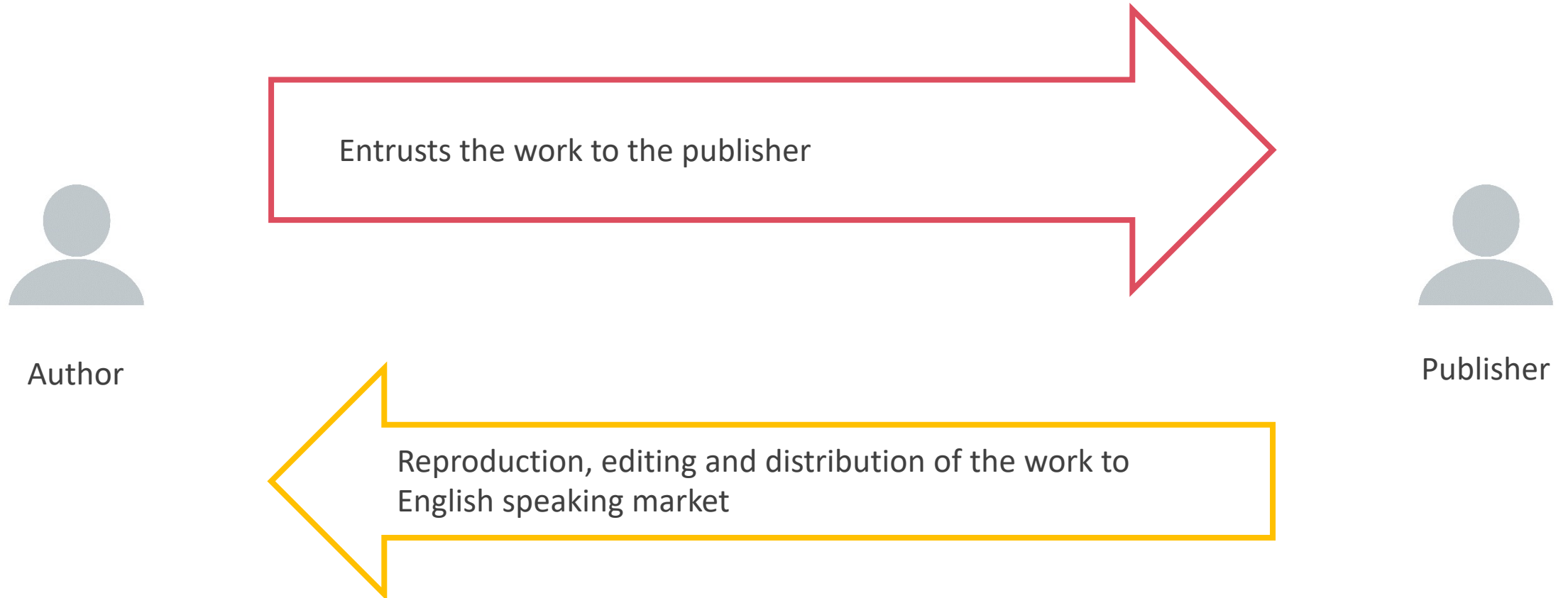
- ✓ Contributes to **better sharing of knowledge**
- ✓ **Publicly funded** research must be **accessible to all** citizens
- ✓ Allows for publications to **become actualized** in the form of policies, treatments, decisions,...
- ✓ Greater **visibility** and **attention** to researchers and publishers
- ✓ Increased **citations**
- ✓ Research is **disseminated** more rapidly and widely
- ✓ Open research is free to **read, copy, reuse** and **distribute**
- ✓ **Evolves science** and **improves society** as a whole

## Second Publication Right



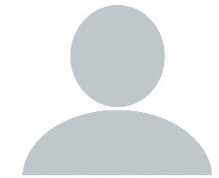
## Publishing contract (art. 380 CO)

---



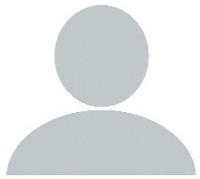
## What are the rights of the Publisher?

- **What power?** Decides how to exploit the work
- **How much?** Only to the **extent** of what is **defined** in the contract
- **How long for?**
  - Established in the contract
  - Time of selling / promotion of the work
- **Possibility to waive exclusivity?** Yes, after embargo



**Publisher**

## What are the rights of the Author?



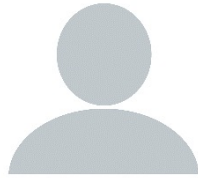
Author

- **What rights?** Only **moral rights** and **rights not transferred to publisher**
- **How much?** No competition with publisher
- **Second publication right?** Yes, after embargo
  - Monography: embargo period = publisher doesn't print/sell anymore
  - Contribution in collection / article of journal: **3 months** (art. 382 para 3 CO)

## Second Publication Right

state of the art according to Swiss Code of obligations

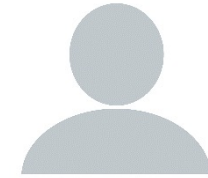
Art. 382 para 1 CO



**Author**



**Books**



**Publisher**

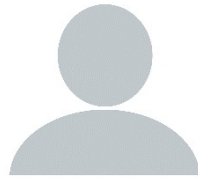
No competition with publisher  
Unless otherwise agreed

Exclusivity on the work

## Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 2 CO

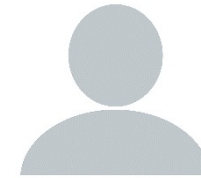


**Author**

Author can always re-publish



**Articles of newspapers  
Small articles**



**Publisher**

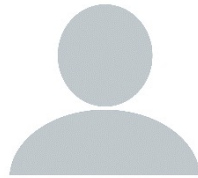
Non-exclusivity on the work



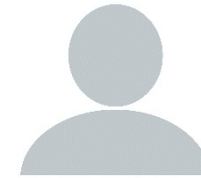
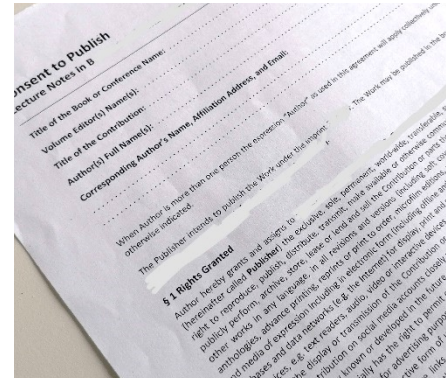
## Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 3 CO



Author



Publisher

Author can re-publish after 3 months

Non-exclusivity on the work

**Contribution of a collection**  
**Longer articles in journals**

## Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 3 CO



**I entered into an agreement with a publisher to publish my paper, in which an embargo period of 12 months was determined.**

**Am I allowed to re-publish my paper after 4 months by applying art. 382/3 CO?**

- a) Yes
- b) No
- c) ?

## Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 3 CO



I entered into an agreement with a publisher to publish my paper, in which an embargo period of 12 months was determined.

Am I allowed to re-publish my paper after 4 months by applying art. 382/3 CO?

a) Yes

b) No

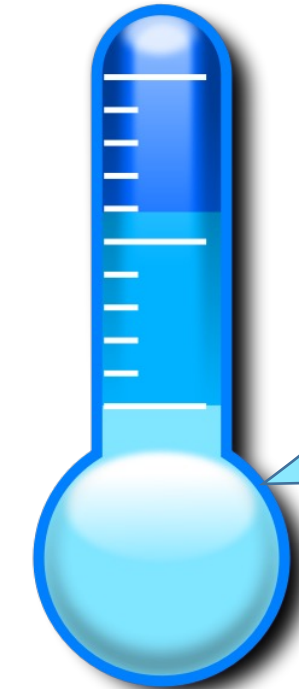
c) ?\*

\*Arguments for an interpretation as of imperative law: Grégoire Geissbühler, L'Open Access dans le Code des Obligations, in: Jusletter 17 mai 2021

## What might be negotiated?

### Go for it!

- Shorter **embargo** (= simple license after an exclusive license)
- Possibility to publish elsewhere, after embargo, with credit to publisher
- Possibility to publish **preprint**, under some conditions required by publisher
- Possibility to choose whether and how to translate and publish these translations



## What might be negotiated?

### Why not?

- Possibility to retain copyrights and only grant the permission to use/publish (exclusive/simple license)  
→ avoid transfer of copyrights
- Possibility to publish **preprint** elsewhere/before end of embargo



## What might be negotiated?

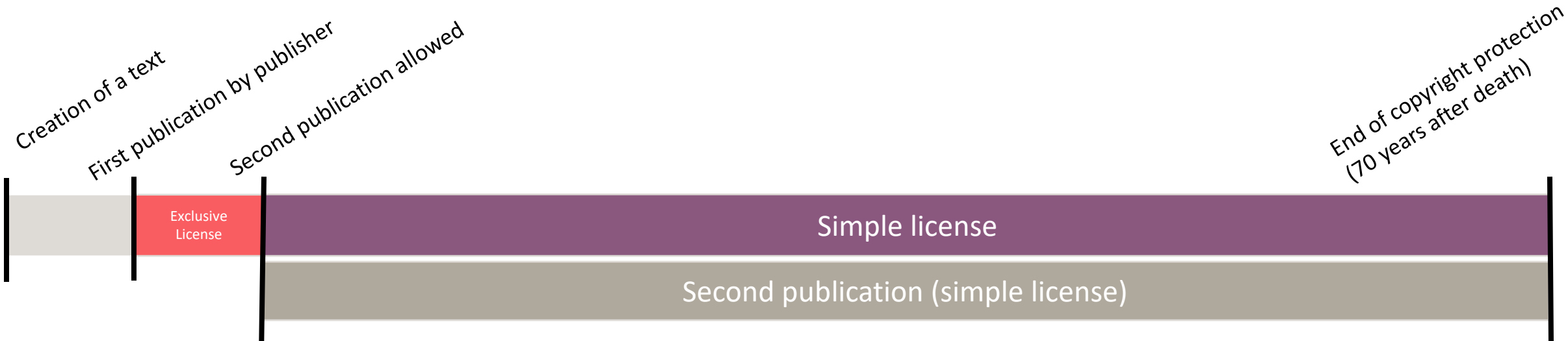
### Give it a try!

- Possibility to completely eliminate **embargo**
- Possibility to publish **preprint** elsewhere without notice of publisher



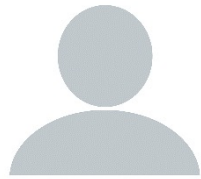
**Rechtseinräumung**

Ich übertrage hiermit der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V. (Vereinigung) an meinem Beitrag (siehe o.a. Job-Nr.) für ein Jahr ab Erscheinen das ausschließliche und danach für die Dauer der gesetzlichen Schutzfrist einschließlich zukünftiger Verlängerungen das nichtausschließliche Recht zu weltweiten Vervielfältigung und Verbreitung einschließlich folgender Rechte: Vorabveröffentlichung, Nachdruck, Übersetzung in andere Sprachen, Nutzung durch andere Vervielfältigungsformen wie insbesondere Fotokopie, Mikrokopie und ähnliche Techniken, Erstellung, Speicherung und Verbreitung elektronischer Formen (offline und online) wie CD-ROM, CD-I, Blu-Ray, DVD, Disketten, Nutzung in Local Area Networks (LAN), Intranets, Internet, Online-Archiven, Datenbanken, Blogs und Social Networks, Nutzung durch andere Verbreitungsformen wie Document Delivery Services, Nutzung durch Formen, Formate und Medien, die gegenwärtig bekannt sind bzw. sich aus der Fortentwicklung der bekannten und der Entwicklung neuer Medien und Formate ergeben. Die Vereinigung wird diese Nutzungsrechte durch den Verlag C.H. Beck ausüben. Die Vereinigung ist berechtigt, diese Rechte vollständig oder teilweise auf Dritte zu übertragen etwa auf die Betreiber anderer Online-Archive und Datenbanken. Sie kann diese Rechteübertragung auf Dritte auch durch den Verlag C.H. Beck ausüben.



# Licensing – Exclusive License (total / partial)

---



Author  
Right holder  
Lincesor



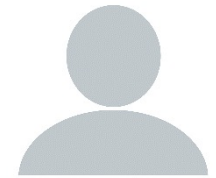
**Right to copy**



**Right to modify**



**Right to distribute copy and modifications**



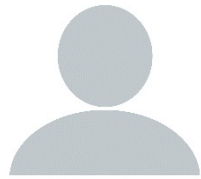
Licensee

e.g. money (Royalties), specifications, other obligations,  
nothing (no compensation)



# Licensing – Simple License

---



Author  
Right holder  
Lincesor



**Right to copy**



**Right to modify**



**Right to distribute copy and modifications**



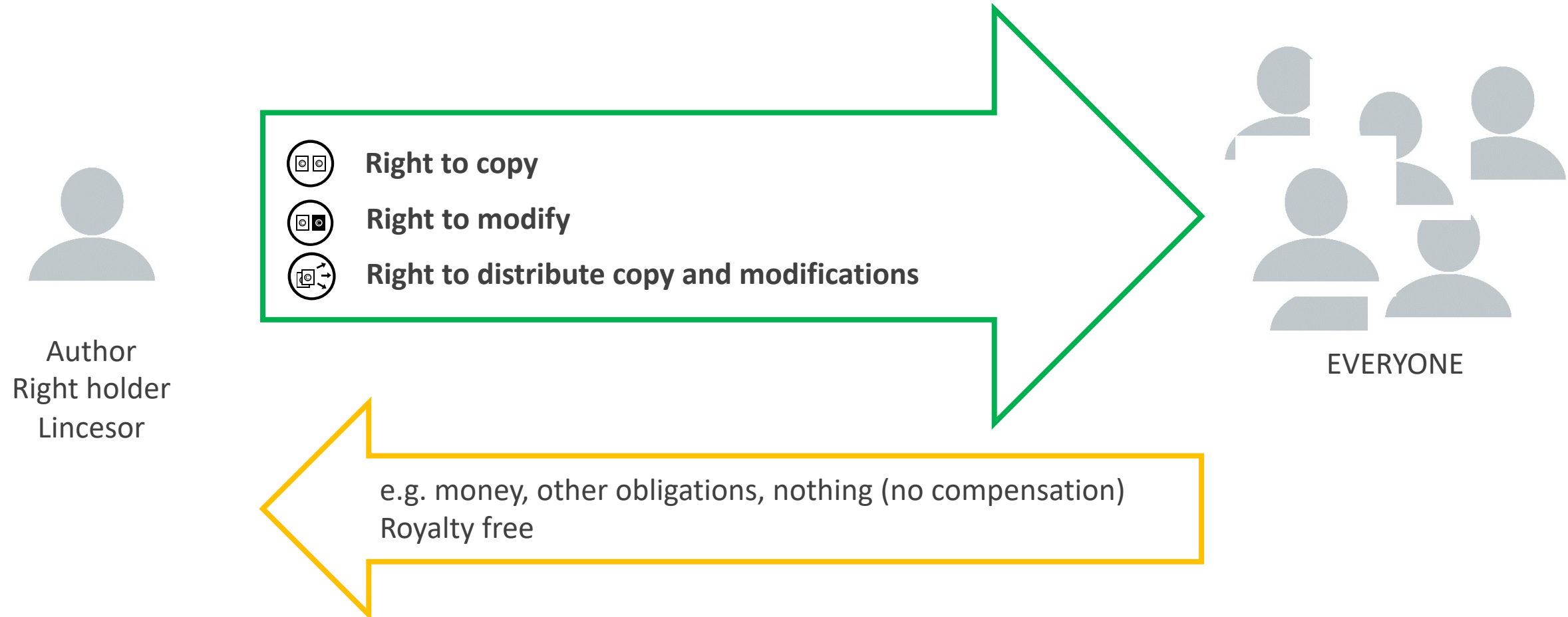
Licensee 1

Licensee 2

Licensee 3

e.g. money (Royalties), specifications, other obligations,  
nothing (no compensation)

# Licensing – Open License



## Regulatory Framework

### The project

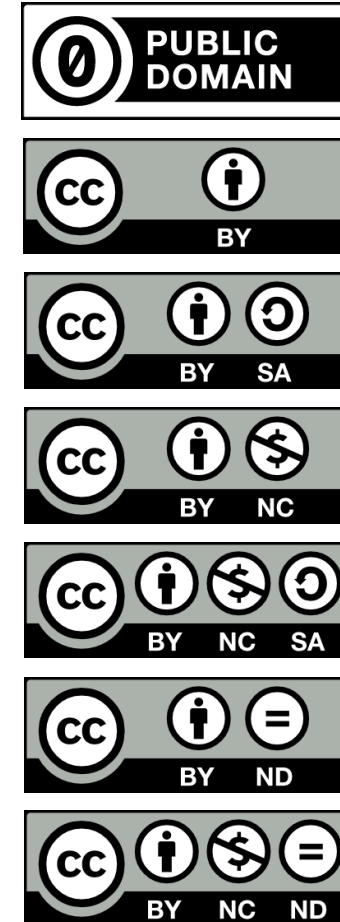
- Second publication right should be guaranteed by law
- Project funded by swissuniversities
- October 2022 – October 2023
- UZH
- UniGe
- UniBas
- Hefr
- Switch
- USI - Ccdigitallaw



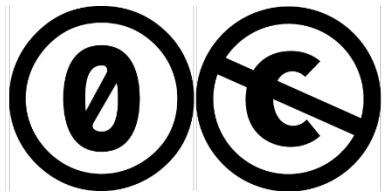
[https://www.youtube.com/watch?list=PL76RNkr3LU8A\\_YbvY8BtZMqiiQj-zd411&v=P1j0OA9N4hs](https://www.youtube.com/watch?list=PL76RNkr3LU8A_YbvY8BtZMqiiQj-zd411&v=P1j0OA9N4hs)



- Non-profit organisation
- 6 Licenses + «Public domain»
- 4 License elements (BY-SA-NC-ND)
- Pre-formulated



# License elements



CC0

**Zero / public domain**

No conditions

→ everything allowed  
(apart from respect  
personality author)

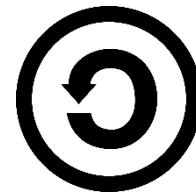


BY

**Attribution**

Condition

→ Where can the  
original be found  
and the author  
→ Several attribution  
obligations



SA

**Share alike**

Condition

→ Preservation of  
openness

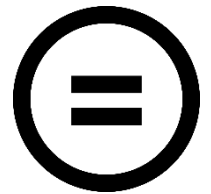


NC

**Non-commercial**

Limit

Not for  
commercial  
purposes



ND

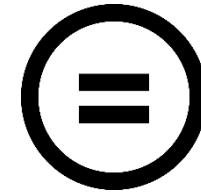
**No-derivatives**

Limit

No modifications

## CHART 2: WHAT USES ARE ALLOWED UNDER ND LICENCES?

Use Case	Permitted under ND?
Mashup video	No
Image or text in newspaper or journal	Yes
Music remix	No
Sampling	No
Image or text on website, blog or social media posting	Yes
Translation	No
Music synching	No
Screen adaptation (e.g. of a novel, music)	No
Images in catalogue	Yes
Article in text collection	Yes
Image Collage	Depends (generally No) <sup>92</sup>
Parody	Depends on the jurisdiction <sup>93</sup>
“Kitchen-Video” with background music	No
Documentary film integrating sound footage	No



**ND**

**No-derivatives**

KREUTZER, Till, 2014. *Open Content: a practical guide to using Creative Commons*, p. 51

[https://upload.wikimedia.org/wikipedia/commons/0/07/Open\\_Content\\_-\\_A\\_Practical\\_Guide\\_to\\_Using\\_Creative\\_Commons\\_Licences.pdf](https://upload.wikimedia.org/wikipedia/commons/0/07/Open_Content_-_A_Practical_Guide_to_Using_Creative_Commons_Licences.pdf)

ABBREVIATIONS:  
 Yes = Use of NC content is permitted  
 No = Use of NC content is not permitted  
 n.a. = Not applicable, i.e. such constellation is inconceivable in the logic of the chart as explained above

CHART 1: WHO CAN USE NC CONTENT IN WHAT USE CASE?

User type	Company	Public institution	Non-profit NGO	Free-lancer	Private person
Sell hardcopies	No	No	No	No	No
Licence content against payment	No	No	No	No	No
Use for advertising	No	No	No	No	No
Use to make money	No	No	No	No	No
Use for the job	n.a.	n.a.	n.a.	No	n.a.
Use on a website that displays ads to recover hosting costs	No	Yes	Yes	No	Yes
Use on a platform, where the platform provider (not the content provider) displays ads	No	Yes	Yes	No	Yes
Use for inhouse education and information	No	Yes	Yes	No	n.a.
Use for private entertainment and to entertain friends/family of the user	n.a.	n.a.	n.a.	n.a.	Yes
Use to inform/entertain customers/clients/audience	No	Yes	Yes	No	Yes
Use in tuition-free courses for educational purposes	No	Yes	Yes	No	Yes
Use in tuition-based courses for educational purposes	No	No	No	No	No
Use for corporate-funded research	No	No	No	No	n.a.
Use for tax-funded research	No	Yes	Yes	No	n.a.
Use for inhouse corporate research	No	n.a.	n.a.	No	n.a.



NC

Non-commercial

KREUTZER, Till, 2014. *Open Content: a practical guide to using Creative Commons*, p. 46

[https://upload.wikimedia.org/wikipedia/commons/0/07/Open\\_Content\\_-\\_A\\_Practical\\_Guide\\_to\\_Using\\_Creative\\_Commons\\_Licences.pdf](https://upload.wikimedia.org/wikipedia/commons/0/07/Open_Content_-_A_Practical_Guide_to_Using_Creative_Commons_Licences.pdf)

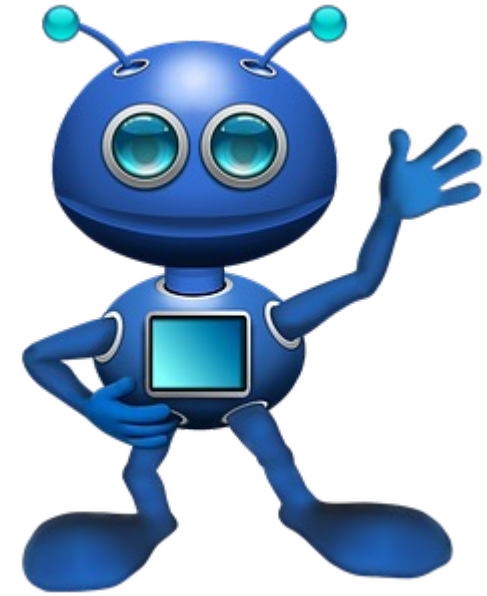


# CC zero/CC0



- All people of the world
- **Copy**
- **Modify**
- **Share**
- **For any purpose**
- No requirements of attribution
- No requirements to write the source
- No requirements to provide its license
- No requirements to release the modified version under a license

CC zero works:

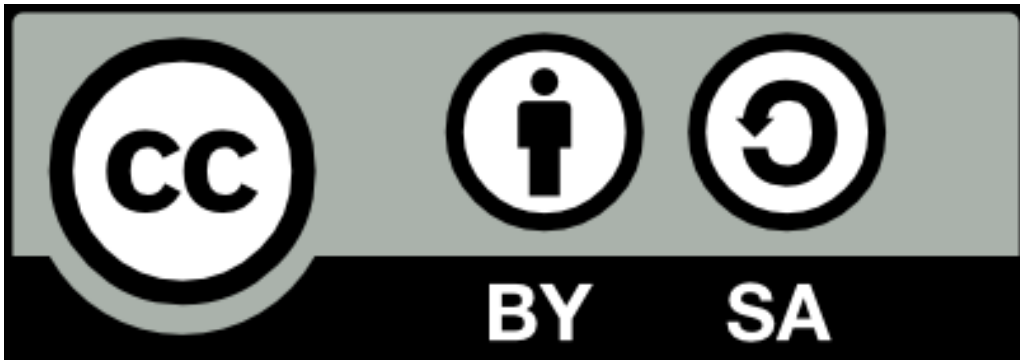


# CC-BY license



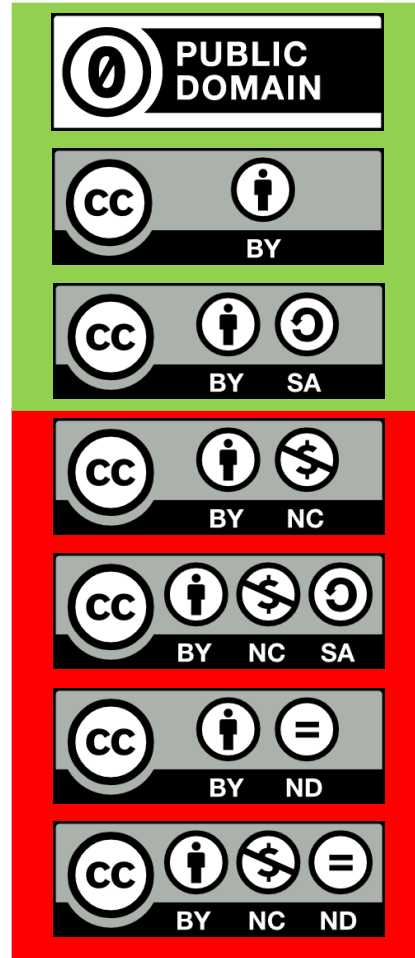
- All people of the world
- **Copy**
- **Modify**
- **Share**
- **For any purpose**
  
- **Requirement of attribution!!! (Element BY)**

# CC-BY-SA license



- All people of the world
- **Copy**
- **Modify**
- **Share**
- **For any purpose**
  
- **Requirement of attribution!!! (Element BY)**
- **Requirement for the modified version (Element SA)**  
→ Share Alike, “Copyleft”

# All Creative Commons Licenses



*open* definition from  
Berlin Declaration of Open Access

NOT «open» in the sense of Berlin  
Declaration of Open Access

**License name:** CC-BY-SA

**License symbol:**



**„Commons Deed“:** <https://creativecommons.org/licenses/by-sa/4.0/deed.en>

**License text (legal full text):**

<https://creativecommons.org/licenses/by-sa/4.0/legalcode>

**→ It must be read before use!**

Attach the license symbol or the license name to the work

→ Reference to license text

→ Similar to: «Our general conditions and terms apply»

Where should I attach it?

→ Where best visible

→ CC license chooser: <https://creativecommons.org/choose/>

## WHAT LICENSE TO CHOOSE?

1 Do you have the **right to license** the work?

No

You must  
not  
license

Yes

2 Do you want to publish it according to **Berlin Declaration of OA**?

No

Choose any  
license

Yes

CC0; CC-BY; CC-BY-SA

3 Do you or your organization want to be **named**?

No

CC0

You can also use CC-BY  
and CC-BY-SA and  
waive to be named

Yes

CC-BY; CC-BY-SA

4 Do you want it to be **kept open**?

I don't care

CC0; CC-BY

Yes

CC-BY-SA

# Exceptions



# Copyright

The **rule** is:

**Always ask** the rights holder for **permission** to use a protected work

There are **exceptions**:

- Private use
- Educational purposes
- Professional purposes
  - Right of quotation
- Text & data mining for research purposes

# WHAT CAN OTHERS DO WITH A PROTECTED WORK? - LAW

## PRIVATE USE



## PROFESSIONAL USE



## QUOTATION



## WORKS PLACED ON PUBLIC GROUNDS



# EXCEPTIONS

## EDUCATIONAL PURPOSE



## SECURITY COPIES



## TEMPORARY RIPIODRODUCTION



## DATA MINING



## CATALOGUES (MUSEUMS, AUCTIONS,...)



## Art. 19 Swiss Copyright Act

For **private use** (very small circle of persons):

- **Anything** (read, watch, view, see, copy, modify, ect.)



For **educational purposes**:

- Included in the collecting societies joint tariffs
- Only for my students
- **Any use** (also modifications): complete work
- **Distribution** of a **copy**:
  - Text, movie, music, video: only an excerpt (if work available in commerce)
  - Article of a newspaper, photo, images, prints: complete copy



For **professional purposes**:

- Included in the collecting societies joint tariffs
- **Distribution** of a **copy** (the extension is same as educational purposes)
- Purpose of internal information and documentation



### Art. 25 Swiss Copyright Act Right of quotation



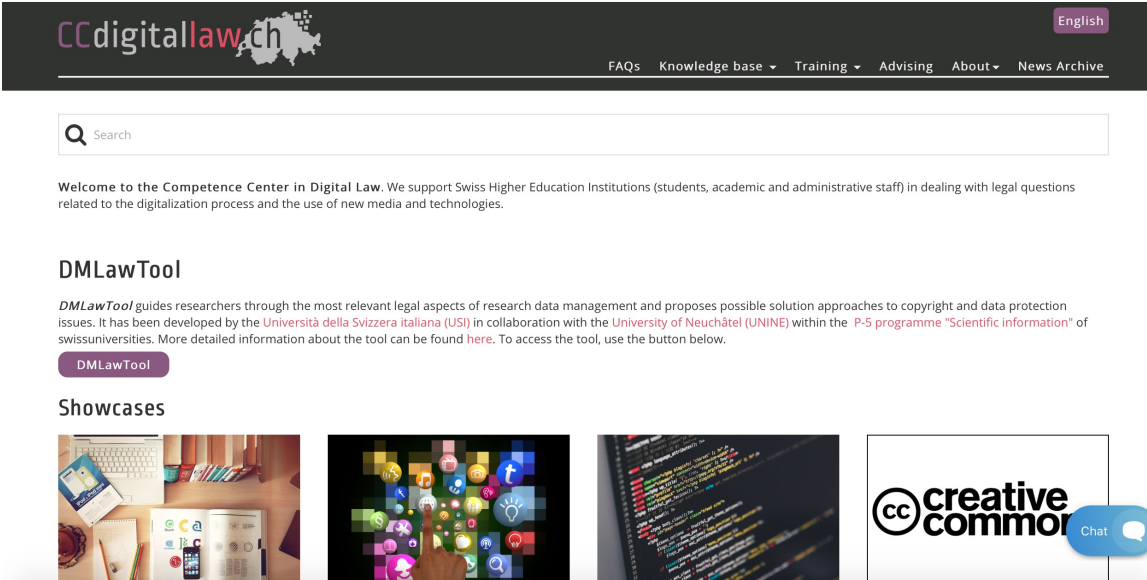
Published works may be quoted if the quotation serves as:

- **explanation,**
- **reference** or
- **illustration,**
- and the **extent** of the quotation is **justified for such purpose.**

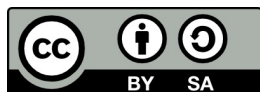
**Caution with images and photos!**

**Thank you very much for your attention!**

# More information @ [www.ccdigitallaw.ch](http://www.ccdigitallaw.ch)



The screenshot shows the website's header with the logo, a search bar, and navigation links: FAQs, Knowledge base, Training, Advising, About, and News Archive. Below the search bar is a welcome message: "Welcome to the Competence Center in Digital Law. We support Swiss Higher Education Institutions (students, academic and administrative staff) in dealing with legal questions related to the digitalization process and the use of new media and technologies." A section titled "DMLawTool" follows, with a description of the tool and a button labeled "DMLawTool". Below this is a "Showcases" section featuring four images: a desk with books and a laptop, a hand pointing at a screen with various icons, a computer monitor displaying code, and the Creative Commons logo with a chat bubble.



This work is licensed under a [Creative Commons Attribution-ShareAlike 4.0 International](https://creativecommons.org/licenses/by-sa/4.0/) license