

# UZH OPEN SCIENCE Lunch&Learn

## Funder requirements and publishers' conditions

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CCdigitalLaw c/o Università della Svizzera italiana

24.08.2023

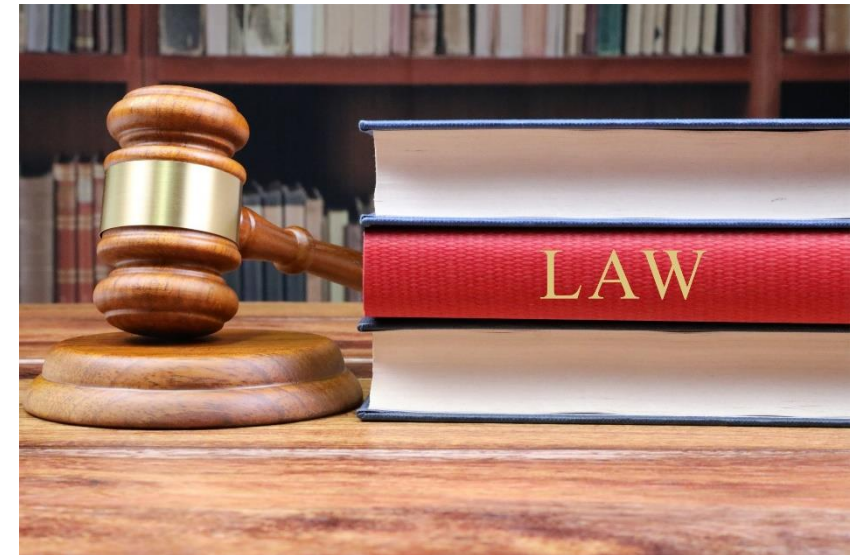
# Today's goals

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- ❑ Applicable laws
- ❑ **What** is protected by copyright
- ❑ Who is the **author** and who is the **right holder**
- ❑ **Publishing contract** and **license to publish** implications
- ❑ **Which version** of the paper and **when** to re-publish
- ❑ Contents of the **agreement with publishers, SNSF's requirements** and what can be **negotiated**

# Applicable laws

- Swiss Copyright Act (CopA)
- Swiss Code of obligations (CO)
- International laws
  - Bern Convention
  - Federal Act on Private International Law



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# What is protected by Copyright

# WHAT IS PROTECTED BY COPYRIGHT?

- Books
- Articles
- Text
- Movies
- Tutorials
- Courses
- Presentations
- Databases
- Computer programs
- Photos
- Technical drawings
- Interviews

## → Usually protected by Copyright

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



# WHAT IS PROTECTED BY COPYRIGHT?

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## → Usually protected by Copyright

- 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/>



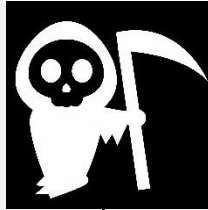
## Collected works

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

- Newspaper
- Dataset
- CD
- ...



# WHAT IS PROTECTED BY COPYRIGHT?



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

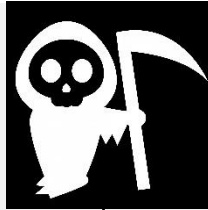


→ Public Domain Day

01.01.2081

01.01.2025

# WHAT IS PROTECTED BY COPYRIGHT?



Author's lifetime

+ 70 years

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**

# RECAP QUIZ

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**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

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# RECAP QUIZ

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**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

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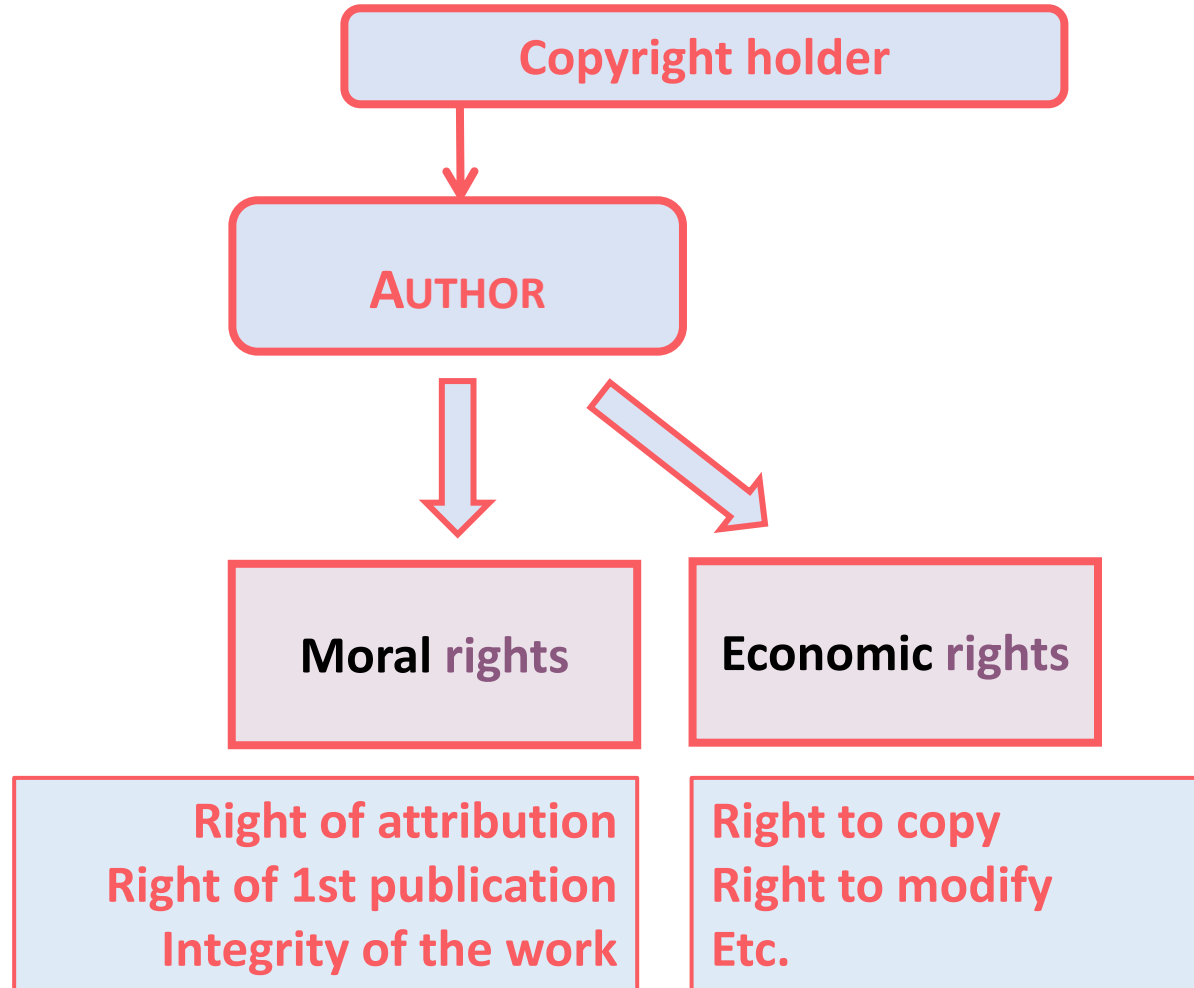
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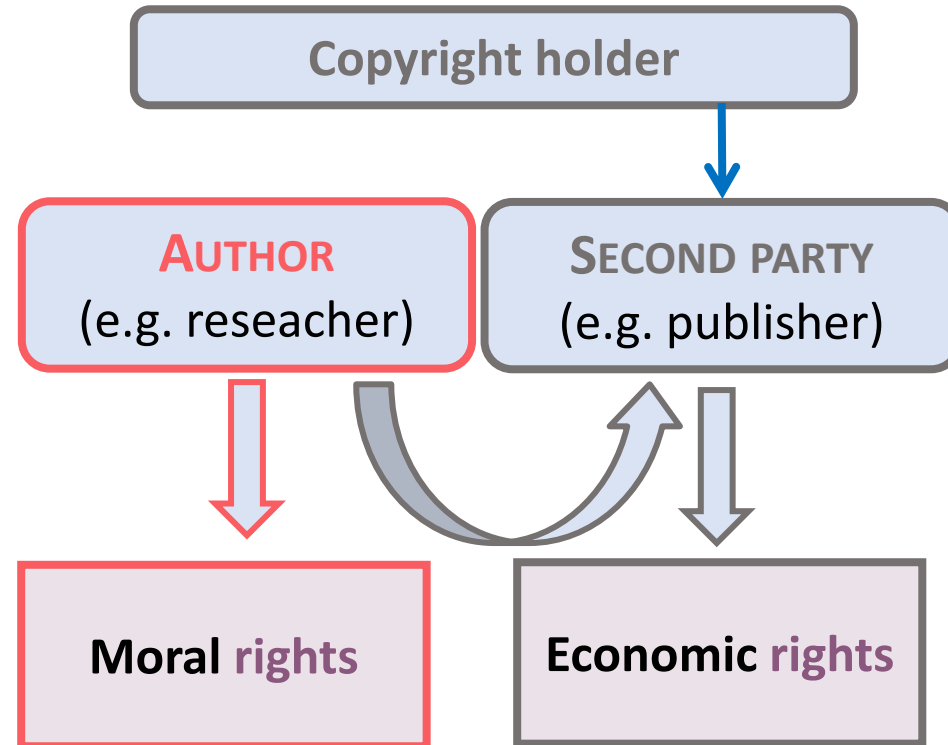
# Who is the Right holder



## THE AUTHOR



## THE RIGHT HOLDER



## THE RIGHT HOLDER

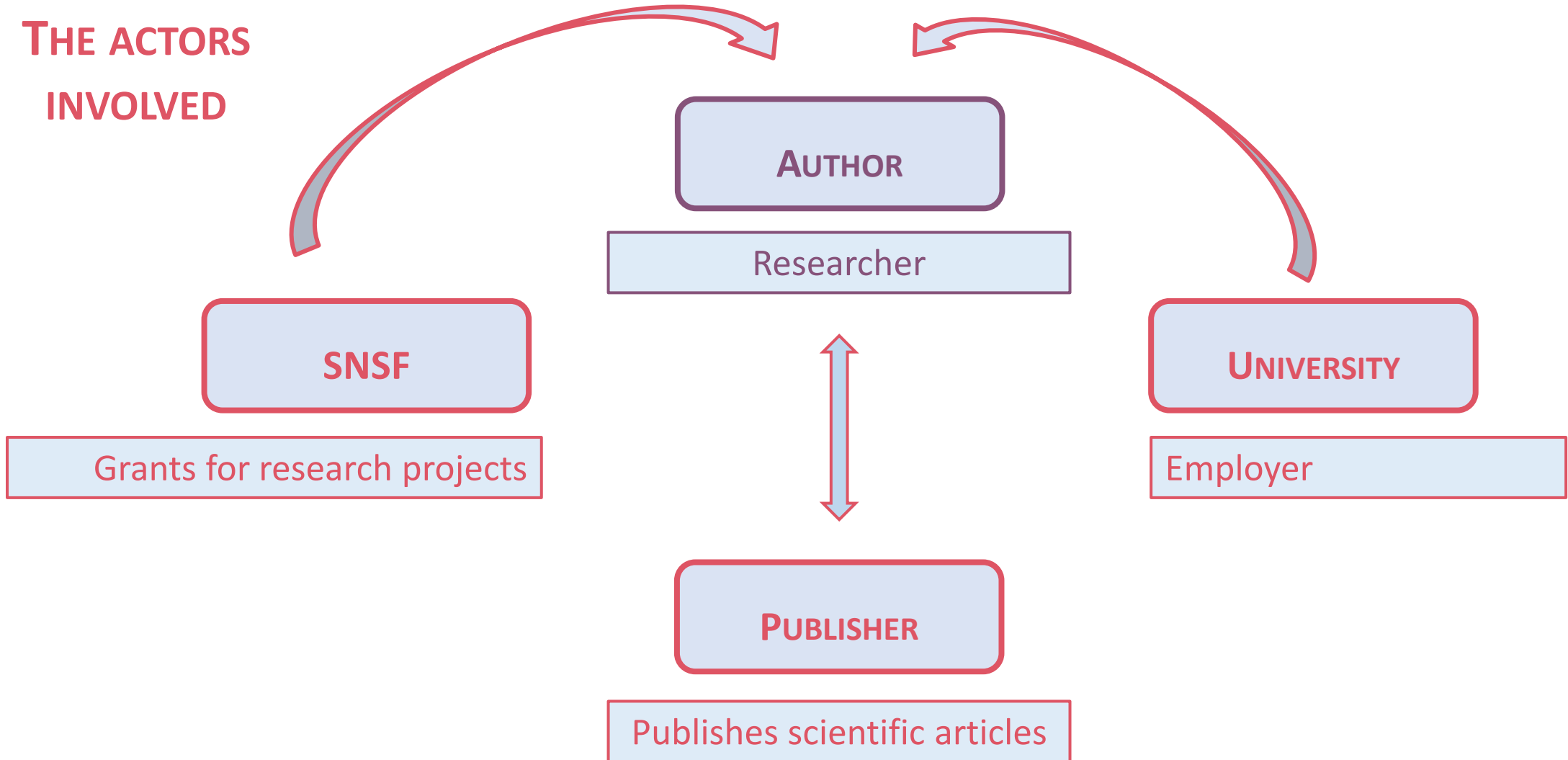
Copyright holder

**ONLY** the Right holder may copy, modify and share a work

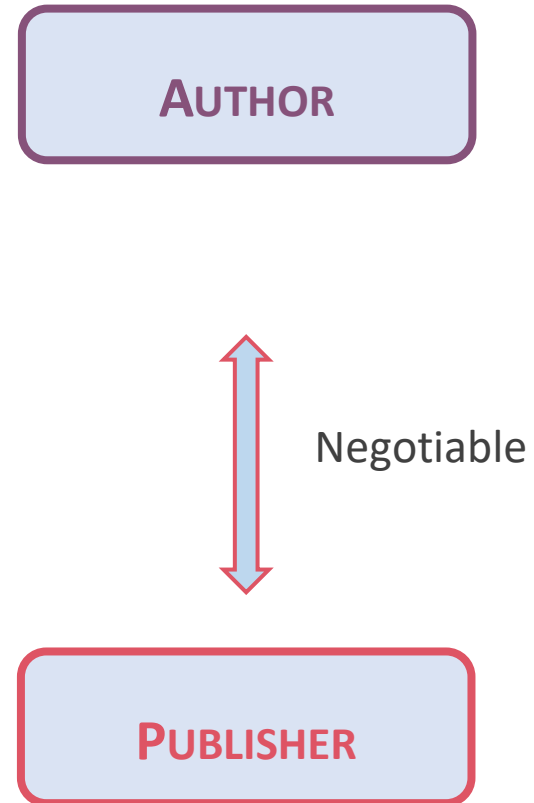
All OTHERS may NOT copy, modify and share a work (with exceptions...)

**Right holders may grant OTHERS permission to use (= to license): e.g. you can copy my work once**

## THE ACTORS INVOLVED



## THE ACTORS INVOLVED



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# Publishing contract and License to publish

## What does the law state?

art. 380 CO [Code of Obligations]

*A publishing contract is a contract whereby*

- *the originator – **the author of a literary or artistic work** or his legal successor – undertakes to **entrust** (überlassen, céder, concedere) the work to a publisher, = to hand over, but no unanimous opinions*
- *who (the **publisher**) undertakes to **reproduce and distribute it.***

- Contract between **Author** and **Publisher**
  - The **Publisher** :
    - is committed to **reproduce**, edit and put the work into sales/**disseminate**
  - The **Author** :
    - Transfers their copyrights (or part of them) to the publisher (**Publishing contract**) or
    - **Grants** only a right to use/publish (**License to publish**)

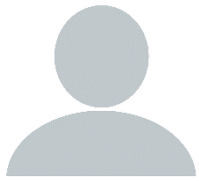


## Which copyrights can be transferred or licensed?

- **Law:** only necessary copyrights for the purpose of publication (the principle of the purpose, art. 381 para 1 CO)
  - no sublicense, no right to translate, no filming right IF not specified
- **Individual agreement:** ANYTHING is possible:
  - Right to reproduce (paper and/or digital), right to share (where), right to modify
  - Sublicense

# Transferring / Assigning Rights

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Author



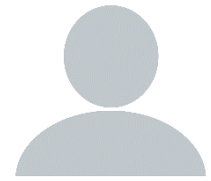
Right to copy



Right to modify



Right to distribute copy and modifications

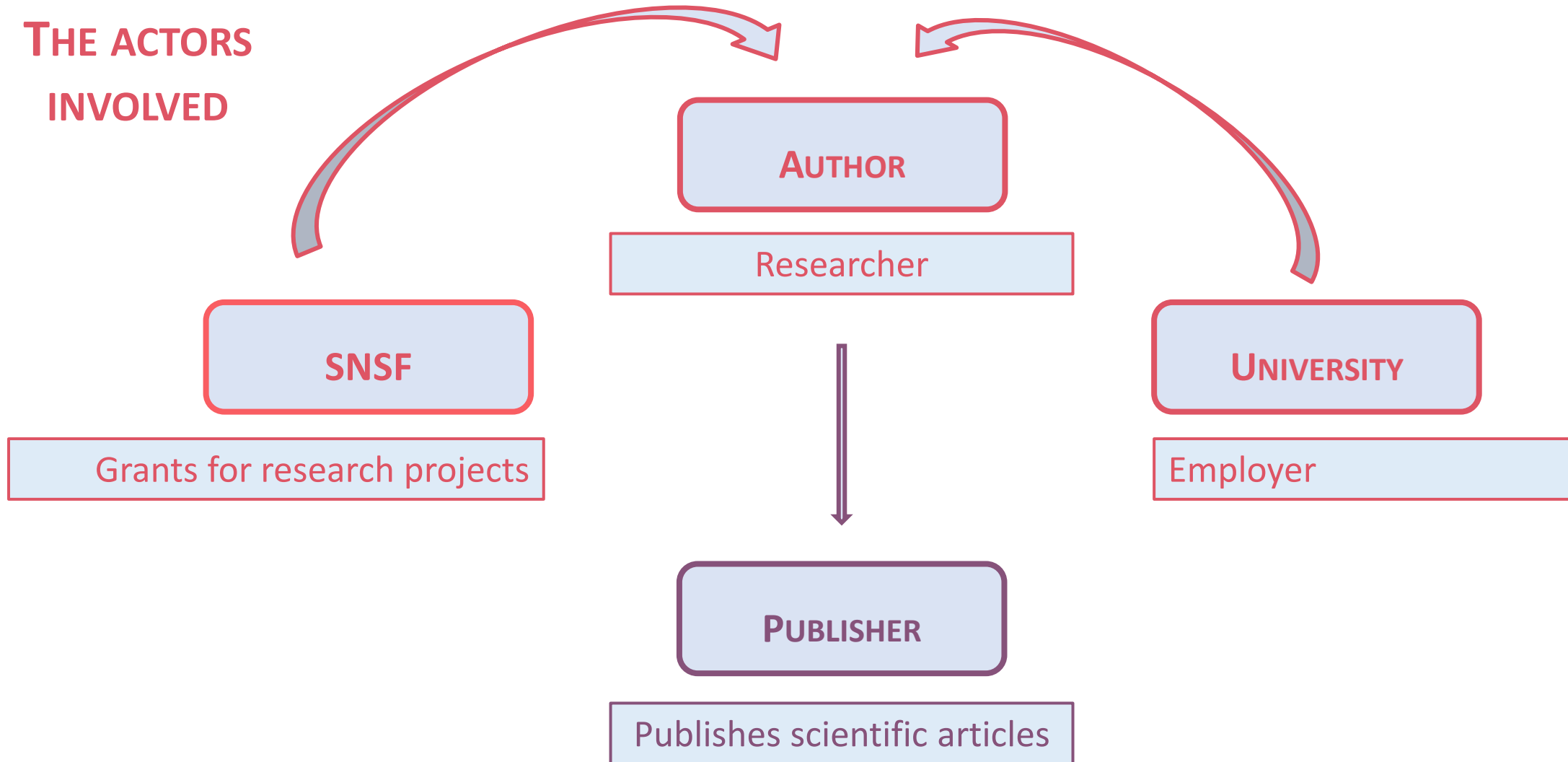


Publisher

Author gives up their economic rights!  
Not anymore allowed to copy, modify,  
distribute the work; see agreement

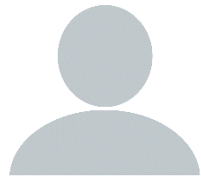
Publisher becomes the **RIGHT HOLDER** of the economic rights  
The publisher can re-sell or sublicense

THE ACTORS INVOLVED



# Licensing – Exclusive License

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Author



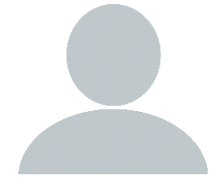
Right to copy



Right to modify



Right to distribute copy and modifications



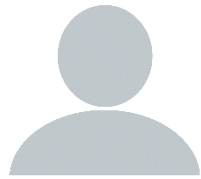
Licensee

Author remains the **RIGHT HOLDER** of the economic rights  
May not grant other licenses for same rights

Is allowed to copy / modify / share the work  
DOESN'T become **RIGHT HOLDER** of the economic rights

# Licensing – Simple License

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Author



Right to copy



Right to modify



Right to distribute copy and modifications



Licensee 1

Licensee 2

Licensee 3

Author remains the **RIGHT HOLDER** of the economic rights

May grant other licenses for same rights

Are allowed to copy / modify / share the work  
DON'T become **RIGHT HOLDERS** of the economic rights

## What can be agreed between the parties?

**Contractual freedom** = Contractual parties are **free to decide** what is written in the contract → **mutual agreement**

→ Most publishing contracts regulate differently

→ Licenses, permission to use

**= Contractual autonomy!**

## Essential elements of an agreement:

- **What:** object of the agreement (which work, versions, formats,...)
- **Which rights** (to what extends) are assigned or granted
- **Where:** territoriality limit or world-wide
- **When:** contract term (fixed term or until expiry of copyright or when contractual obligations are fulfilled)

## What else is usually regulated?

- Publisher's rights and obligations:
  - Number of (printed) copies (art. 383 CO)
  - Where and how to sell / distribute (who has access)
  
- Author's rights and obligations:
  - Right of second publication = publication by means other than the publisher (e.g. university's repository, on social networks, ect.)
  - Free copies available for the author
  - OA costs (→ usually the author must pay for OA publishers publication)

**→ Requirements of SNSF must be met!**



## Is a second publication possible?

- **Law:**
  - **Newspaper articles** and **short essay** in journals (art. 382 para. 2 CO) ✓
  - **Contributions to collective works** or **larger contribution to journals:** can be published elsewhere after a period of **3 months** (art. 382 para. 3 CO) ✓
  - All other texts: author may **not** dispose of his work to the detriment of the publisher = exclusivity of the publisher (art. 382 para. 1 CO) = no right to second publication!! ✗
  
- **Individual agreement:** it is still controversial if a different agreement prevails or not!

## PUBLISHING CONTRACT AND LICENSE TO PUBLISH

Did the author **transfer the copyrights** so that the publisher is the right holder?

↓  
*No*

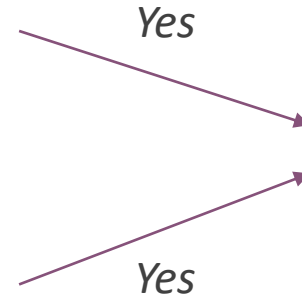
Did the author grant the publisher the right to publish through an **exclusive license**?

↓  
*No*

The publisher has a **non-exclusive license** to publish the work.



Authors can **immediately** re-publish the work.



The publisher has **exclusivity** on the work.



Authors can re-publish the work **after an embargo period**.

# RECAP QUIZ

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**3. With a License to publish, who is the right holder of a scientific article?**

- a) The University
- b) The SNSF
- c) Prolitteris
- d) The Researcher
- e) The Publisher

# RECAP QUIZ

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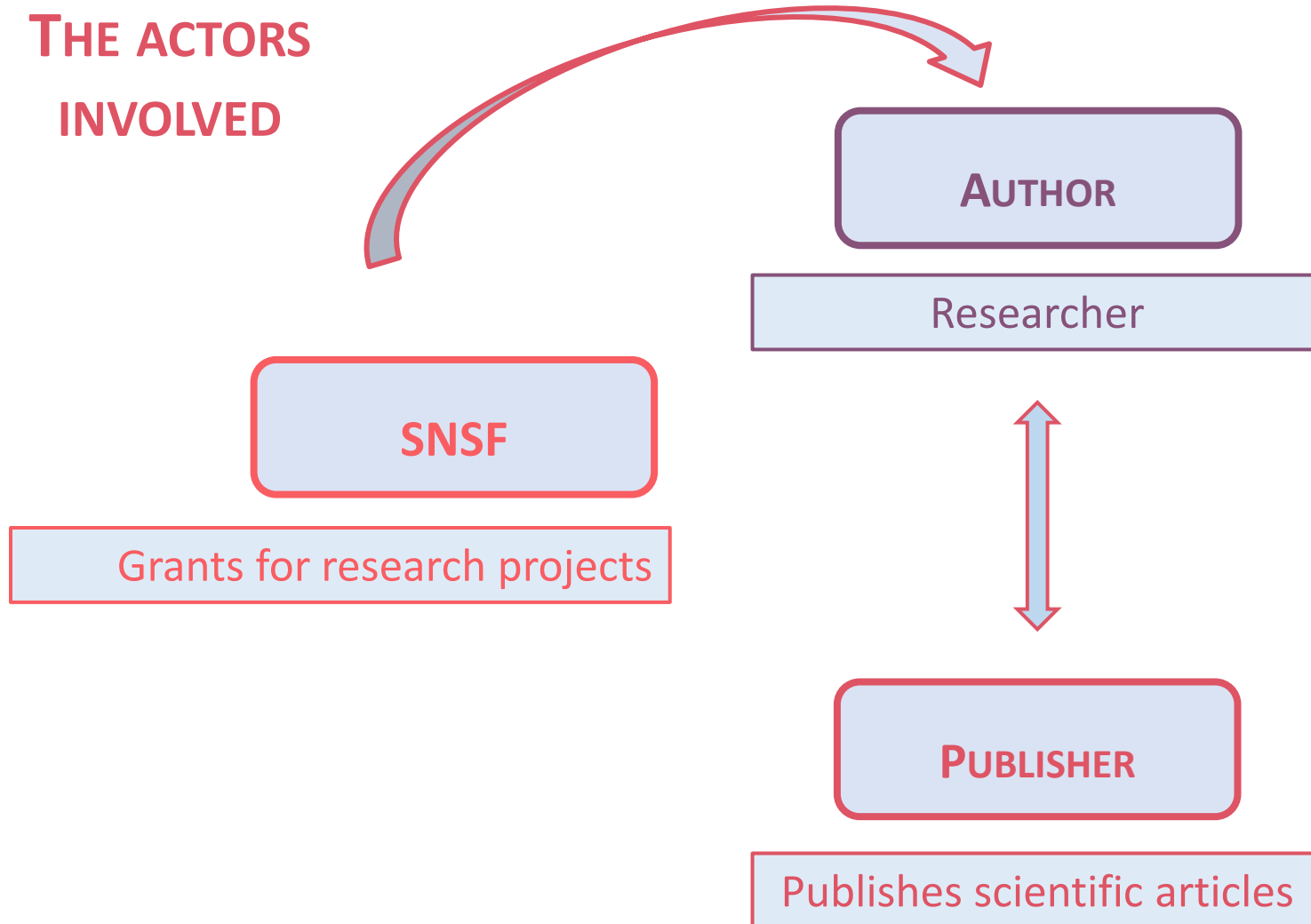


**3. With a License to publish, who is the right holder of a scientific article?**

- a) The University
- b) The SNSF
- c) Prolitteris
- d) The Researcher**
- e) The Publisher

# Funder requirements

**THE ACTORS INVOLVED**



### SNSF grants requirements (since 1.1.2023 – cOAlition S)

- Scientific articles
  - **Immediately** available publicly
  - With a **CC-BY license**
- All other publications
  - Publicly available after a period of **12 months**
  - With a **CC-BY license**

Exceptions: disproportionately high costs for image rights

→ **Aggrement with publisher is necessary!**

## Rights Retention Strategy

- Use the following standard statement in the acknowledgement field **when submitting an article manuscript to publisher:**

*“This research was funded in whole or in part by the Swiss National Science Foundation (SNSF) [Grant number]. For the purpose of Open Access, a CC BY public copyright licence is applied to any Author Accepted Manuscript (AAM) version arising from this submission.”*

Clause 11.13 para. 3 of the Implementation Regulations

→ Immediately publish the pre-print on a digital repository with a CC-BY license



### Which version can be re-published?

- **Law:** the right holder **is allowed** to publish a preprint **before submitting** it to a journal. Important to **inform** the publisher!  
However, some publisher may refuse preprint-published articles. Check their policies.
- If/when publishing a preprint, **don't assign copyrights**. Better to release it under a CC license.

...**submission is already accepted** by journal but in the **meanwhile** you would like to publish the preprint?

- Publishers' policies or agreement may require **specific conditions**.
  - **check** the publisher's policies  
E.g. acknowledgment that *"This article has been accepted for publication in [JOURNAL TITLE], published by Taylor & Francis."* (<https://authorservices.taylorandfrancis.com/research-impact/sharing-versions-of-journal-articles/>)

Publishing **regardless** of agreement with publisher = **violation of copyright** and of **publishing contract!**

# RECAP QUIZ

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**4. What shall I do if my funder requires immediate open access publication of my scientific article and I have a publishing contract which sets an embargo period of 12 months?**

- a) I immediately publish it as open access
- b) I re-publish it after 12 months
- c) Either way I would need to pay the consequences for breaching one of the two contracts

# RECAP QUIZ

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**4. What shall I do if my funder requires immediate open access publication of my scientific article and I have a publishing contract which sets an embargo period of 12 months?**

- a) I immediately publish it as open access
- b) I re-publish it after 12 months
- c) **Either way I would need to pay the consequences for breaching one of the two contracts**

# Negotiating with the Publisher

### Before concluding a publishing contract

- Authors should tell the publisher about SNSF's requirements
- Authors should retain their copyrights → only grant a **license to publish**
  - Exclusive license for a period of time (embargo), upon expiry of which the license becomes non-exclusive.
- Better would be a **non-exclusive license to publish**  
(try to negotiate lower APC costs)



### Go for it!

- No **embargo** (SNSF requirements)
- 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.



## 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





### Give it a try!

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

### After having concluded a contract with Publisher

- Check what are the **penalties** set by SNSF and/or what demands the publisher
- Explain your circumstances (public research field, no profits,...)
- If you committed a contractual violation, you will need to pay the consequences!

# Examples of agreements



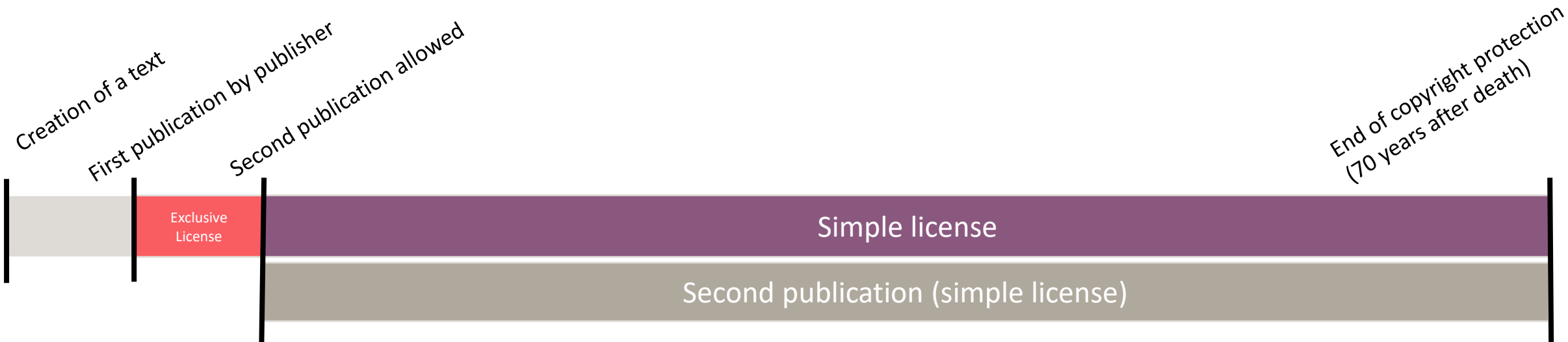
## **§ 1 Rights Granted**

*Author hereby grants and **assigns** to Publisher the exclusive, world-wide, transferable, sub-licensable right to reproduce, publish, distribute, make available or otherwise communicate to the public, translate in any language, archive, store, the Work in all revisions and versions, in all forms and media of expression including in electronic form for display, print, ...(and any other right).*

*The copyright shall be vested in the name of Publisher.*

### Rechtseineräumung

Ich übertrage hiermit der Vereinigung X an meinem Beitrag 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, Erstellung, Speicherung und Verbreitung elektronischer Formen, ...(usw.).



## 2. Grant of Rights

(a) Owner hereby grants to [redacted] an **exclusive**, worldwide, royalty-free, perpetual, irrevocable, transferable and sublicenseable license to publish, reproduce and distribute all or any part of the Work in any and all forms of media, now or hereafter known, including in the above publication and in the [redacted], and to authorize third parties to do the same.

(b) In connection with software and [redacted]s, Owner grants [redacted] **non-exclusive permission to publish, reproduce and distribute** in any and all forms of media, now or hereafter known, including in the above publication and in the [redacted]

(c) In connection with any "Minor Revision", that is, a derivative work containing less than twenty-five percent (25%) of new substantive material, Owner hereby **grants** to [redacted] all rights in the Minor Revision that Owner grants to [redacted] with respect to the Work, and all terms of this Agreement shall apply to the Minor Revision.

(d) If your paper is withdrawn before it is published in the [redacted], the rights revert back to the author(s).

**3. License Grant.** Subject to the terms and conditions of this License, Licensor hereby grants You a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) license to exercise the rights in the Work as stated below:

- a. to reproduce the Work, to incorporate the Work into one or more Collective Works, and to reproduce the Work as incorporated in the Collective Works;
- b. to create and reproduce Derivative Works;
- c. to distribute copies or phonorecords of, display publicly, perform publicly, and perform publicly by means of a digital audio transmission the Work including as incorporated in Collective Works;
- d. to distribute copies or phonorecords of, display publicly, perform publicly, and perform publicly by means of a digital audio transmission Derivative Works.

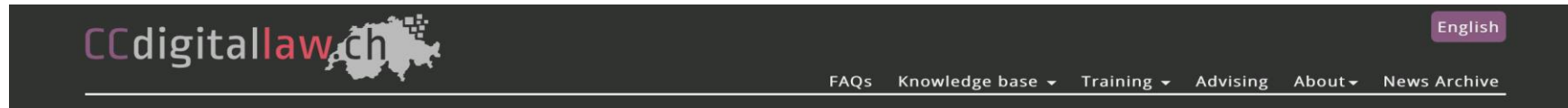
Creative Commons License (CC-BY 2.0)

URL: <https://creativecommons.org/licenses/by/2.0/legalcode>



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

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




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.

## DMLawTool

*DMLawTool* guides researchers through the most relevant legal aspects of research data management and proposes possible solution approaches to copyright and data protection issues. It has been developed by the [Università della Svizzera italiana \(USI\)](#) in collaboration with the [University of Neuchâtel \(UNINE\)](#) within the [P-5 programme "Scientific information"](#) of swissuniversities. More detailed information about the tool can be found [here](#). To access the tool, use the button below.

[DMLawTool](#)

## Showcases



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