

Copyright and Second Publication Right Regulatory Framework

31 August 2023

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CCdigitalLaw c/o Università della Svizzera italiana

swissuniversities

Agenda

1. Overview on **Copyright**
 - a) **When** is a work protected by copyright
 - b) Who is the **Author** and who is the **Right holder**
2. **Publishing** contract and **Second publication right**
 - a. **The Swiss Code of Obligations – Second publication right (art. 382/3 CO)**
 - b. **The Publishing contract – Mutual Agreement**
 - c. The possibility of republishing as **Open Access**
 - d. Which **national law** applies
3. Recap quiz
4. Discussion

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WHEN IS A WORK PROTECTED BY COPYRIGHT?

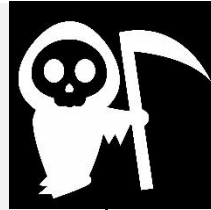
- Books
- Articles
- Text
- Movies
- Tutorials
- Courses
- Presentations
- Databases
- Computer programs
- Photos
- Technical drawings
- Interviews

Protected by Copyright if ...

1. Made by a person (Intellectual creation)
2. Form of expression
3. Individual character / originality



WHEN IS A WORK PROTECTED BY COPYRIGHT?



Author's lifetime



+ 70 years

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

WHEN IS A WORK PROTECTED BY COPYRIGHT?



Author's lifetime



+ 70 years

Date of creation:
27.10.1975

Author's death date:
05.03.2010

Protection lasts until:
31.12.2080



→ **Public Domain Day**

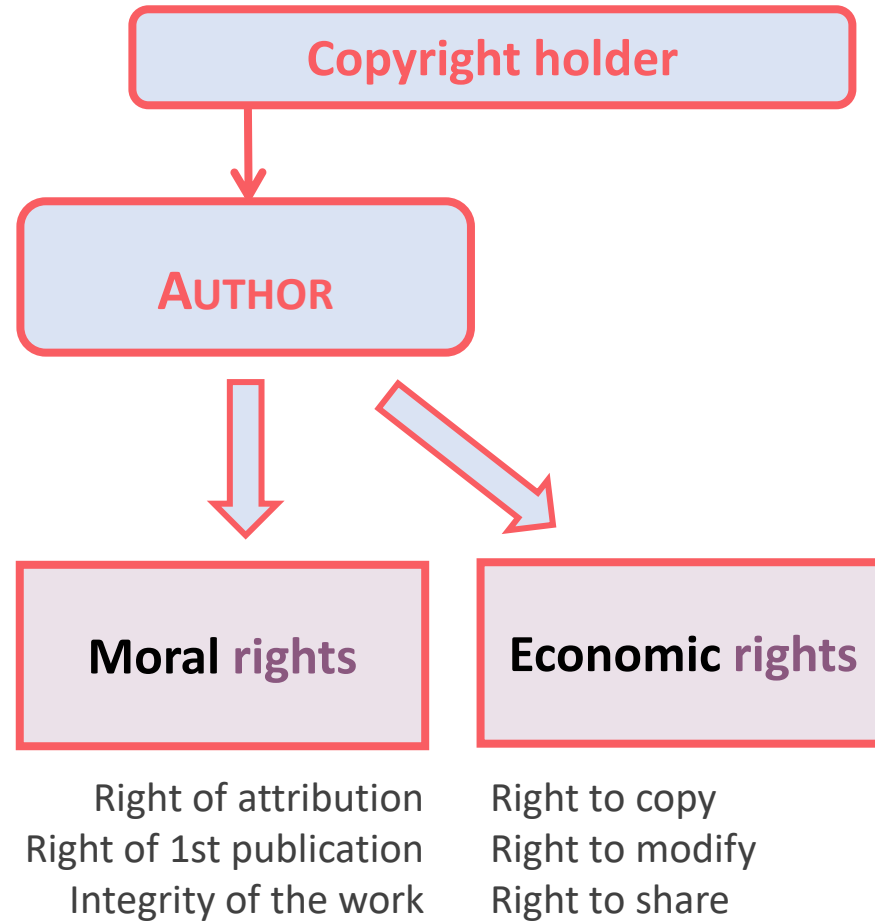
01.01.2081
01.01.2025

Agenda

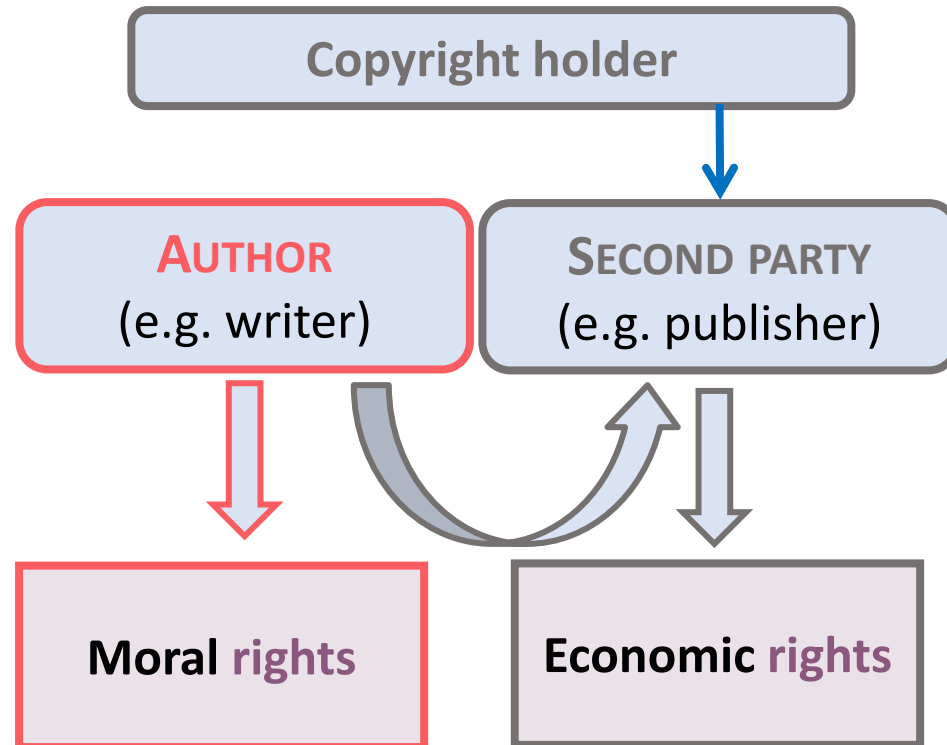
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WHO IS THE AUTHOR AND WHO IS THE RIGHT HOLDER?

THE AUTHOR



THE RIGHT HOLDER



THE RIGHT HOLDER

Copyright holder

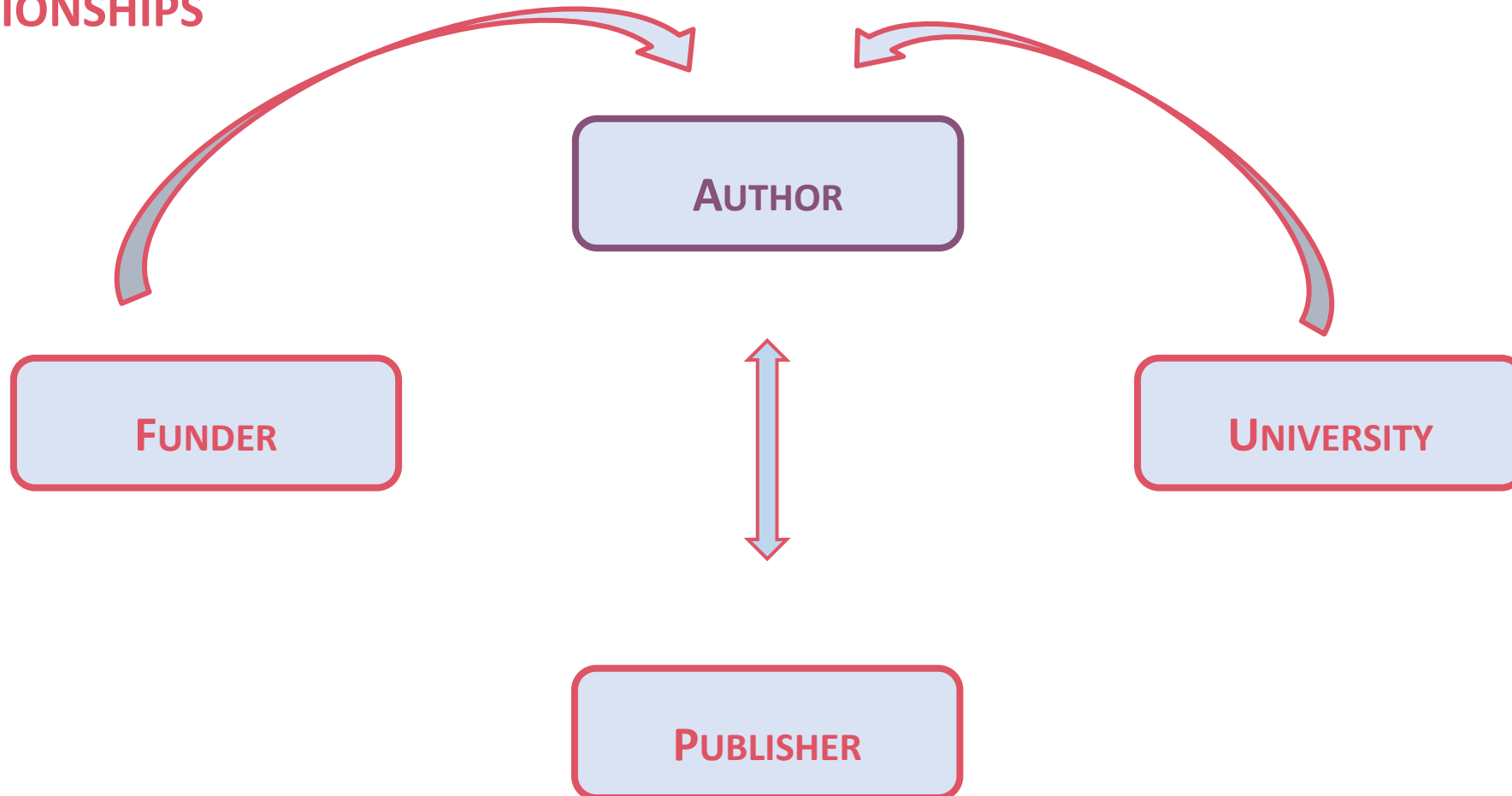
ONLY the Right holder may copy, modify and share a work

All OTHERS are NOT allowed to do so, but there are some legal **exceptions**

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

WHO IS THE AUTHOR AND WHO IS THE RIGHT HOLDER?

INVOLVED ACTORS & THEIR RELATIONSHIPS



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?

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- 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

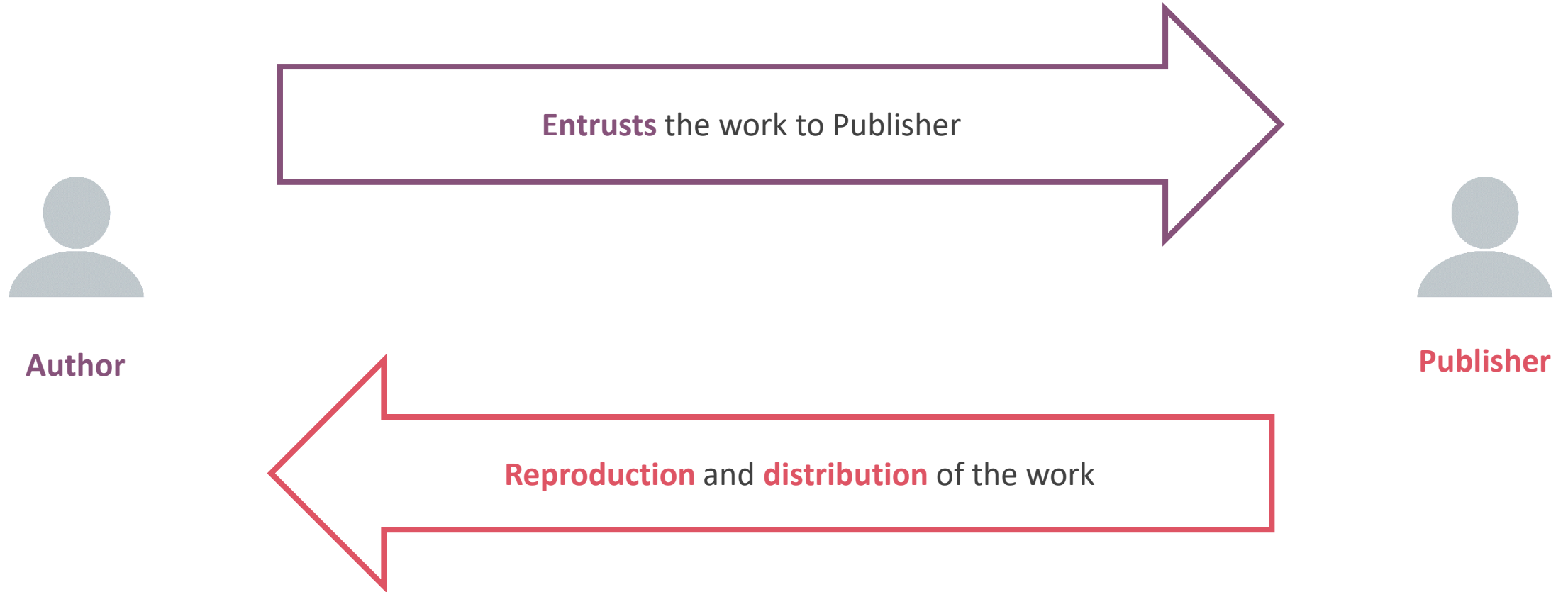


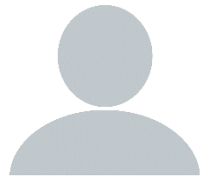
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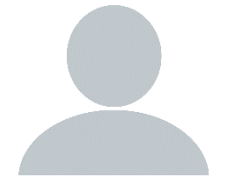
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Author

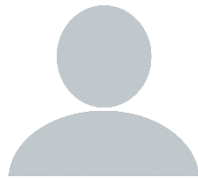


Publisher

Art. 381 para 1 CO: only **necessary** copyrights for the **purpose of publication**

→ no sublicense, no right to translate, no filming right IF not specified

Second Publication Right
state of the art according to Swiss Code of obligations
Art. 382 para 1 CO

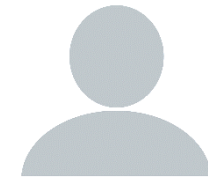


Author

No competition with publisher
(no use that competes with the interests of the publisher)



Books / Larger Works



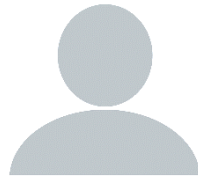
Publisher

Exclusivity on the work
(exclusive right to publish/distribute the work)

Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 2 CO

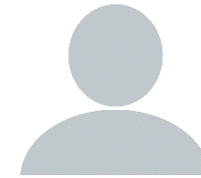


Author

Author can always re-publish



**Newspaper Articles
Short Articles**



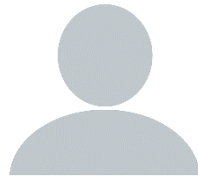
Publisher

Non-exclusivity on the work

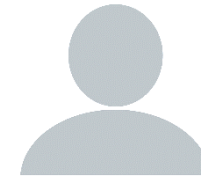
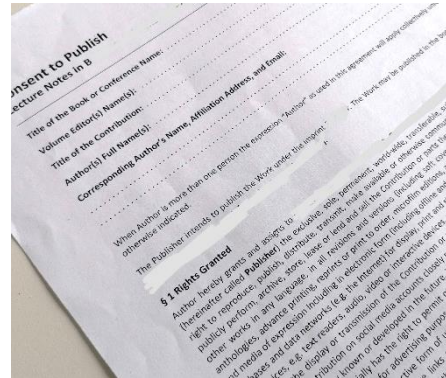
Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 3 CO



Author



Publisher

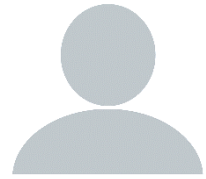
Author can re-publish after **3 months**

Exclusivity on the work only for the **first 3 months**

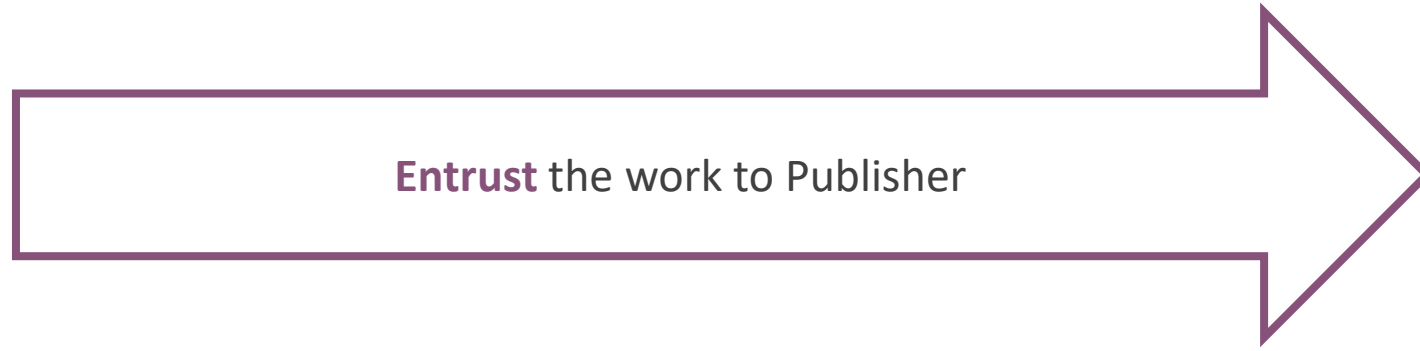
Scientific Articles
Contributions to Collections

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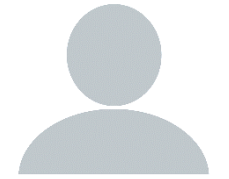


Author



Entrust the work to Publisher

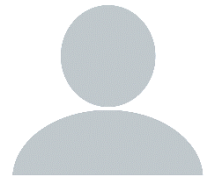
Mutual Agreement



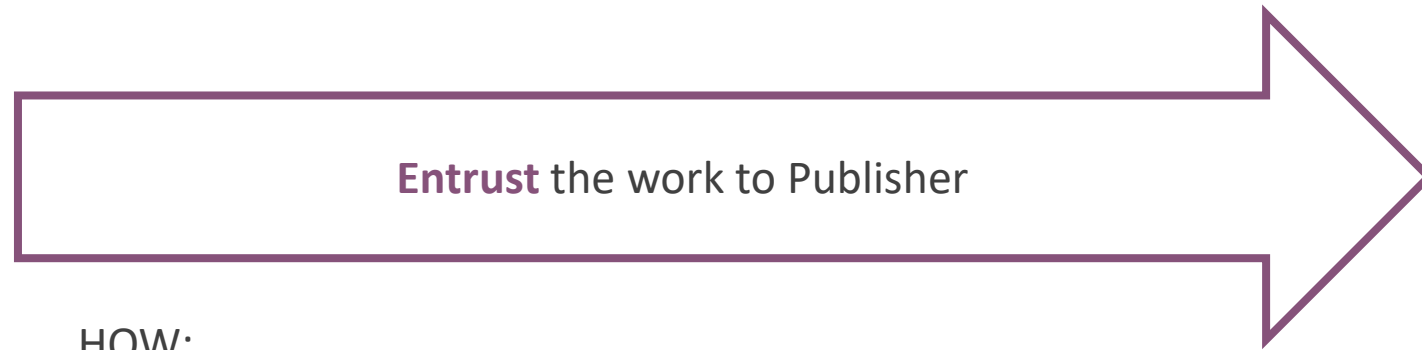
Publisher



Reproduction and **distribution** of the work...



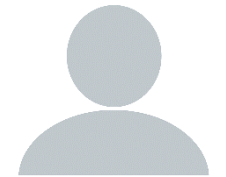
Author



Entrust the work to Publisher

HOW:

- Transfers their copyrights (or part of them) or
- Grants only a right to use/publish (**License to publish**)



Publisher



Reproduction and **distribution** of the work...

MUTUAL AGREEMENT

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.



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

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.



Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 3 CO



In my contract with the publisher an embargo period of 12 months is determined. Am I allowed to re-publish my paper after 4 months by applying art. 382/3 CO?

- a) Yes
- b) No
- c) Not clear

Second Publication Right

state of the art according to Swiss Code of obligations

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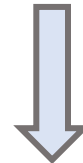
- a) Yes
- b) No
- c) Not clear**

Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 3 CO

Generally artt. 380 – 393 CO are considered as **not imperative law**
(contract prevails over law)



Allows to regulate things differently in contracts

Second Publication Right

state of the art according to Swiss Code of obligations

Art. 382 para 3 CO

However there are arguments in favor of the embargo period of 3 months prevailing over a longer period defined in a publishing contract:

→ Grégoire Geissbuhler, L'Open Access dans le Code des obligations, in: Jusletter 17 mai 2021
<https://jusletter.weblaw.ch/fr/juslissues/2021/1067/l-open-access-dans-l-7b71339175.html> ONCE

➤ The goal of the project **Regulatory Framework**:
make this right (explicitly) **imperative**

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Researcher



Publisher

Art. 380 CO

Contractual freedom

- Transfer of copyrights
- ...
- Right of second publication
- Open Access

Content of Art 382 para. 3 CO
not needed

Researcher



Publisher

Art. 380 CO

Contractual freedom

Content of Art 382 para. 3 CO applies



Transfer of copyrights



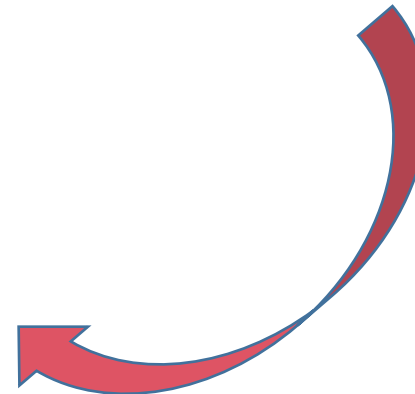
...



Right of second publication



Open Access



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WHICH NATIONAL LAW APPLIES?



WHICH NATIONAL LAW APPLIES?

AUTHOR

FUNDER

If nothing defined, generally
the law of the publisher's
country is applied

UNIVERSITY

PUBLISHER

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RECAP QUIZ



Wooclap.com: **JLPYSB**

RECAP QUIZ



3. I published an article with a publisher many years ago. During our discussions we had no idea of publishing online nor of what Open Science is. Am I allowed to re-publish the article on an open journal, today?

- a) Yes, as the author, I decide what to do with my work.
- b) The publisher is the only one who can decide about this publication.
- c) As during the agreement there was no mention about an online publication, I remain entitled of the right to publish the article online and thus, I may decide to do so.
- d) The publishing contract probably foresees the transfer of my economic rights for any kind of format of my article, both analogic and digital.
- e) The legislation decided to advance with its Open Access politic. Therefore, the publishers are forced to re-negotiate their contracts in order to allow at least the archiving of articles in open repositories.

RECAP QUIZ



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RECAP QUIZ



4. Which version of my article can I republish if nothing is specified in the publishing contract?

- a) The pre-print version immediately
- b) The final version after the embargo period of 3 months
- c) The pre-print version after 1 months
- d) The final version after one year

RECAP QUIZ



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- a) The pre-print version immediately
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- c) The pre-print version after 1 months
- d) The final version after one year**

RECAP QUIZ



5. If nothing is mentioned in the institutional regulations, who is the right holder of scientific publications written by several researchers?

- a) The publisher
- b) The university
- c) The project manager
- d) One of the researchers
- e) The researchers together
- f) Prolitteris

RECAP QUIZ



5. If nothing is mentioned in the institutional regulations, who is the right holder of scientific publications written by several researchers?

- a) The publisher
- b) The university
- c) The project manager
- d) One of the researchers
- e) The researchers together
- f) Prolitteris

RECAP QUIZ



6. 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



6. 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?

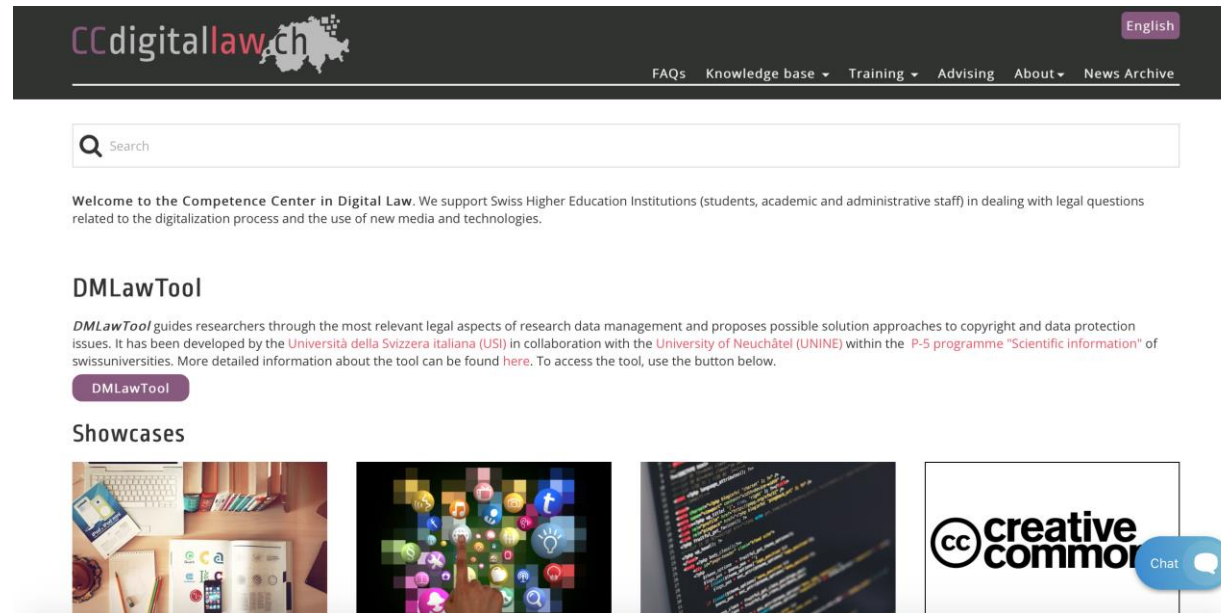
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- b) I re-publish it after 12 months
- c) **Either way I would need to pay the consequences for breaching one of the two contracts**

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Thank you very much for your attention!

More information @ www.ccdigitallaw.ch



The screenshot shows the homepage of the CCdigitallaw.ch website. At the top, there is a dark navigation bar with the logo on the left, a language selector set to 'English' on the right, and a menu with items: 'FAQs', 'Knowledge base', 'Training', 'Advising', 'About', and 'News Archive'. Below the navigation bar is a search bar with a magnifying glass icon and the text 'Search'. A welcome message follows: '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.' Below this is a section for 'DMLawTool' with a brief description and a button labeled 'DMLawTool'. The 'Showcases' section features four images: a desk with a laptop and books, a hand interacting with a grid of colorful icons, a computer screen displaying code, and the Creative Commons logo with a 'Chat' button.

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