
Legal aspects of open access

For a publication to meet all of the [characteristics of open access](#), access to it must be **independent**, i.e. **the legal barriers to sharing the publication must be removed**. A tool to ensure independent access to a publication is public licences, which allow anyone to use the work under clearly defined conditions stipulated in the licence attached to the work (thus there is no need to conclude individual licensing agreements with the author).

Libre open access versus gratis open access

If a publication is made accessible under one of the public licences, it is known as **libre open access** where the publication can be shared (in accordance with the attached licence); access to the publication is independent. However, from the legal point of view, there should be a distinction between libre open access (as described above) and a situation where a publication is made accessible on a website so that anyone can read it free of charge but is not subject to any public licence. This is known as **gratis open access** or “read-only access”. The objective of gratis open access is to remove all financial barriers while preserving legal barriers – without the explicit consent of the copyright holder, the work cannot be shared or otherwise utilized for anything other than personal use. Thus, the conditions of open access in the meaning of the [Berlin Declaration](#), which CU signed in 2013, are not fulfilled, and we therefore do not consider publications made available in gratis open access to be open access in the strict sense of the term.

Who decides what licence the work will have?

The **author** of a copyrighted work is always the private individual who produced the creative activity. The author (private individual) has both *moral rights* (rights attached to the author as a person, typically the right to attribution) and *proprietary rights* (the right to use the work and to grant a licence to another person).

If a work has more than one author, all **co-authors** of the work must provide their consent to any use of the work (e.g. to submit the work for publication, to license the work). The principle of unanimity, not majority, applies here.

However, in the case of a work created by an employee (while performing their duties as an employee), the **employer** exercises the *proprietary copyrights* to the work directly. Hence, the employer is the one who is entitled to decide how the work is licensed or to conclude licensing agreements with publishers. The author only retains “simple authorship”. The specific conditions for employee works at CU are set out in [Rector’s Directive no. 17/2018](#). This Rector’s Directive authorizes the employee to represent the employer in granting gratuitous licences for non-commercial use of an employee work in a periodical or non-periodical publication.

Another person who might be entitled to make decisions about proprietary copyrights to a work is the **publisher** who has an exclusive licence to the work that prevents the actual author from using the work. In relation to publishers who require an exclusive licence (a *Copyright Transfer Agreement*¹ is often required by foreign publishers), the issue of rights retention is often discussed. In principle, this is a strategy ensuring that the author does not lose their rights to the work and can continue to use it to the extent necessary (e.g. to translate the work or self-archive the work without a time embargo). You can find out more about this strategy on the [website of Plan S](#), an initiative of the cOAlition S consortium which supports the creation and promotion of a *rights retention strategy*.

Is your publication the outcome of a project?

If your publication was created as an outcome of a project, find out what the Research Funders’ Policy states in relation to open access, specifically:

- whether it obliges you to publish the project outcomes under a specific licence (often a CC BY or CC BY-SA licence)
- whether it obliges you to publish outcomes under that licence immediately (i.e. without a time embargo that is used by many journals)

The choice of journal should be in line with the obligations set out in the Research Funders’ Policy – you should choose a journal that allows access to the publication under the terms set by the funder. For [the gold open access route](#), you should choose a journal that publishes articles directly under the licence that the Research Funders’ Policy requires.

Subsequently, such an article can be safely auto-archived in a repository (CU employees and students can use the [CU Research Publications Repository](#)). For [the green open access route](#) , the article does not need to be published directly under the licence in the journal, but it is important for the publisher of the journal to allow the author to auto-archive the article in the repository in accordance with the Research Funders' Policy.

Considering the importance of selecting a suitable journal in terms of compliance with the Research Funders' Policy, you should pay careful attention to the terms and conditions of the licensing agreement or the general licensing terms on the publisher's website before submitting an article for publication. If you need help interpreting the licensing terms, please contact the [legal support](#) at the Open Science Support Centre.