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Biodiversity Data Publishing – Legal Framework (M30)

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Partners: UTARTU, University of Tartu, Natural History Museum , Estonia
UEF, University of Eastern Finland, Digitisation Centre, Finland
GBIF, Global Biodiversity Information Facility, Denmark
UniLeeds, University of Leeds, School of Biology, UK
UFZ, Helmholtz Centre for Environmental Research, Germany
CSIC, The Spanish National Research Council, Doñana Biological Station, Spain
UCAM, University of Cambridge, Centre for Science and Policy, UK
CNRS-IMBE, Mediterranean Institute of marine and terrestrial Biodiversity and Ecology, France
Pensoft, Pensoft Publishers Ltd, Bulgaria
SGN, Senckenberg Gesellschaft für Naturforschung, Germany
SIMBIOTICA, Simbiotica S.L., Spain
FIN, FishBase Information and Research Group, Inc., Philippines
HCMR, Hellenic Centre for Marine Research, Greece
NHM, The Natural History Museum, London
BGBM, Botanic Garden and Botanical Museum Berlin-Dahlem, Germany
UCPH, University of Copenhagen: Natural History Museum of Denmark, Denmark
RMCA, Royal Museum of Central Africa, Belgium
PLAZI, Plazi GmbH, Switzerland
GlueCAD, GlueCAD Ltd. – Engineering IT, Israel
IEEP, Institute for European Environmental Policy, UK
INPA, National Institute of Amazonian Research, Brazil
NRM, Swedish Museum of Natural History, Sweden
IBSAS, Slovak Academy of Sciences, Institute of Botany, Slovakia
EBCC-CTFC, Forest Technology Centre of Catalonia, Spain
NBIC, Norwegian Biodiversity Information Centre, Norway
FEM, Fondazione Edmund Mach, Italy
TerraData, TerraData environmetrics, Monterotondo Marittimo, Italy
EURAC, European Academy of Bozen/Bolzano, Italy
WCMC, UNEP World Conservation Monitoring Centre, UK
UGR, University of Granada, Spain

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EU BON

EU BON: Building the European Biodiversity Observation Network
Project no. 308454

Large scale collaborative project

MS841**Biodiversity Data Publishing – Legal Framework**

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In case the report consists of the delivery of materials (guidelines, manuscripts, etc)

Delivery name	Delivery name	From Partner	To Partner

I. Introduction

Task 8.4 (Data Publishing, Data Citation and Data Usage Strategy and Guidelines) is described as follows:

A major impact of EU BON for the scientific community will be achieved through the implementation of a Strategy and Guidelines for peer-reviewed, open-access data publishing, citation and usage as an important incentive to publish their data, thereby sharing them for subsequent reuse. A legal framework for data publishing and dissemination will be developed, on the basis of a survey of the applicability of Intellectual Property Rights (IPR) issues with regard to biodiversity data.

One of the key elements of EU BON is to monitor national, European and international legal frameworks which affect the access to, management of, and in particular the subsequent sharing, distribution and re-use of biodiversity data. EU BON conceives its work on the basis of the GEOSS Data Sharing Principles¹, which promotes full and open exchange of data, metadata, and products shared within GEOSS, recognising relevant international instruments and national policies and legislation. EU BON also adheres to the principles of free and open exchange of data and knowledge, in accordance with the “Joint Declaration on Open Science for the 21st Century”², presented by the European Federation of Academies of Sciences and Humanities and the European Commission on 11th April, 2012. In June 2012, numerous organizations, institutions and individuals, working in the field of biodiversity, have expressed their vision free and open use of biodiversity data in the Bouchout Declaration for Open Biodiversity Knowledge Management³.

On the basis of these principles, EU BON has agreed upon a data-sharing policy, which is binding for providers of data to the EU BON-portal, EU BON-members, associated persons and institutions, and for all users of this portal⁴. The present report is part of the process to develop the legal framework on which this data sharing policy will be based.

II. Intellectual property rights on biodiversity data?

There is no intellectual property right on information or data. “Intellectual property right” is a notion for a group of legal instruments which exist in a number of countries and apply to precise immaterial goods in a precise context. In member countries of the EU, “intellectual property rights” refer mainly to copyright (conceived in relation to creative works of art and literature), neighboring rights (relating to performances, phonograms and broadcasts), patent rights (relating to inventions), industrial designs, trademarks and databases. The concept of intellectual property rights applies only if the goods are precisely defined: Where there is no

¹ http://www.earthobservations.org/geoss_dsp.shtml.

² <http://www.allea.org/Content/ALLEA/General%20Assemblies/General%20Assembly%202012/Joint%20Declaration%20GA%20Rome%202012%20signed%20v2.pdf>.

³ <http://www.bouchoutdeclaration.org/declaration/>.

⁴ www.eubon.eu/getatt.php?filename=EU%20BON_Data%20Sharing%20Agreement_20140401_10953.pdf.

law stipulating explicitly the protection of a specified class of immaterial items, there is no intellectual property right.

Data and information in general or biodiversity data in particular are none of these protected immaterial goods. Consequently, there can be no intellectual property right on biodiversity data as such. A legal protection could only exist if a given biodiversity data qualifies cumulatively as one of the protected immaterial goods. In practice, this can occur where collections of biodiversity data qualify as “work” in the meaning of copyright or as “databases” in the meaning of EU database protection.

Copyright can be applied to works that are original, individual, new creations with respect to the form of the presentation. It does neither cover ideas, procedures, systems nor content. Scientific data represent facts in a standardized form that is preconceived and agreed by the respective scientific community. As they cannot be individual with respect to the form, scientific data in general as well as their metadata do not qualify as works⁵. This is also valid for numerous biodiversity data presented in form of images: they represent facts in standardized, preconceived forms and can therefore not qualify as work.

On the other hand, copyright protection can apply to a collection of biodiversity data if it constitutes, by reason of the selection or arrangement of their contents, an intellectual creation with individual character. The more systematic a collection of data is, and the more consistent with agreed standards the less individual it is in the meaning of copyright, and the less likely copyright considerations will apply. Consequently, collections of biodiversity data will be protected by copyright only in a very small minority of cases. Nevertheless, in this limited number of cases, copyright may constitute a barrier to the free exchange of biodiversity data.

European copyright legislators are well aware of this impediment to data exchange. The EU-Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society⁶ addresses the challenge and puts considerable weight on the importance of science by providing for exceptions and limitations to copyright. It grants to the author the rights to decide who shall be allowed to reproduce his work (“reproduction right”) or who shall be allowed to communicate it to the public (“communication right”), but it provides for several restrictions (“exceptions and limitations”) to these rights in the general interest such as “educational and scientific purposes” (Recital 34) or “for the benefit of certain non-profit making establishments such as publicly accessible libraries and equivalent institutions, as well as archives” (Recital 40). However, these exceptions and limitations are only applicable when they are transformed into national law by individual member states of the EU, and in such cases, they apply only to that member state.

The EU Database protection is not part of copyright but is a *sui generis* (special case) right that applies whether copyright relating to the database exists or not. It applies only to databases which show “that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents” (art. 7,

⁵ Patterson DJ, Egloff W, Agosti D, Eades D, Franz N, Hagedorn G, Rees J, Remsen DP 2014. Scientific names of organisms: attribution, rights, and licensing . BMC Research Notes 2014, 7:79 DOI: [10.1186/1756-0500-7-79](https://doi.org/10.1186/1756-0500-7-79).

⁶ European Parliament and the Council of the European Union (2001) Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

Directive 96/9/EC)⁷. As the European Court of Justice pointed out in several judgments, database protection concerns the creation of databases out of material that already exists, but does not deal with the creation of those data. The expression “investment in the obtaining of the contents” refers therefore to the resources used to find existing materials and collect them in the database, and not to the resources used to create materials.

Database rights only refer to the database as a whole, not to single data. They would be violated by unauthorized use of the whole or substantial part of the database. Database rights do not prevent the use of individual data or minor parts of the data collection. The EU Database protection too, provides for exceptions and limitations in the general interest, for example in the interest of scientific efforts. As in the case of copyright, these exceptions and limitations are only applicable when they are transformed into national law by individual member states of the EU, and in this case, they apply only to that member state.

As illustrated in a recently published review⁸, such transformations into national law have resulted in a multiplicity of variations. National provisions in Europe on copyright and database protection regarding exceptions and limitations for research purposes differ not only in certain details but in substance. There is no consistency among national legislations despite Directive 2001/29/EC that aims to achieve harmonisation. Exceptions to the *sui-generis*-database-protection are even more varied. Therefore, scientists who rely on data from different EU member states or who collaborate internationally need to be aware that different legal frameworks may apply to the data they use. In the Communication on “Copyright in the Knowledge Economy”, the EU Commission makes it clear that this situation is a major stumbling block to international scientific cooperation within the EU⁹.

Copyright as well as database protection are part of the so called “private law”, which is applied only on demand of the owner of the rights. Even if there is an intellectual property right with respect to a defined collection of biodiversity data, the owner is entitled to renounce their claim to those rights. This principle of private law is the base of the common-sense phrase: “Where there is no plaintiff, there is no judge”.

III. Other legal aspects referring to biodiversity data

Intellectual property rights are not the only legal aspect that may influence the access to and the re-use of biodiversity data. There are prescriptions concerning national security, protection of endangered species or cultural resources that may intervene in the exchange of biodiversity data. On the other hand, there may be the necessity to restrict access to scientific data for a certain time in order to allow for verification and/or corrections.

Prescriptions of national security differ from country to country. Where they exist and apply to biodiversity data, they have to be taken into account for any exchange of data. The same is

⁷ European Parliament and the Council of the European Union (1996) Directive 96/9/EC on the legal protection of databases. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0009&from=EN>.

⁸ Egloff W, Patterson D, Agosti D, Hagedorn G 2014. Open exchange of scientific knowledge and European copyright: The case of biodiversity information. *ZooKeys* 414, 109-135. DOI: [10.3897/zookeys.414.7717](https://doi.org/10.3897/zookeys.414.7717). See also Dietrich N, Guibault L, Margoni T, Siewicz K, Spindler G, Wiebe A (2013) OpenAIRE Study on licensing of publications and research data. http://www.ivir.nl/publications/guibault/OpenAIRELicensingStudy_Summary.pdf.

⁹ European Commission (2009) Copyright in the knowledge economy (COM [2009] 532 final). http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20091019_532_en.pdf.

valid for norms that try to protect endangered species or cultural resources and that relate to biodiversity data.

Time embargoes for access to and the re-use of scientific data are in general not imposed by any law but result from the publication policy of scientific institutions. Such restrictions should be of purely transitory character justified only by scientific needs.

IV. The EU BON Data Sharing Agreement

At the General Meeting in Heraklion (1st April, 2014), EU BON adopted a Data Sharing Agreement which applies this legal framework to the data exchange within the EU BON-network. It is oriented towards the principles of free and open exchange of data and knowledge and transforms eventual restrictions into concrete obligations and guarantees for data providers, members of EU BON, and users of the EU BON-network.

As a main obligation, data providers should refrain from asserting intellectual property rights on data provided by them (section 2.3 EU BON Data Sharing Agreement). As far as a data collection should be protected by database protection or by another intellectual property right, the data provider is expected to explicitly authorise the reproduction, distribution, making available, and re-use of these data. This implies that no intellectual property right can hamper the data exchange within the EU BON-network.

For all data for which there are restrictions on use by national or international security laws or for reasons of protection of endangered species or cultural resources, EU BON has created the category of “sensitive data”. Sensitive data are kept separately from all other data in the EU BON-network (sections 2.4 and 3.2 EU BON Data Sharing Agreement). EU BON makes them available only upon special justification and in accordance with the criteria convened with the provider of these data.

A special rule applies to data under time embargos. These data are treated as sensitive data for the embargo period and change to the category of non-sensitive data as soon as the embargo time has elapsed. By default, the maximum embargo time is 6 months (section 2.5 EU BON Data Sharing Agreement).

EU BON does not assert any intellectual property rights (section 3.3 EU BON Data Sharing Agreement). Data collections and any other information that might qualify as works in the meaning of copyright are dedicated to the public domain (by CC0-waiver) or made available under a CC-BY 4.0 License. All data may be re-used for personal objectives or scientific research as well as for dissemination to government bodies and the public.

EU BON attributes data and datasets to the direct data provider who served the data to EU BON (section 3.4 EU BON Data Sharing Agreement). Further attribution, especially to the original source, is added where appropriate in the light of applicable scientific codes of conduct.

V. Summary

The legal framework for data publishing and dissemination applicable to EU BON is realized in form of the EU BON Data Sharing Agreement. By obliging data providers to refrain from

claiming intellectual property rights, it makes sure that no such rights are applied to data within the EU BON-network. For data under national or international security restrictions or under time embargos, EU BON provides for a special category of “sensitive data”. Such data are kept separately from other data and which are made available only by special justification. Finally, EU BON does not assert any intellectual property rights for itself; it dedicates all collections of data that might qualify as works in the meaning of copyright, to the public domain or publishes them under a CC-BY4.0-license.

As a result, EU BON has implemented a publishing policy which is fully consistent with the guidelines for a free and open exchange of data and knowledge.