

Report of the *Pro Bono* Legal Expert Group Meeting Global Biodiversity Information Facility 18 – 19 September 2006



Legal Expert Group (ProLEG) to identify legal issues of importance to GBIF and to analyze them and provide recommendations on how to address them. The Group consisted of legal and other experts from Africa, Asia, Europe, Latin America and North America, who provided advice in their personal expert capacity and not as representative of their respective institutions of employment.

The ProLEG met once outside Copenhagen on 18-19 September 2006 to consider the issues raised by GBIF and to write the first draft of this report. The list of ProLEG members and GBIF Secretariat participants in this meeting is provided in Appendix A. The report was completed subsequently by e-mail consultations. It identifies the key issues that the Group believes GBIF needs to address, provides conclusions in each issue area, and establishes recommendations in response to the conclusions.¹ Unless specifically stated otherwise, all references to GBIF in this report refers to the GBIF Secretariat and to all organizations involved in GBIF, including its Participant Members, Affiliated Members, and data providers.

ISSUES, CONCLUSIONS, AND RECOMMENDATIONS

1. The public, cooperative nature of GBIF and its users.

GBIF and the users of its portal (www.gbif.net) are engaged predominantly in public scientific, educational, and not-for-profit activities. The GBIF portal constitutes a central interface between GBIF's data providers and users, which therefore raises certain expectations and requirements on both sides that require attention by all parties involved in the project.

As stated in the GBIF Memorandum of Understanding (MoU) and the data sharing agreement, the presumption is that data providers will, to the greatest extent possible, make their data freely and openly available through the GBIF portal, subject to a user requirement of due attribution for the data source. Moreover, the primary biodiversity data that are the focal point of GBIF services have broad public-interest value.

Although the organizations and activities associated with GBIF are largely public and not-for-profit, there are a number of potentially significant legal consequences that may arise and should be considered expressly by GBIF management. GBIF, like all other

¹ This report, however, should not be construed as providing legal advice. GBIF and its participating organizations should consult with their legal counsel regarding the implementation of any recommendations or related activities that may involve potential legal liabilities.

individuals and organizations, is subject to the well-established legal principle that ignorance of the law is no excuse.

Recommendation 1: *Considering that the mandate and purpose of GBIF is to promote the sharing of primary biodiversity data freely and openly, GBIF should seek to rely upon and use, as much as possible, the practices norms, and policies of public science to guide its activities and avoid using legalistic solutions and enforcement mechanisms.*

2. Legal status of different information products made available through the GBIF portal.

As is the case with all data and databases and other types of information products, such as literature and software, their legal status is subject to a range of public laws (treaties, legislation, regulations and their interpretation in different jurisdictions by the judiciary) and increasingly to private law (licensing agreements and contracts) in the online environment. Although a detailed discussion of these legal sources is beyond the scope of this report, a basic outline of these sources and their relevance to the different information made available through GBIF is useful for framing the discussion that follows. A much more comprehensive treatment of the relevant legal sources, concepts, and application to GBIF data and other information products is provided in the report commissioned by GBIF in 2004, “An analysis of the implications of intellectual property rights (IPR) on the *Global Biodiversity Information Facility (GBIF)*”, by Manuel Ruiz Muller, which may be found on the GBIF Web site at:

<http://www.gbif.org/prog/ocb/iprmtg/IPRanalysis.pdf>

The most important public law sources are intellectual property (IP) statutes such as copyright and, in those jurisdictions that have it, database protection legislation. Patent law may be relevant to certain data, such as genomic or proteomic, but such data constitute only a small percentage of data that may be made available through GBIF and the legal aspects of that information are the bailiwick of the source organizations. In this regard, it should be noted that patents do not protect data per se, but only the practice, making, or selling of inventions. Thus, data content or transfers cannot, by themselves, infringe a patent, although specific uses or applications of those data may.

Other legislation and regulations applicable to biodiversity research activities include laws governing biodiversity samples and related information. For example, some developing countries are enacting new laws that may limit disclosure of data or information about biological resources originating from these countries. Consistent with the Convention on Biodiversity, over 30 countries have enacted or introduced legislation that regulates access to the genetic resources within their jurisdictions, and related benefit sharing. In some cases, such legislation also regulates the access to and use of data and information about those resources for commercial purposes (e.g., *The Biological Diversity Act, 2002* [No. 18 of 2003], Ministry of Law and Justice, India, available at: http://www.envfor.nic.in/divisions/biodiv/act/bio_div_act_2002.pdf). Although these

laws are not directly applicable to GBIF's data activities at present, it is not clear how they may affect GBIF in the future.

Licenses and contracts are increasingly used for the dissemination of digital information from the owner to the user. The validity of such private law instruments depends on whether they meet all the legal criteria in the jurisdiction(s) in question, as discussed further below.

With regard to the information products that are made available through the GBIF portal, an important legal distinction needs to be made between facts and compilation of those facts into substantial data sets or entire databases. Under both copyright and *sui generis* database protection statutes, individual facts are in the public domain. Under copyright law, moreover, all the factual data remain in the public domain and only the original and creative selection and arrangement of those data may be subject to copyright protection. However, under the database protection law in the EU and some other countries, "substantial parts" of a database are protected if they resulted from substantial investment by the rights holder. Thus, in these jurisdictions many databases are presumably subject to protection under database protection laws and discrete subsets of data also may be.

These differences in IP law in different jurisdictions may affect the applicability of license agreements and of restrictions on data use, including attribution and non-commercial restrictions imposed by data providers. Licenses are applicable when relevant law protects the data or databases (for example, under copyright or *sui generis* database rights). In contrast, contracts can impose conditions on use, even without statutory rights. However, the use of contracts for this purpose is limited in practice by contract formation principles and validity issues, as discussed further in Section 4, below.

<p><i>Recommendation 2: Consistent with Recommendation 1 and the relevant statutory law, GBIF should impose the least possible restrictions and obligations on users.</i></p>

3. Seeking permission from originating data sources by data providers.

Most data collections of providers that are made available via GBIF are compiled from multiple sources, and some portions of these collections may be of unknown origin or legal status. This situation can undermine the ability of data providers to warrant that they have made all the necessary agreements with the original owners of the data in order to make the data available online through the GBIF portal. Nevertheless, data providers should not neglect their responsibility to seek permission for providing data. At a minimum, the data providers should warrant that they have made reasonable attempts to locate and seek the consent of the original sources of the specimens or of the data sources, and to provide due attribution to them. Failure to obtain the requisite permissions and to give due attributions can result in damaging negative publicity to the data provider and GBIF, and undermine their reputation and ability to pursue their objectives. Moreover, the issue here is not only a question of legal conformity, but the quality and

reliability of the data is in doubt when you cannot specify their origin and have access to the source.

Recommendation 3: GBIF should consider revising Clause 1.3 of the GBIF Data Sharing Agreement as follows: “The data provider has made reasonable efforts to ensure that the original owner(s) of the data have agreed that the data may be made available on the GBIF Web site. The data provider also should disclose existing information about the origin of the data in order to allow appropriate recognition and attribution of the original source.”

4. Attribution requirement on users.

As alluded to in the previous section, appropriate attribution is an important benefit to the original data sources and to the providers of biodiversity data. It provides recognition of work and reputational benefits to the organizations (and individuals) participating in GBIF. It also contributes to the transparency of the activity and supports good scientific norms and research processes. Developing countries are particularly concerned that due attribution is not being given to data accessed from them. Attribution thus not only constitutes an equitable condition of free and open data dissemination and reuse, but provides one of the few incentives for the data sources and providers to continue to make their data freely and openly available.

Based on the legal status of data and databases under IP law in different jurisdictions, however, there are substantial problems with the legal validity and enforcement of the attribution requirement for data. The GBIF contractual requirement regarding due attribution by users is defective for individuals or entities in jurisdictions that do not grant statutory database protection such as the E.U. Database Directive for the following reasons, when there is:

- No underlying statutory enforcement of such a right;
- Uncertain validity of “click-through” licenses online; or
- Insufficient consideration given by each party (i.e., no *quid pro quo*).

Acknowledgement may be enforceable for substantial data sets and entire databases in jurisdictions that have database protection legislation, since such laws confer exclusive property rights in substantial parts (measured quantitatively or qualitatively) of data collections resulting from substantial investment. Acknowledgement may be enforceable under copyright law as well, if the database is copyrightable.

However, even under these conditions, the license would be valid only for the signing party and not for other third parties (who lack privity of contract). Moreover, as noted in Section 2 above, there is no legal basis for requiring or enforcing the attribution of individual facts (or insubstantial amounts of data) by re-users of the data, which most likely would eliminate most users of GBIF data from the ambit of the attribution requirement, even in those jurisdictions that have enacted database protection legislation.

The attribution “requirement” thus should be viewed and treated by GBIF as a request to follow good scientific practice and generally accepted normative conduct.

Recommendation 4: GBIF should continue to include attribution as a condition of the use of the data through its portal in order to encourage such normative behavior by the data users.

5. *Non-commercial requirements on users.*

For the same reasons discussed above, non-commercial limitations on the use of data created by licensing agreements in the absence of underlying statutory protection could be defective. Moreover, different providers may have different conceptions of “non-commercial use” or “commercial use” (or even define the terms differently in their contracts). For example, “commercial use” may be defined as being dependent upon an entity’s status (i.e., non-profit vs. for-profit) or on the type of activity (i.e., whether payment is received for the reuse of the data). Data providers may have further variations on the scope of their own definitions of what constitutes commercial and non-commercial uses. Such varying definitions would be difficult to implement or communicate in a standard GBIF agreement. Existing Creative Commons licenses (using database protection rights for their enforcement) therefore may be inappropriate because of potential inconsistencies between the Creative Commons definition of “non-commercial” and the requirements of GBIF (or its data providers). In any case, restrictions or obligations should not be imposed by contract on individual facts which are not protected by any relevant law or norm.

Recommendation 5a: GBIF should continue to work with its data providers to promote its free and open data access policy, subject only to appropriate attribution.

Recommendation 5b: For those data providers that require restrictions on commercial reuse of their data, the development of a standardized licensing mechanism similar to the Creative Commons licenses could be appropriate. This is an area that requires further investigation by GBIF and legal experts on data and information licensing in different jurisdictions.

6. *Enforcement of terms and conditions on users.*

Legal enforcement of terms and conditions on the use of data would involve negative adversarial aspects and substantial costs associated with monitoring the uses and asserting the rights. Enforcement mechanisms can include various approaches, including legal (e.g., threatening legal action through cease and desist letters, or filing law suits), technological (e.g., use of Trusted Platform Management - TPM, Digital Rights Management - DRM, or persistent, unique identifiers), and normative (e.g., use of scientific ethics and publicizing of transgressions through the “mobilization of shame”). For reasons discussed above, legal approaches are not appropriate for enforcing GBIF’s

attribution requirement and may be appropriate for challenging commercial abuses only in exceptional circumstances involving wholesale infringement and misappropriation of large collections.

TPM and DRM tools should not be used if they undermine the primary objective of free and open access online, or impose undue costs or new obligations on providers and users. Persistent and unique identifiers are useful and appropriate and are being investigated by GBIF at this time. These tools can help track various uses and users automatically. They may have substantial costs associated with their adoption and raise some privacy concerns that can be contrary to the values promoted by GBIF, however. Users also may be blocked from access. Such problems may be especially burdensome to data providers and users in developing countries. In any case, trust and transparency must remain the main values underlying GBIF policy.

Recommendation 6a: GBIF should consider normative enforcement methods that rely on the promotion of ethical scientific practice, good will, and peer pressure as a soft and low-cost alternative, and in conformity with the values and objectives promoted by the organization.

Recommendation 6b: Publicizing of inappropriate behavior related to persistent non-compliance with important terms and conditions of data use may be considered, but only in consultation with legal counsel.

7. Barriers to the addition of new GBIF Participants or of disclosing data through the GBIF portal.

The characterization of barriers, including legal barriers, is incomplete and their effect on GBIF participation or on data availability is not fully known or understood. Trade-related benefits, protection of traditional indigenous knowledge, biological conservation, management of national natural resources, laws and policies based on national security, and other considerations based on perceived national interests may come into play. Some of these constraints, whether reasonable or not, may apply even to the primary biodiversity data that constitute the basic content on the GBIF portal. Economic and technological asymmetries among nations can exacerbate the perceptions of these problems.

There was a diversity of viewpoints among the ProLEG members about more specific requirements or terms that GBIF might incorporate into its data use and data sharing agreements, including: disclosure requirements--disclosure of the origin of the source of the information; prior informed consent--permission of the original owner to provide the information; benefit sharing from use of data from developing countries; technology transfer and technical assistance, particularly for overcoming technological barriers to accessing and using data; and privacy concerns. There was no consensus about these

specific approaches, however, so they are not offered as formal recommendations of the committee.

Recommendation 7: GBIF should continue to develop a strategy for dealing with the barriers perceived by potential participants, consistent with its fundamental data access and use principles.

8. Risk Management.

There are a number of potential, though remote, liabilities for GBIF (and its other member organizations) arising from public disclosure of erroneous and harmful data, illegal data disclosure, or negligence.

Recommendation 8a: GBIF should consult with legal counsel to determine relevant liabilities and whether it would be prudent to obtain insurance to cover such risks.

Recommendation 8b: Clause 1.9 of the Data Sharing Agreement should be merged into clause 1.10, because it is largely redundant. The new clause should read: “GBIF Secretariat is not liable or responsible, nor are its employees or contractors, for the data contents or their use; or for any loss, damage, claim, cost or expense however it may arise, from an inability to use the GBIF network.”

APPENDIX A

GBIF *Pro Bono* Legal Expert Group Meeting 18-19 September 2006 Gentofte, Denmark

List of Participants

Paul Uhlir (Chair)
Director, International Scientific and Technical Information Programs
National Research Council
Washington, DC, USA

Paul Asimwe
Sipi Law Associates
Advocates & Legal Consultants
Kampala, Uganda

Daniele Bourcier
Director of Research
CERSA-CNRSA
Berlin, Germany

Philippe Desmeth
Service Public Federal de Programmation Politique Scientifique
Belgian Federal Science Policy Office
Brussels, Belgium

Anitha Ramanna
Lecturer, Department of Politics & Public Administration
University of Pune
Pune, India

Manuel Ruíz
Sociedad Peruana de Derecho Ambiental (SPDA)
Lima, Peru

Thinh Nguyen
Counsel, Science Commons
Cambridge, MA, USA

China Williams
CBD Unit
Royal Botanic Gardens, Kew
Richmond, Surrey, UK

GBIF Secretariat:

Beatriz Torres (Meeting organizer on behalf of the GBIF Secretariat)

Also attending the September 2006 ProLEG meeting from the GBIF Secretariat:

James L. Edwards

Donald Hobern

Francisco Pando

Meredith Lane

Hugo von Linstow

David Remsen

Hannu Saarenmaa

Larry Speers

GBIF Address:

15 Universitetsparken

DK-2100, Copenhagen Ø

Denmark

Phone: + 45 35 32 14 70

Fax: + 45 35 32 14 80

www.gbif.org