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BHL-Europe

**Deliver IPR framework to support long-term
access and sustainability of the digitised
material**

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eContentplus

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¹ OJ L 79, 24.3.2005, p. 1.

0 Document History

0.1 Contributors

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0.2 Revision History

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4 May 2011	N Chillingworth	1.0	Final version

0.3 Reviewers

This document requires the following reviews and approvals.

Name	Position	Date	Version
Naomi Korn	IP Consultant	27 April 2011	0.1
Graham Higley	BHL-Europe PMG	4 May 2011	0.2

0.4 Distribution

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2 Purpose

This document attempts to articulate the ways in which the BHL-Europe project aims to ensure long term access and sustainability of the digital material that makes up the corpus of biodiversity literature on the BHL-Europe portal. Additionally, it identifies the ways in which the project aims to ensure that Europeana and BHL have long term access to the material and associated rights. This document does not seek to address how the project may exploit its Intellectual Property to fund further development of the portal or associated services.²

3 Sustainability and long term access

The BHL-Europe Project Management Group recognises the inherent risk of the project being partly reliant on third party content and data for its success. This risk is apparent not only for the 36 month duration of the project but also beyond if the BHL-Europe portal is to remain available online with meaningful content and searchable data for users to discover and explore. Formal strategies have been necessary therefore to mitigate any risk of losing access to, or discoverability of, the digital content.

3.1 Open Access

The project's Open Access ideology is the foundation for free, long term access to the BHL-Europe biodiversity content. This ideology has been further underpinned by the formal agreements in place with project partners [Annex I: Description of Work from the Grant Agreement with the EC, and the Memorandum of Understanding between the project's legal representative, the Museum für Naturkunde in Berlin, and existing and potential content and data providers].

3.2 Implementing and Open Access ideology

3.2.1 Public Domain works

The majority of digitised biodiversity literature made available by project partners is sufficiently old to be no longer protected by copyright. Furthermore, as the original literature has already been published it is also not subject to any publication right which might lock the work under control of a single rights owner for a further 25 years. Any risk of trademark infringement of titles is considered sufficiently small for out of copyright works. Consequently sustainable access to the majority of the content is not threatened by proprietary rights. Only UK partners [due to the nature of UK copyright legislation, custom and practice] might recognise copyright protection for digitised public domain works. The project has addressed this anomaly through the Memorandum of Understanding which stipulates that *“Neither BHL-Europe nor the data/information providers will seek to assert any Intellectual Property Rights over digital copies of public domain materials. Public domain material can*

² Due to the open access (and re-use) ideology of the project, sustainability in terms of funding to support the portal, content and data beyond the terms of funding from the EU cannot be sought by exploiting the content or data itself. Indeed overt exploitation of content by the project itself is counter to projects purpose & ethos. Sustainable funding opportunities lie in establishing the BHL-Europe brand and the potential sale of value added services.

*be reused or exploited by anyone who wishes to use it including educational, non-commercial, and commercial users and Europeana”.*³

Where partners recognise copyright protection for digitised public domain works the mechanism for achieving this is the Creative Commons Zero (CC0) licence. The function of this licence is for rights owners to give up their rights in a work to the fullest extent allowed by law. The Creative Commons website provides an explanation of how this licence works: “A person using CC0 (called the “affirmer” in the legal code) dedicates a work to the public domain by waiving all of his or her copyright and neighboring and related rights in a work, to the fullest extent permitted by law. If the waiver isn’t effective for any reason, then CC0 acts as a license from the affirmer granting the public an unconditional, irrevocable, non exclusive, royalty free license to use the work for any purpose.”⁴ This will allow thumbnails to be made available in the Europeana portal as well as full sized images on the BHL-Europe portal.

Digitised Public Domain works where no new copyright is recognised will be identified as ‘Public Domain’ through the metadata. The BHL-Europe Best Practice Guide for IPR, encourages content providers to use the Public Domain Mark⁵ to identify a work as being free of known restrictions under copyright law, including all related and neighbouring rights. The Public Domain Mark was launched by Creative Commons in conjunction with Europeana and according to Creative Commons “will become the standard mark for works free of known copyright that are shared via the [Europeana portal](#), playing an important infrastructural role in the EU’s efforts to ensure that all works shared online are marked with rights information.”⁶

3.2.2 Works protected by copyright

The practical tool used by the project to fulfil its Open Access agenda is the Creative Commons licensing framework. In addition to the CC0 rights waiver referred to above, the project makes original works protected by copyright available under Creative Commons licences.

Where content providers are also rights owners, they have agreed to license their works under the open access terms provided for by the Creative Commons suite of licences.

In cases where the content provider is not the rights owner for original content they have secured agreements with rights owners to make their works available on the BHL-Europe portal under Creative Commons licences. The choice of licence in these cases is determined by the rights owner, however content providers are encouraged to advocate adoption of the more permissive licences for in copyright works, such as CC-BY-SA (Attribution-Share Alike). This Creative Commons licence allows re-use subject to attribution to the creator and on the condition that any works created or derived from a work so licensed must also be licensed under equivalent terms. This helps ensure that the benefits enjoyed by users of BHL-Europe content are perpetuated by ensuring further enrichment of ‘Commons’ of freely re-usable works.

Creative Commons licences meet the need to ensure long term access to the biodiversity content on the BHL-Europe Portal in a variety of ways:

³ From Memorandum of Understanding of the Biodiversity Heritage Library for Europe Partners, https://bhl.wikispaces.com/file/view/BHL-Europe_MoU-final.pdf

⁴ From http://wiki.creativecommons.org/CC0_FAQ

⁵ See <http://creativecommons.org/publicdomain/mark/1.0/>

⁶ From *Creative Commons launches Public Domain Mark; Europeana and Cultural Heritage Institutions lead early adoption*, Diane Peters, 11 October 2010, <https://creativecommons.org/press-releases/entry/23755>

1. No Technical Protection Measures! Content shared with BHL-Europe must not be locked down with Technical Protection Measures, as these are incompatible with Creative Commons licences. From Creative Commons licence legal text: “*You may not impose any effective technological measures on the Work that restrict the ability of a recipient of the Work from You to exercise the rights granted to that recipient under the terms of the License.*”⁷ Such technologies run the risk of locking up access to content even when the term of copyright has expired in the work. The message has been reiterated to all content providers through the IPR Best Practice Guide, made available to partners in February 2010.
2. Creative Commons licences, unlike many copyright licences, do not override statutory exceptions or other limitations to the monopoly rights conferred by copyright.
3. The Creative Commons brand is well-established and is becoming a ubiquitous licensing scheme for in-copyright digital content on the web. The Creative Commons brand is increasingly recognised and trusted by web users who expect to find Creative Commons licensed content on the web, ever more so from institutions and organisations as well as for User Generated Content or individual creators online. The ubiquity of Creative Commons licences helps not only sustainability but also visibility of BHL-Europe content by helping surface the content; Google and Yahoo! search engines both have options to filter search results by the type of Creative Commons licence applied.
4. The licences are ‘Free licences’ to use in so far as there is no cost to use them and no associated ongoing costs either administratively or in the form of licence fees. When institutional and library budgets are being slashed this is an important consideration.
5. The licences are irrevocable meaning that the licences for BHL-Europe content will remain valid in perpetuity and therefore there are no future licensing fees to budget for by BHL-Europe content providers.

3.2.3 Further safeguards to ensure long term access

To assist partners in implementing the requirements of the Memorandum of Understanding, the project has delivered an IPR Best Practice Guide. This includes advice to partners regarding the appropriate licensing framework for content. Additionally, the guide stresses that content providers need to be aware of the terms of any contractual agreements they may have with third party digitising partners in case they prevent partners providing content under open access terms; such contracts may give ownership of control and access to content to third party private interests and be thereby incompatible with the project’s open access commitments.

Software and code used in the development of the BHL-Europe system itself is non-proprietary Open Source and can be openly developed, improved and built upon to support the project’s changing needs. The chosen Open Source licence agreed within Work Package 3 is the modified BSD licence, <http://www.oss-watch.ac.uk/resources/modbsd.xml>.

⁷ From <http://creativecommons.org/licenses/by/3.0/legalcode>

3.2.4 Data

While the content for the project is either not protected by copyright or has been licensed under a ‘some rights reserved’ Creative Commons licence, ensuring ongoing access to the content is not possible without suitable agreements regarding metadata. This is crucial to maximise interoperability with other projects such as Europeana and BHL.

The project has sufficient permission/authority to migrate the content and data to other platforms as necessary for preservation or to keep pace with future technological developments. From the Description of Work: *“Data transformation processes will have to be carried out from time-to-time to provide continued access to the data in the repository, as formats and standards change over time.”* The project has met this requirement by ensuring all content providers (existing and future) sign the Memorandum of Understanding which states the terms under which they make their data available to the project and how this will then be made available to third parties: *“All models of access will allow for searching, browsing and harvesting all data and unrestricted re-use of all data by third parties, including but not limited to Europeana, EOL and Global BHL.”*⁸

Due to the time-dependent nature of copyright protection, a need has been identified to build an automated process to periodically update metadata for content in the repository where the work has fallen into the Public Domain (copyright has expired for the work). This is not identified as a priority at this stage and could be manually achieved if necessary.

3.2.5 Data Exchange Agreement with Europeana

The project as a key content aggregator for Europeana is required to sign the Data Exchange Agreement with Europeana. This document has been through various iterations but a final version will be recommended to the Council of Content Providers and Aggregators by June 2011. The IPR work package leader for BHL-Europe is part of the Core Legal Work Group for Europeana and will be instrumental in shaping this document to ensure it meets the needs of BHL-Europe in the long term. The agreement is to be automatically renewed each year unless either party gives 3 month’s notice prior to the date of renewal.

3.2.6 Potential Legislative, Licensing and Policy-Related Developments

The project is keeping abreast of the potential legislative changes at European level which may help facilitate the addition of further material to the corpus on content in the BHL-Europe portal. In particular the European Commission has mooted the possibility of an Orphan Works Directive⁹ which will a) provide legal certainty for Orphan works currently available on the portal and b) encourage and enable the submission of further content that hitherto had been considered too great a risk to include (that where the copyright owner could not be identified or located).

An additional promising legal development is the recent rejection of the rejected Google Books Settlement by Judge Denny Chin in the United States. A consequence of this is that Google no longer has a legally sanctioned monopoly right to digitise and make available orphan works online.

The Comité des Sages report on Bringing Europe's Cultural Heritage On-line, *The New Renaissance*¹⁰ includes further notions that might help support long term access to BHL-

⁸ Memorandum of Understanding of the Biodiversity Heritage Library for Europe Partners

⁹ See http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf

¹⁰ See: http://ec.europa.eu/culture/pdf/report_Comite_des_Sages.pdf

Europe's digital content online. The report advocates: *“To guarantee the preservation of the European digital cultural heritage, a copy of digitised or born digital cultural material should be archived at Europeana. For in copyright works the deposit site would be a dark archive functioning as a safe harbour.”* And that *“Copyright and related legislation have to enable the cultural heritage institutions responsible for preservation to create archival copies and to make file conversions for archival purposes.”* While this is not a certainty for change in European law, the fortunate position of BHL-Europe's IPR work package leader being part of the Core Legal Work Group for Europeana, whose remit is to provide feedback on the Comité des Sages report helps ensure the project remains abreast of significant developments on the European stage and has a voice in guiding those developments.