

Guidance on the meaning of non-commercial/commercial use

By Jo Judge

Board Actions:

a) Agree guidance on the definition of non-commercial/commercial use

The Network have requested some clarification about the meaning of “commercial use” with reference to the NBN Atlas. The lack of clarity around this is delaying the return of Data Partner Agreements and, therefore, permission to transfer data from the NBN Gateway to the NBN Atlas.

There is no fixed definition of commercial use, Creative Commons define commercial use as “one primarily intended for or directed towards commercial advantage or monetary compensation”. Whether a use is commercial will depend on the specifics of the situation and the intentions of the user. Their definition is “intentionally flexible, [so that] the definition is specific enough to make its intended operation and reach clear, but versatile enough to cover a wide variety of use cases”.

Indirect use of the data in order to create some other product (e.g. including the data in a wider report on other matters) for commercial gain is still regarded as commercial use of the original data. However, not all use by a business is necessarily “commercial” and, on the other hand, use by a non-profit organisation is not necessarily non-commercial.

There are many grey areas surrounding the definition of commercial and non-commercial use, some of the main areas of dispute are whether government use of data and/or research are considered commercial. Taking the Creative Commons definition at its strictest interpretation, commercial use would be where financial compensation and/or gain were received at any point in the use of the data. This would include cost recovery as well as profit.

Guidance provided by the NBN Trust’s lawyers confirm that there is no strict legal definition of what is ‘commercial’ or ‘non-commercial’. However, they do suggest there are some key questions when considering this issue:

- a). Is the use to make money?
- b). What is the economic value of the data and how might the use impact on competitors?
- c). Does the use generate promotional value for the users?

Some potential uses of data on the NBN Atlas that the lawyers agree would be commercial use are; an ecological consultant using the data in a report then charge for that report, and the use of data by developers etc. in planning applications, as it is reasonable to assume that gaining planning consent for a development will ultimately result in financial gain.

They ended their advice by saying that they agree that providing guidance would be useful, but that we don’t necessarily need to worry about “drawing a hard line in the sand” between commercial and non-commercial. However, they would suggest that we err on the side of caution of saying that something is commercial, but make sure that we would “not be embarrassed to make the argument to support it”. Ultimately,

whatever guidance we give will not change the terms of the Creative Commons licence or their interpretation. Unless, there is a clear cut commercial use, If a data provider believes the terms have been breached each individual case would have to involved discussions with the data user.

Trying to provide guidance on commercial use has prompted a lot of debate within the core NBN Atlas Steering Group, and it was felt that we can give guidance of non-commercial use more easily. Even so, they have been unable to come to agreement. Therefore, the Steering Group will defer to the decision of the NBN Trust Board on this matter.

The four potential options put forward are:

- i). Non-commercial use is defined as personal use only
- ii). Non-commercial use is defined using an adapted version of the NBN Data Use Principles¹ and 7
- iii). No guidance is given for what constitutes commercial/non-commercial use
- iv). The CC-BY-NC licence is removed from the NBN Atlas

i). Personal use only

This would obviously be the most restrictive definition of non-commercial use, and, therefore, the easiest to determine if a breach of the licence has occurred. Taking the Creative Commons definition at its strictest interpretation, it could be argued that anyone who receives any payment (including a salary) could be said to be receiving monetary compensation for the use of that data.

There are precedents for using this definition of the creative commons licence in other countries. A German court upheld a request for compensation for a photographer whose photo had been used on a radio station's website, despite the fact that there was no charge to use the website, there was no advertising and no sponsorship. The court stated that German law defined non-commercial use as purely for personal use. While there is no similar clarity in the UK law, it is a relevant interpretation of the same licence.

As with any definition attributed to non-commercial use, a user can apply to the data provider for an exemption to allow them to use the data commercially. It would be possible for such agreements to be standardised and long-lasting to reduce the admin associated with this. There would also be the potential for the CC+ protocol to be added to allow requests for exemptions to be routed via the NBN Atlas (see attached document, "CC and CC+ Overview for the World Wide Web" for more details).

Advantages: Clear distinction between commercial and non-commercial, easy to implement and regulate, preferred option of many data providers

Disadvantages: Restrictive, some funders uncomfortable with this definition

ii). Adapt the NBN Data Exchange Principles

The agreed NBN Data Exchange Principles, which were produced to lay ground rules for taking part in the Network and to provide a practical tool which can be used to underpin the way participants in the NBN work, may provide a solution;

Principle 1 states “biodiversity data should be easily accessible to enable their use for not-for-profit decision making, education, research and other public benefit purposes.”

While Principle 7 states:

- i). Managers and funders of biodiversity data should make basic fact freely available (except for handling charges if needed) for not-for-profit decision-making, education, research and other public-benefit purposes.
- ii). Biodiversity data suppliers should try to arrange resourcing of information provision so that charges for not-for-profit uses are minimal and charges for commercial uses are realistic but do not prevent the use of biodiversity data.
- iii). Biodiversity data users should expect to contribute to sustaining the provision of biodiversity data through contributing either in kind or financially to the collection, collation and management of biodiversity data, or at the point of use.

This wording could be adapted to produce a definition of what is considered to be non-commercial use, and, therefore, all other use is seen as commercial, unless the user can demonstrate otherwise.

Advantages: is consistent with current NBN policy and principles, broader definition of non-commercial use, more acceptable to statutory bodies

Disadvantages: Provides more potential for dispute over what is non-commercial use

iii). NBN Trust does not provide guidance for what constitutes commercial/non-commercial use

From the NBN Trust perspective, this could, on the face of it, be the easiest solution, as we are then not involved in determining what may or may not be considered commercial use over and above the definition provided by Creative Commons. Instead it would be up to the data providers and data users to make their own decisions on the matter.

However, Network members have specifically asked for some form of guidance or definition on how the NBN Trust interprets the definition. Indeed many data providers are delaying completing their Data Partner Agreements until some guidance is forthcoming. It is likely that if we do not provide guidance for the Network there will be a loss of data, as data providers are not confident of what would be considered commercial use and would not take the perceived risk of abuse of the licence.

Advantages: NBN Trust does not have to become involved in determining what is non-commercial and commercial use

Disadvantages: Could be interpreted that the NBN Trust are not listening to the Network and ignoring their request for support, may result in less data being submitted to the NBN Atlas as data providers are not confident in the protection of a CC-BY-NC licence.

iv). Removing the CC-BY-NC licence from the NBN Atlas

It has been suggested that removing the option for a CC-BY-NC licence could be a solution as there would then be no need to define commercial vs non-commercial use, or the process for dealing with breaches of the CC-BY-NC licence (see separate paper). However, this is likely to result in the loss of data, currently 171 of the 384 datasets with permission to transfer to the NBN Atlas, including the 150 million records provided by BTO, are associated with a CC-BY-NC licence. Furthermore, it could be seen as the NBN Trust not supporting those data providers who have concerns about their business models.

One reason for selecting the licences we have for use in the NBN Atlas is to be in line with GBIF, who “support publishers’ use of CC BY-NC, and we will make reasonable efforts to honour the intent of such licensing, even where its inheritance extends additional restrictions to other aggregated data that are more freely licensed by themselves.” Therefore, removing the option of a CC-BY-NC licence would be a departure from that.

Advantages: Removes the necessity to provide guidance on what constitutes commercial vs non-commercial use

Disadvantages: Could be seen as not supporting the needs of many network members, could result in a significant loss of data from the NBN Atlas

Appendix A - Examples from other sectors:

Ordnance Survey

Ordnance Survey mapping agreement licences are non-commercial licences that allow members to use OS digital map products for a specific purpose, their 'core business'. For public sector organisations this includes:

- a) Creating and monitoring policy
- b) Operational management of government
- c) Delivering government business and public services
- d) Making information available to the public
- e) Performing any other function required by statute
- f) Passing/sharing derived information and/or data to third parties

They define commercial activity as "any activity which involves or is intended to involve financial gain". They also define financial gain as "any revenue or credit received which exceeds the licensee's incremental costs of supplying or making available to a recipient any copy of licenced data. Financial gain does not include any receipts from statutory charges."

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