

Implementation of a system for taking action when licence conditions are breached

By Jo Judge

At the meeting on the 9th November 2016, the board agreed that including the potential for a fixed charge to be levied on users who breach the terms of the Creative Commons licences (specifically the CC-BY-NC licence) could be a good deterrent and that we should pursue this option as it will help alleviate some of the data providers' concerns on moving towards more open data and the lack of access controls on the NBN Atlas. As such, there was an action to develop the fixed charge and report back at this board meeting.

However, following the discussions surrounding the definition of commercial/non-commercial use, one member of the steering group feels strongly that the NBN Trust should not be taking on the role of "enforcer" and has specifically requested that this should be raised again at this board meeting. Their main concern is that it would require an exorbitant level of resource to implement, that the NBN Trust would not be able to enforce it effectively and that it fundamentally changes the remit of the NBN Trust. In addition, they are concerned that the NBN Trust may be drawn into legal battles if there is a disagreement between the data provider and the data user over whether a use is commercial.

Conversely, the majority of the steering group members are in favour of the NBN Trust providing this service and feel that the value of this offer of support to the Network, in terms of giving confidence that this issue is being taken seriously, will be immense and far outweigh any time cost incurred. Legal advice received by the NBN Trust and presented to the Board in November (a summary is in appendix A) has confirmed that the NBN Trust has the right to take action for breach of contract and infringement of database rights.

It will not be the responsibility of the NBN Trust to police the use of the licences, data providers will have to inform the NBN Trust that they believe a breach has occurred. Having discussed the frequency with which breaches of the NBN Gateway's terms and conditions are currently identified with a number of data providers, it appears unlikely that there will be a burdensome number of breaches being reported to the NBN Trust.

It is my recommendation that we provide a support service to the Network, giving the potential for fixed charges to be levied for breaches of the CC-BY-NC licence, and I set out an outline of the proposed approach below.

Proposed approach

The first action should be to try to resolve the problem to the satisfaction of the NBN Trust and the data provider without recourse to a fixed charge or court action.

If this is unsuccessful, a fixed charge should be levied for breach of licence conditions.

In exceptional circumstances (e.g. if the fixed charges are ignored of for a repeat offender) the NBN Trust may take legal action. The Trust would reserve the right to assess whether this was a cost-effective course to take for each individual case.

If this approach is agreed:

- i). the terms and conditions of use for the NBN Atlas will be amended to include a statement to the effect that if the NBN Trust is notified of a breach of the licence conditions we may, at our discretion, take such action as we deem appropriate. Including the issuing of a fixed charge or legal proceedings for reimbursement of all costs on an indemnity basis (including, but not limited to, reasonable administrative and legal costs) resulting from the breach.
- ii). a prescribed process, with templates for reporting breaches and fixed charge notices, including an appeals process will be drafted and implemented
- iii). The NBN Trust should reserve the right to determine whether to pursue a user for breach of licence conditions on a case by case basis.
- iv). The NBN Trust should reserve the right to review and/or amend the policy at any time

Appendix A - Breaches of the CC-BY-NC licence

If a genuine user who has legitimate access to the NBN Atlas, and obtains data in accordance with the applicable terms and conditions of the CC-BY-NC licence, but subsequently uses the data for commercial purposes they are in breach of the licence terms. If they are in breach of the licence terms and conditions, the NBN Trust may take action for breach of contract and infringement of database rights.

The first course of action would be to resolve the matter without resorting to formal litigation. If this were unsuccessful, there are two potential courses of action:

1. Take action through the courts.

If the NBN Trust were to succeed in court action the court would usually order the user to pay damages to compensation for any loss suffered as a result of the breach/infringement. Alternatively, the court may ask the user to account for any profit it has made as a result of the breach infringement.

The key purpose of damages is to compensate the data provider for its losses, not to punish the wrong-doer. As it is the NBN Trust who would be taking any action, and as the NBN does not profit from the data in monetary terms the compensation cannot be for a loss of "sales". However, the loss could be measured by reference to a notional "royalty rate" which the data provider may have received if the unauthorised use had been properly licensed.

The disadvantage of this approach is that it could be an expensive process with no certainty of success.

2. Apply a fixed charge for breach of licence

A fixed charge should be proportional to the legitimate interests which the Trust is seeking to protect. As the Trust will not be suffering a financial loss, the fixed charge would be based on the value of the Trust's purpose, i.e. to provide a centralised and secure environment for the sharing of biological data, and in particular in a way which allows data providers to retain value in that data and their ability to fund their own activities (without which, they may withdraw their data entirely).

The advantages of setting a fixed charge are that it provides some certainty and would pose a deterrent against misuse of data. The difficulty is going to be in striking a balance between being an effective deterrent and proportionate to the circumstances.

It is possible to have a fixed charge for misuse of data in the terms and conditions of the NBN Atlas and reserve the right to pursue damages for unauthorised use instead of levying the fixed charge.