

Further explanation of Intellectual Property Rights and how they pertain to biological data records

Background

With the move to the NBN Atlas infrastructure, NBN Data Partners are required to sign new Data Partner Agreements to permit the transfer of data currently held on the NBN Gateway to the NBN Atlas¹. Data Partners have requested guidance on how to proceed with data for which they either do not know the details of the original data recorder or are unable to contact the data recorder. This document sets out the circumstances in which data is protected under the legislation, including in particular the Copyright, Designs and Patents Act 1988 and the Copyright and Rights in Databases Regulations 1997, and the conditions under which the protection does not apply in regards to data records supplied to an NBN Data Partner and/or direct to the NBN Trust.

Intellectual Property Rights of the Data Recorder

There are three IP rights which may apply depending on the circumstances: copyright, database right and confidentiality.

1. **Copyright** is sometimes used to refer to IP rights more generally. However, in legal terms copyright does not apply to the information provided through individual data records² per se. For these purposes:
 - (a) Copyright may apply to a document if the "manner of expression" is original and if sufficient "art, skill or labour" has gone into its creation. Even in this context, the copyright would only apply to the *document* and not the underlying information;
 - (b) Copyright may also apply to a database³ if, and only if, by reason of the selection or arrangement of the contents, the database constitutes the author's own intellectual creation and is therefore original. However, this copyright would only apply to the *structure* of the database, and not to its contents;
 - (c) Copyright may also apply to a table or compilation⁴ (provided it does not also qualify as being a "database", which would be a very rare occasion) if sufficient skill and labour has been applied in compiling and selecting the

¹ Whether the data partner is required to seek permission from the data recorder before submitting data to the NBN Atlas will depend on the agreement the data provider has with the data recorder

² Where we refer to an "individual data record", we mean a simple record of a single sighting containing e.g. details of the species seen, number of organisms present, the location, date and time, etc.

³ A "database" is defined as a collection of independent works, data or materials which are arranged in a systematic or methodical way and individually accessible by electronic or other means. Therefore, a notebook, an organised collection of pages or a simple spreadsheet could all be regarded as a database. For the purposes of this guidance, a single individual data record supplied by a data recorder would not qualify as a database because it is not a "collection of independent works", but a number of individual data records which are properly organised and accessible might qualify.

⁴ There are no statutory definitions of "table" or "compilation" for these purposes, but they are generally understood to mean, respectively: a list of numbers or other facts systematically arranged in columns or similar; and the construction of a documentary work out of materials collected from various sources. An individual data record supplied by a data recorder could conceivably qualify as a "table", but it is likely this would apply only in rare circumstances as the layout of the table would largely be dictated by the contents. An individual data record could not qualify as a "compilation" because it is not a collection of materials from various sources (much like the reason it does not qualify as a "database": see footnote 3).

information from a wider range of data or in arranging it in an original way. Even then, the copyright would only apply to the *particular selection or arrangement* of that information, and not the information itself.

The fact that there may be considerable skill and labour involved in finding and identifying species does not give rise to copyright in the data itself. Copyright will only apply if the compilation and/or organisation of the data includes a significant level of ingenuity or skill on the part of the compiler/organiser.

Given the nature of the data supplied by data recorders, it is unlikely that data recorders would hold any material copyright in the data. It is possible that, in some limited cases, there may be copyright in the particular format in which the data is recorded or presented, however given that the NBN Trust requires data to be supplied to the Atlas in a common standardised format, this is unlikely to be relevant.

2. **Database right** may apply to a database⁵ if substantial investment has been made in the obtaining, verifying or presentation of the data. There is no legal definition of what constitutes a "substantial investment" and there is no minimum number of records that would need to be in a database in order for it to qualify for protection.

A database is defined as a collection of independent works, data or materials which are arranged in a systematic or methodical way and individually accessible by electronic or other means (e.g. via an index). A simple spreadsheet could be considered a database. Furthermore, a database does not have to be electronic, and a paper-based database will still qualify for protection as long as it is possible to find the data without having to search through all of the contents. For example, an unorganised collection of paper records would not qualify as a database, but if they have been organised in some way which makes it easy to find a particular entry (e.g. alphabetically or chronologically) it could be classified as a database.

Database rights last for 15 years from the end of the year in which the last "substantial changes" to the content of the database were made. For example, if a recorder had a database containing records from 1970 and they were still adding substantially to the dataset in 2017, the database rights for all of those records would be in force until 2032. Substantial changes can be as simple as the addition of new records to a notebook or spreadsheet etc.

In contrast with copyright (as discussed above), database rights protect against the extraction⁶ or re-utilisation⁷ of substantial parts of the data (i.e. the information) itself, except by permission of the rights holder or where statutory or other legal exemption occurs.

For the purposes of the NBN Trust and the NBN Atlas, we work under the assumption that the data recorder has collected and prepared a significant amount of data (i.e. a substantial number of individual data records) and therefore owns database rights in that collection of data.

⁵ See footnote 3.

⁶ "Extraction" in relation to any contents of the database, means the permanent or temporary transfer of those contents to another medium by any means or in any form.

⁷ "re-utilisation" in relation to any contents of a database, means making those contents available to the public by any means

3. **Confidentiality** can only be assigned to information that is of limited availability (which could be disputed given that the majority of biodiversity information is observed in public) and, even then, only if the data recorder imposes a duty of confidentiality when disclosing that data to the data provider or to the NBN Trust. Given that, for the majority of data, the precise purpose is for the information to be made available for use, it is presumed that this will not apply to data submitted to the NBN Atlas, as long as the data was not submitted to the data provider or the NBN Trust with an explicit statement of confidentiality.

If the data recorder does not have any of the above rights in the data which it supplies to the data provider, or directly to the NBN Trust, then no further consent from the data recorder is legally required.

Database rights when the data recorder cannot be contacted

With respect to data originally provided by a recorder who can no longer be contacted, there are two aspects of database right that need to be considered: a "permitted act" within the regulations and duration of protection of database right.

1. The regulations set out a number of permitted acts whereby the database right is not infringed by fair dealing with a substantial part of its contents in certain defined circumstances. One such circumstance permits the extraction and re-utilisation of the data if "it is not possible by reasonable inquiry" to ascertain the identity of the data recorder and it is "reasonable to assume that the database right has expired".
2. Database rights have a prescribed duration of 15 years from either the end of the year in which the making of the database was completed or, if it was published within that period, 15 years from the end of the year in which the database was first made available to the public. If there are substantial changes to the contents of the database then the 15 year protection period recommences. Substantial change is defined as "resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment".

If the original supplier of the data has died:

1. If the database has been created as part of their job, the rights to the database will be retained by their employer, in which case the employer could permit transfer of the data;
2. If it was not compiled as part of their job, the database may pass in the owner's will or as part of their estate. Whoever inherits those rights will be able to permit the transfer of the data as though they were the original owner;
3. If there is no will and no-one to inherit ownership of the database as part of their estate, the rights pass to the Crown. An application to the UK Intellectual Property Office would have to be made in order to transfer ownership of the database rights. This is likely to take some time and incur a fee.