## CREATE WP3C-2 COPYRIGHT AND CIVIL ENFORCEMENT - INVESTIGATING THE 'LEGAL ICEBERG'

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RESEARCH OBJECTIVES AND KEY THEMES: To map formal and informal copyright enforcement activity in Scotland and to explore the different factors influencing that activity.

- What are the key practices in IP/copyright enforcement, 'formally' in court litigation and 'informally' in correspondence, negotiation and settlement?
- What are the key factors influencing the conduct of IP/copyright infringement disputes, their trajectories and outcomes?
- What are the particular considerations relevant to copyright infringement disputes, generally and in the creative industries?

Galanter (1974) identified 'official' justice systems as: 'the 'upper' layers of a massive 'legal' iceberg'

consisting of distinct but inter-merging layers of adjudication, litigation, private settlement systems and other routes to dispute resolution.

KEY CHALLENGES: To develop and implement a research design capable of investigating 'unobservable' informal and private enforcement practices as well as 'observable' litigation activity.

Empirical research into IP enforcement focussed on other jurisdictions — Dent and Weatherall, Greenhalgh et al, Gallagher, Helmers and McDonagh.

**INFLUENCES** 

Empirical research into other areas of disputing practice in Scotland – Coope and Morris, Samuel, Agapiou and Clark.

**RESEARCH DESIGN:** Mixed empirical methods combining analysis of quantitative and qualitative data from Scottish court records and a survey/interviews among legal advisers. **VALUE ADDED:** Refining new research design; deepening research connections with legal sector; widening opportunities for knowledge exchange and dissemination (eg CIPA Journal, ITMA seminar).

Scottish court records

Focus: Court of Session IP actions - approx. 70+ cases in 5 year date range.

Data to be collected: IP right(s) in suit; use of interim interdict; case trajectories; settlement rates; timescales; industry sectors; and more.

Status: currently in discussion with Scottish Court Service over access to SCS data.

Next steps: once agreement reached with SCS, to collect and analyse available data.

The unobservable....

observable....

Survey and interviews

Focus: Firms of solicitors with a practice in IP and firms of patent/trade mark attorneys, all based in Scotland – approx. 170+ firms in total.

Data to be collected: nature and range of IP/copyright infringement disputes, prelitigation and at court; dispute trajectories and influencing factors; online infringement and intermediaries; use of ADR; settlement outcomes; costs; creative industry disputes; and more.

Status: survey currently live with respondents until into autumn 2014.

Next steps: to collect and analyse survey data; thereafter to arrange follow-up interviews with respondents and other relevant stakeholders.

References: M. Galanter, 'Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change', 9 Law & Soc'y Rev 95 1974-1975; C. Dent and K. Weatherall, 'Lawyers' decisions in Australian patent dispute settlements: An empirical perspective', Australian Intellectual Property Journal 2006, 17(4), 255-276; C. Greenhalgh, J. Phillips, R. Pitkethly, M. Rogers, J. Tomalin, 'Intellectual Property Enforcement in Smaller UK Firms', report for SABIP/UK IPO, October 2010; W.T. Gallagher, 'Trademark and Copyright Enforcement in the Shadow of IP Law' 28 Santa Clara Computer & High Tech. L.J 453; C. Helmers and L. McDonagh, 'Patent litigation in the UK: an empirical survey 2000-2008' JIPLP 2013, 8(11), 846-861; S. Coope and S. Morris, 'Personal Injury Litigation, Negotiation and Settlement' Scottish Executive Social Research, 2007; A. Agapiou and B. Clark, 'Scottish construction lawyers and mediation: an investigation into attitudes and experiences' IJLBE 2011, 3(2), 159-191; A. Agapiou and B. Clark, 'An empirical analysis of Scottish construction lawyers' interaction with mediation: a qualitative approach' CJQ 2012, 31(4), 494-513.