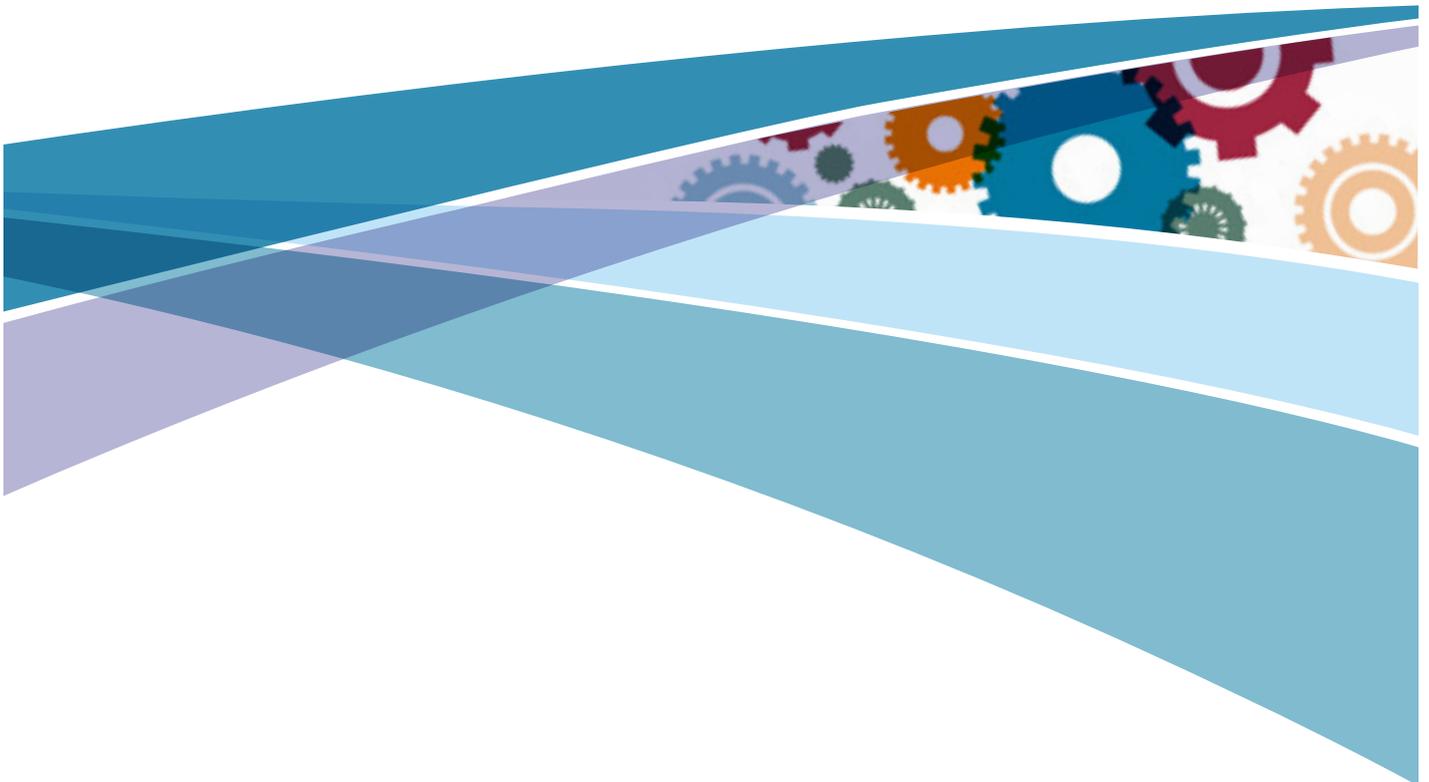




Intellectual
Property
Office

Measuring Infringement of Intellectual Property Rights - Executive Summary



Research commissioned by the Intellectual Property Office, and carried out by:

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This is an independent report commissioned by the Intellectual Property Office (IPO). Findings and opinions are those of the researchers, not necessarily the views of the IPO or the Government.

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1. Executive Summary

This study was commissioned by the Intellectual Property Office (IPO) with a stated aim of providing a robust overview of existing methods used to measure infringement of intellectual property rights (IPR) as well as recommend suitable methodologies, especially those capable of being adopted across different IP rights. This report summarises the outcomes of a four-month review of methodologies currently used to identify the scale of infringement in the four main areas of IPR: copyright, trademark, patent, and design rights. It includes recommendations for future methodologies to improve rigour and robustness and is split into two parts:

1. The main report summarises our findings and recommendations starting with a section on the background to our review, framed around concerns amongst policy makers about the quality of data generated by most IP right infringement research. The main report includes our methodological approach followed by a summary of the research outcomes and finally by our recommendations.
2. The second part of the report is divided into appended sections containing our detailed findings. This includes recommendations for best practice on statistics and estimating IPR infringement. The review then covers the three main sources of our information: a comprehensive and systematic review of industry and government (so-called 'grey') literature along with appropriate relevant academic literature; structured interviews with trade body representatives in the different areas; and a series of interviews with industry experts within the area of online IP infringement. The study covers research carried out mainly during the past ten years although some goes back to the turn of the Millennium. Whilst we recognise the importance of keeping up with most recent efforts, especially given the fast-changing markets IPR operate in, there are also useful insights available from work carried out over a decade ago.

The review is wide-ranging in scope and overall our findings evidence a lack of appreciation among those producing research for the high-level principles of measurement and assessment of scale. To date, the approaches adopted by industry seem more designed for internal consumption and are usually contingent on particular technologies and/or sector perspectives. Typically, there is a lack of transparency in the methodologies and data used to form the basis of claims, making much of this an unreliable basis for policy formulation.

The research approaches we found are characterised by a number of features that can be summarised as a preference for reactive approaches that look to establish snapshots of an important issue at the time of investigation. Most studies are ad hoc in nature and on the whole we found a lack of sustained longitudinal approaches that would develop the appreciation of change. Typically the studies are designed to address specific hypotheses that might serve to support the position of the particular commissioning body.

To help bring some structure to this area, we propose a framework for the assessment of the volume of infringement in each different area. The underlying aim is to draw out a common approach wherever possible in each area, rather than being drawn initially to the differences in each field.

We advocate on-going survey tracking of the attitudes, perceptions and, where practical, behaviours of both perpetrators and claimants in IP infringement. Clearly, the nature of perpetrators, claimants and enforcement differs within each IPR¹ but in our view the assessment for each IPR should include all of these elements.²

It is important to clarify that the key element of the survey structure is the adoption of a survey sampling methodology and smaller volumes of representative participation. Once selection is given the appropriate priority, a traditional offline survey will have a part to play, but as the opportunity arises, new technological methodologies, particularly for the voluntary monitoring of online behaviour, can add additional detail to the overall assessment of the scale of activity.

This framework can be applied within each of the IP right sectors: copyright, trademarks, patents, and design rights. It may well be that the costs involved with this common approach could be mitigated by a syndicated approach³ to the survey elements. Indeed, a syndicated approach has a number of advantages in addition to cost. It could be designed to reduce any tendency either to hide inappropriate/illegal activity or alternatively exaggerate its volume to fit with the theme of the survey. It also has the scope to allow for monthly assessments of attitudes rather than being vulnerable to unmeasured seasonal impacts.

A significant distinction between the different IPR sectors is whether or not perpetrators and victims are individual consumers, businesses in general or specific sectors. Clearly, online copyright infringement is particularly focused on consumers, whereas patents (and, as we will show, design rights too) are very much about relationships between businesses, notably in particular business sectors. Trademarks are of interest across a broader range of sectors, especially those that provide consumer-based products and services. This enabled us to identify the common threads between the different IP sectors and their 'audiences' and to consider the feasibility of applying methodologies across the different rights.

To move towards the above long-term goal, taking account of the IP sectorial differences and applying the framework, we can show that each type of IP right infringement could be implemented as follows:

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- 1 The robustness of this overview can be shown by relating it to other areas such as the number of prosecutions for rape. Whilst comprehensive, this is very susceptible to the expectation that the victim will be treated appropriately and that it is worth making a complaint known to the police. But this attitude is highly susceptible to themes within the media at any given time, including the difficult treatment of a victim witness by a barrister or the successful prosecution of a high-profile case. The same can be said for the impact of current media attention on historic child abuse by high-profile individuals on the level of reporting and prosecution of offences.
 - 2 This approach is also applied in the assessment of the volume of defaulted debt within the UK economy. It is feasible to track, for example, the number of county court judgments implemented on a monthly basis. However, this count will be influenced by the number of those unable to meet their debt repayments, as well as creditors' assessments of whether they will be able to recover a bad debt.
 - 3 The omnibus approach suggested by CEBR in 2000.
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- Online copyright infringement should be assessed by the blended combination of the number of ‘take-down’ notices, omnibus research of the level of compliant and infringed activity by consumers, and a survey of organisations regarding their evidence of infringement notifications prior to enforcement and their assessment of criteria for a challenge. The use of emerging technological tools to measure observable online behaviour should be added to the blend of approaches to provide a more accurate picture.
- Offline copyright ‘piracy’ and counterfeiting (i.e. trademark infringement) should include a multi-tiered but blended approach encompassing data from industry, government and consumers. This could take the form of counting industry and Customs ‘seizures’ along with consumer, producer, distributor and retailer surveys, and mystery shopping.
- Estimates of patent infringement levels are distorted by the effects of patent assertion entity activities and widespread aversion to the high costs of litigation amongst most stakeholders in the market. Levels of actual infringement are best assessed by a combination of surveys of inventors and practitioners, together with quantitative data on the number of court cases. The latter at best represent the ‘tip of the iceberg’ and certainly cannot represent the full range of infringements taking place.
- Assessing levels of design right infringement are less well developed but could follow similar approaches to those for patent infringement, including capturing infringement data from designers. There is potential overlap on industrial designs and patents where a syndicated approach to measuring infringement of both elements could be a way forward. We note the suggested use of Customs data for assessing levels of infringing goods internationally and also the possibility for capturing some industry data from exhibitions and trade fairs.

As in any field of official data measurement, a publicly available count of enforceable and actionable infringements is necessary. OECD and various official bodies note such a count currently does not exist but it is a logical outcome of our proposed framework. Such a count would acknowledge that in each area there is a highly skewed distribution, particularly of the economic impact of infringement, leading to a large proportion of the value being concentrated in a very small proportion of the perpetrators. Comprehensive scoping of the infringement enforcement data can pick up on this tiny segment that escapes sampling methods. However, this cannot be used in isolation, as the actual volume of enforceable infringement is the outcome of an inevitable tension between the levels of underlying infringement by perpetrators and the expectation of enforcement by the claimant.

To address this issue, we advocate systematic, regular, on-going survey tracking of the attitudes, perceptions and, where practical, behaviours of both perpetrators and claimants. Clearly, the nature of the perpetrators, claimants and enforcement differ in each field, but the assessment methodology should include each of these elements. We also propose this regular survey tracking could take the omnibus form recently used within the Ofcom/Kantar online surveys but it should be more frequent, ideally monthly. In addition to sampling across the audience, there should be a comprehensive transparent count of the major infringements, which will not be sampled. This blended approach could allow for the inclusion of market intelligence data supplied regularly by industry. The entire process should be conducted or overseen by government, to ensure the methodology is rigorous and robust and to enable measurement of the infringement of all IP owners’ rights.

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