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WHO NEEDS A COPYRIGHT SMALL CLAIMS COURT? EVIDENCE FROM THE U.K.'S IP ENTERPRISE COURT

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Calls for the creation of a "small claims" intellectual property (IP) court—i.e., a court employing procedures designed to efficiently adjudicate relatively small IP disputes—have arisen periodically in the U.S. since at least the late 1980s.[1] While prior efforts to establish such a court have fizzled, a recent push to establish a small claims tribunal within the U.S. Copyright Office is gaining traction. The U.S. Copyright Office itself embraced the idea in a 2013 report,[2] and legislation to create such a tribunal was introduced in each of the last two congressional terms.[3] This legislation, known in its present form as the Copyright Alternative in Small–Claims Enforcement (CASE) Act of 2017, would create a "Copyright Claims Board" authorized to hear claims of copyright infringement on an accelerated basis, with streamlined procedures, minimal discovery, and a $30,000 cap on recoverable damages.[4]

Support for the CASE Act is far from universal, however. As summarized by the recently–released report of the BCLT–Hastings workshop on this topic, there are many reasons to be cautious about the adoption of a small claims tribunal for the adjudication of U.S. copyright infringement claims.[5] Particularly because the creation of such a court would be uncharted territory for the U.S. IP

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1. *See* Robert P. Greenspoon, *Is the United States Finally Ready for a Patent Small Claims Court?*, 10 MINN. J.L. SCI. & TECH. 549, 553–57 (2009) (summarizing recommendations made in the early 1990s for the establishment of a copyright and patent small claims court by the American Bar Association Section of Patent, Trademark, and Copyright Law and the American Intellectual Property Law Association). Until recently, the prospect of forming a *patent* small claims court had received the most attention from U.S. policymakers. In 1990, the U.S. Department of Commerce formed an Advisory Commission on Patent Law Reform that considered establishing a federal small claims court for patent proceedings. *Id.* at 557. More than two decades later the issue arose again when in 2012 the U.S. Patent and Trademark Office sought public input on the creation of a small claims patent court. Patent Small Claims Proceeding in the United States, 77 Fed. Reg. 243 (Dec. 18, 2012).

2. In 2011, the House Judiciary Committee asked the U.S. Copyright Office to produce a report on the cost of enforcing copyrights in federal court and to make recommendations to "improve the adjudication of small copyright claims." The Office's report, which was completed in 2013, recommended creation of "a centralized tribunal within the Copyright Office . . . staffed by three adjudicators" to hear "small infringement cases valued at no more than $30,000 in damages." U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 4 (2013), https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf [https://perma.cc/VWB2-MFMJ].

3. In 2016, Representatives Hakeem Jeffries and Judy Chu both introduced bills to establish a small claims "board" within the U.S. Copyright Office. Copyright Alternative in Small-Claims Enforcement (CASE) Act, H.R. 5757, 114th Cong. (2016); Fairness for American Small Creators Act, H.R. 6496, 114th Cong. (2016).

4. In October 2017, Representative Jeffries re–introduced the CASE Act with five co–sponsors. H.R. 3945, 115th Cong. (2017). In addition to infringement claims, the Board is authorized to hear requests for declarations of noninfringement. *Id.*

5. *See* Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, BERKELEY TECH. L.J. COMMENTARIES (Nov. 28, 2017), http://btlj.org/commentaries/scholarly-concerns-about-a-proposed-small-copyright-claims-tribunal/ [https://perma.cc/A2KV-WTGZ] ("[T]he Berkeley Center for Law & Technology (BCLT) and UC Hastings College of the Law convened a workshop on February 3, 2017, of eighteen scholars . . . . Participants in this workshop expressed a rather wide range of reservations about the Tribunal proposal . . . [and] the range and seriousness of concerns expressed at the workshop lead us to conclude that further consideration is warranted before moving forward with the proposed legislation.").

community, there is considerable uncertainty for the time being about who might take advantage of the procedure, in what kinds of cases, and whether the system could be gamed to impose disproportionate cost or remedies on accused infringers.

I. THE SMALL CLAIMS TRACK OF THE U.K.'S IP ENTERPRISE COURT (IPEC)

Fortunately for U.S. policymakers and stakeholders on both sides of the issue, debate about the CASE Act need not take place in an empirical vacuum. Across the Atlantic in England and Wales,[6] IP cases have been litigated for several years now in a "small claims" court that bears many similarities to proposals presently under consideration in the U.S. In addition to providing a set of procedural rules to which U.S. proposals may be compared, the U.K.'s experimentation with a small–claims court for IP cases provides a history of case filings and outcomes that we can observe and analyze (something that, to our knowledge, has not been attempted to date) to better inform debates about adopting similar practices in the U.S.

In 2010, Lord Justice Jackson published a report on the costs of civil litigation in the courts of England and Wales that set in motion a series of reforms (often referred to as the "Jackson Reforms"). These reforms modified many aspects of U.K. civil procedure, especially with respect to the adjudication of IP cases.[7] One such reform, which became effective in October 2012, was the creation of a new "Small Claims Track" (SCT) within the existing Intellectual Property Enterprise Court (IPEC).[8] The IPEC-SCT, as it is often referred to, is authorized to hear claims pertaining to copyrights, trademarks, unregistered designs, and databases (but not registered designs or utility patents),[9] and features a damages cap of £10,000 (since April 2013[10]), as well as a £260 cap on the attorney's fees that the victorious party can recover from its opponent.[11]

Given the obvious similarities between the IPEC–SCT and the tribunal outlined in the CASE Act, an examination of the U.K.'s experience with the IPEC–SCT may help reduce uncertainty about how a copyright small claims tribunal might be utilized in the U.S. Indeed, prior discussions in the U.S. about the need for small claims IP tribunals have frequently alluded to the U.K.'s recent experimentation with mechanisms designed to funnel IP cases into one of several "tracks" depending

6. For the sake of simplicity, we refer to the courts of England and Wales as the "U.K." legal system. The U.K. additionally encompasses the courts of Scotland and Northern Ireland, but exceedingly few IP cases are filed in those jurisdictions. *See* Christian Helmers, Brian J. Love & Luke McDonagh, *Is There a Patent Troll Problem in the UK?*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 509, 517 (2014).

7. RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (2010), https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf [https://perma.cc/ZKF6-2GHT].

8. Prior to October 2013, the IPEC was known as the "Patents County Court" (though it heard more than just patent cases). The current IPEC is housed within the Rolls Building in London, though the SCT cases are heard by District Judges in the Royal Courts of Justice in London.

9. HM COURTS & TRIBUNALS SERV., GUIDE TO THE INTELLECTUAL PROPERTY ENTERPRISE COURT SMALL CLAIMS TRACK (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426129/patents-court-small-claims.pdf [https://perma.cc/5EA7-LXC4] [hereinafter GUIDE TO THE IPEC-SCT]; *see also* ANGELA FOX, THE INTELLECTUAL PROPERTY ENTERPRISE COURT: PRACTICE AND PROCEDURE ch. 10 (2d ed. 2016).

10. Between October 2012 and April 2013, the damages cap was £5,000.

11. *See* GUIDE TO THE IPEC-SCT, s*upra* note 9. In addition to purely compensatory damages and fees, the IPEC-SCT is authorized to order an accounting of the defendant's profits, destruction of infringing articles, and final (but not interim) injunctions. *Id.*

on their complexity and the amount of damages at stake.[12] In addition to the IPEC's SCT, IP cases may be brought in the IPEC "Multi–Track" (or IPEC–MT), which features a £500,000 cap on damages and a £50,000 cap on fee awards, as well as in the High Court of England and Wales, which places no limit on a plaintiff's recovery.[13]

However, despite the clear relevance of the U.K. tracking system to the U.S. small claims court debate, no empirical analysis of the IPEC-SCT has been attempted to date. One important reason for this seemingly–glaring omission is that, until recently, it was difficult to conduct such a study. For most of the IPEC's history, case records were not made available to the public in any format, and even today comprehensive IPEC court records are available only to members of the public who visit the Rolls Building in London to inspect original copies in person

Fortunately, in the context of a prior research project, we received special permission to hand–collect data about all cases filed at the IPEC from 2007 through the end of 2013.[14] Access to these records gives us the ability to present, for the first time, descriptive statistics about the parties who opted to file suit in the SCT after its creation, as well as the ability to compare those statistics to cases filed in the IPEC–MT.

II. COPYRIGHT CLAIMS AT THE IPEC–SCT

We begin by examining the number and types of cases filed at the IPEC–SCT during the first fifteen months of its existence. As shown in Table 1 below, copyright claims were by far the most common type of claim adjudicated using the IPEC–SCT procedures in 2012 and 2013. This finding itself is noteworthy because it indicates an especially great need for a small claims tribunal among copyright holders. As the BCLT–Hastings report explains, one criticism that has been leveled at the CASE Act is a lack of explanation "why copyright violations are so special that a regime should be created that would address just these types of small claims and none others."[15] The breakdown of cases brought in the IPEC–SCT provides at least some empirical support for the bill's implicit assumption that the availability of a small claims procedure would be, at least among IP owners, particularly impactful for copyright holders.

12. *See, e.g.*, Greenspoon, *supra* note 1, at 558 ("While practitioners in the United States were merely talking about a small claims court, England and Wales were actually forming one. This established court supplies a comparative law example that can teach much about how to craft a successful small claims court for the United States.").

13. *See* HM COURTS & TRIBUNALS SERV., THE INTELLECTUAL PROPERTY ENTERPRISE COURT GUIDE (2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/543307/intellectual-property-_enterprise-court-guide.pdf [https://perma.cc/F6AS-YQFG]; *see also* CHRISTIAN HELMERS, YASSINE LEFOUILI & LUKE MCDONAGH, EVALUATION OF THE REFORMS OF THE INTELLECTUAL PROPERTY ENTERPRISE COURT 2010-2013 (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447710/Evaluation_of_the_Reforms_of_the_Intellectual_Property_Enterprise_Court_2010-2013.pdf [https://perma.cc/66GN-3A5H].

14. For a more detailed discussion of our data collection methodology, see HELMERS ET AL., *supra* note 13, at app. E, xiii–xiv.

15. Samuelson & Hashimoto, *supra* note 5, at 15.

Table 1: Annual IPEC-SCT Caseload by Claim Type

	Copyright	Design	Trademark
Q4 2012[16]	16	0	1
Q1 2013	9	0	3
Q2 2013	8	1	4
Q3 2013	6	1	1
Q4 2013	16	0	2
Total	55	2	11

Taking a closer look at the fifty–five copyright cases that were filed during the first fifteen months of the SCT's availability, we see (as shown in Table 2) that most were filed by individuals, most were filed against businesses, most involve the unauthorized use of photographs,[17] and most plaintiffs sought damages at or below £2,500 and often settled for much less.

As the BCLT–Hastings report aptly explains, it is conceivable that litigants will take advantage of a small claims tribunal in unintended, if not flat–out abusive, ways.[18] However, we do not observe such behavior at the IPEC–SCT. Overwhelmingly, what we see are suits brought by individuals who make a living producing creative content in an attempt to remedy clear, but low–value, infringement—a scenario that the BCLT–Hastings report describes as the "most sympathetic 'use case'" for such a court.[19] We do not see a large number of repeat filers,[20] nor do we see a large number of default judgments.[21] In fact, most damages requests fall far below the statutory maximum, and many cases are reported to have settled for less than one–tenth that amount.

16. In this quarter, we have also included four copyright cases that were filed prior to October 2012, but were transferred to the IPEC–SCT after its creation.

17. Virtually all of these cases involved the use of photographs on websites.

18. Samuelson & Hashimoto, *supra* note 5, at 11–12; *see also* Anthony Niblett & Albert H. Yoon, *Unintended Consequences: The Regressive Effects of Increased Access to Courts*, 14 J. EMPIRICAL LEGAL STUD. 5 (2017) (studying cases filed in the Ontario Small Claims Court between 2006 and 2013, and concluding that their findings "suggest that legislative attempts to make the courts more accessible may have unintended regressive consequences").

19. Samuelson & Hashimoto, *supra* note 5, at 7 ("The most sympathetic 'use case' for a small claims process for copyright infringement are those individual creators who are trying to make a living from their creative work; a small claims process would enable these individuals to seek a remedy for infringing uses of their photographs, images, or stories. Currently, many potential infringers are not deterred from infringing copyrights because they know that individual creators cannot afford to sue to get the $1,500 license fee that they would have charged. A more narrowly drawn proposal designed to address this type of use case would have found more support among workshop participants.").

20. The fifty–five cases that we observe were filed by thirty–nine unique plaintiffs, and no plaintiff filed more than five unique cases.

21. The rate of default in the SCT appears to be about twice that seen in copyright cases filed at the IPEC-MT, which itself is quite similar to the rate of default in U.S. IP cases. According to Lex Machina, about seven percent of U.S. copyright cases that were terminated since 2000 ended with a default judgment.

Table 2: Copyright Case–Level Data by Plaintiff Type

	Plaintiff Type			
	Individual	SME[22]	Large Entity	All Cases
Num. Case	34	20	1	55
Defendant Type:				
Individual	12 (35%)	5 (25%)	0 (0%)	17 (31%)
SME	12 (35%)	10 (50%)	1 (100%)	23 (42%)
Large Enterprise	10 (30%)	5 (25%)	0 (0%)	15 (27%)
Copyrighted Work at Issue:				
Photo	27 (79%)	13 (65%)	0 (0%)	40 (73%)
Other Pictorial	2 (6%)	2 (10%)	0 (0%)	4 (7%)
Audiovisual	1 (3%)	4 (20%)	1 (100%)	5 (9%)
Sound Recording	0 (0%)	0 (0%)	0 (0%)	1 (2%)
Literary	3 (9%)	1 (5%)	0 (0%)	4 (7%)
Not Specified	1 (3%)	0 (0%)	0 (0%)	1 (2%)
Damages Requested: Avg.	£2,635	£3,321	£1,596	£2,865
(Median)	(£2,484)	(£3,750)	(£1,596)	(£2,500)
Outcome:				
Settlement	19 (56%)	8 (40%)	0 (0%)	27 (49%)
Default Judg.	3 (9%)	3 (15%)	1 (100%)	7 (13%)
Merits Decision[23]	7 (20%)	2 (10%)	0 (0%)	9 (16%)
Dismissal	3 (9%)	5 (25%)	0 (0%)	8 (14%)
Ongoing (as of Mar. 2014)	2 (6%)	2 (10%)	0 (0%)	4 (7%)
Settlements Reported to Ct:[24]				
Num.	16	5	0	21
Avg.	£1,091	£1,054	-	£1,082
(Median)	(£600)	(£1,000)		(£600)

In addition, our observations suggest to us that most copyright cases brought in the IPEC–SCT would likely not have been brought at all if the SCT did not exist. For one, reviewing all cases filed at the IPEC, we see little evidence of a shift in cases from the MT to the SCT following the latter's creation. We do not observe an overall drop in MT filings, nor do we see a drop in MT cases that

22. Here, we followed the standard EU definition, which relies on information on a firm's number of employees, turnover, and total assets. *See* EUROPEAN COMM'N, *What Is an SME?*, http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en [https://perma.cc/8UCZ-28SH] (last visited Nov. 30, 2017). To be clear, some of the business entities that we include within the definition of "SME" are essentially the alter ego of a single person. An illustrative example is Gavin Kemp Photography, Ltd., which is solely directed by photographer Gavin Kemp.

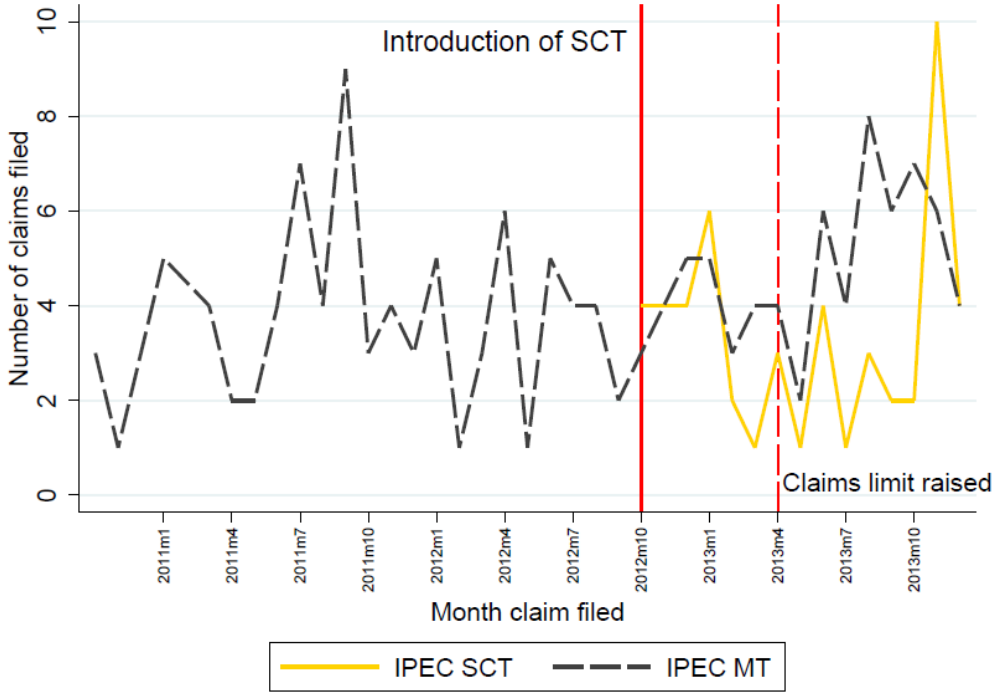
23. We include in this category decisions with respect to the calculation of damages *or* with respect to liability. In several cases, liability was not contested and the court considered only the issue of damages. In one case, the court determined liability and transferred the case to the High Court for a determination of damages.

24. The U.K.'s official Guide to the IPEC-SCT asks parties to notify the court of settlements and, in doing so, to provide information including "if damages is to be paid, stating that [*party*] shall pay [*party*] the sum of [*amount*] [inclusive/exclusive of VAT, if applicable] by [*payment date*] (or by [*x*] monthly instalments of [*amount*], first instalment date being [*date*]) in full and final settlement of the claim." GUIDE TO THE IPEC-SCT, *supra* note 9, at 11.

involve copyright claims (see Figure 1)[25] or individual claimants.[26] Neither do we see a shift of copyright cases alleging the unauthorized use of photographs from the MT to the SCT when the SCT becomes available.[27] We also fail to detect an increase in the "value" of MT cases filed in or after October 2012,[28] something that might result if the smallest subset of MT cases simply transitioned to the SCT. In fact, the average value of MT filings dropped after the SCT's creation.

Survey responses from U.K. legal practitioners whom we interviewed in 2014 (during the preparation of a UKIPO report on the Jackson Reforms[29]) also support our conclusion that most SCT cases would, but for the court's creation, likely not have been filed. Overall, U.K. IP attorneys appear to hold a positive view of the SCT, and believe that it has succeeded in its goal of protecting small content creators. As one respondent put it: "My practice is doing much more litigation—at the IPEC-MT and the SCT levels—than before, with clients who would not previously have been able to undertake litigation. The SCT in particular is very useful in this regard."[30]

Figure 1: IPEC–MT, SCT Monthly Copyright Case Filings (Q4 2010–2013)



In short, what we see suggests to us that the U.K.'s IPEC–SCT has achieved precisely what U.S. policymakers hope to achieve with the CASE Act. Overwhelmingly, the SCT serves the needs of especially small plaintiffs who sue to enforce rights in their own creations against defendants who have engaged in infringing acts that are particularly easy to prove, and in return seek modest recoveries that before would not have been rational to pursue in court.

25. Note that in our graphs, IPEC–MT copyright cases exclude twelve cases brought by performance rights organization PPL (Phonographic Performance Limited).
26. *See* Figures A-1, A-2 *infra*, in the Appendix
27. *See* Figure A-3 *infra*, in the Appendix.
28. *See* Figure A-4 *infra*, in the Appendix
29. HELMERS ET AL, *supra* note 13.
30. *Id.* at 9.

III. WILL THESE RESULTS TRANSLATE?

From a comparative perspective, however, the above findings should be taken with a grain of salt. Though the U.K. legal system shares a common law history (and more) with the U.S.,[31] there are nonetheless many important differences between the systems that could produce divergent results.

For one, U.S. courts have traditionally seen a rather different mix of IP cases than those filed in U.K. courts. Perhaps most notably for this discussion, while the U.S. has a lengthy history with sharp IP enforcement practices by so–called "trolls,"[32] the U.K. has been largely immune from this phenomenon, a fact that we explored in a prior paper.[33] As a result, there is reason to believe that a U.S. small claims court would naturally see a higher rate of abuse than the IPEC–SCT. That said, the U.K.'s relative lack of "trolling" has been linked by many (including us) to the "English Rule" of routinely awarding attorney's fees and costs to prevailing parties, a practice that substantially reduces English claimants' ability to "hold up" accused infringers simply by threatening costly litigation.[34] If this link is a valid one, litigants in U.S. and U.K. small claims courts should be on much more comparable footing when it comes to the risk of "trolls" because, while the IPEC–SCT does call for routine cost recovery, attorney's fee awards are strictly capped at the quite modest amount of £260.[35] We are extremely skeptical that such a small deterrent could, by itself, explain the lack of abusive enforcement that we see.[36]

While we may be able to largely ignore the impact of fee shifting, other differences remain that give us serious pause in concluding that the U.S. can re–create the U.K.'s experience with the SCT by passing the CASE Act. For one, the U.S. has been much more litigious than the U.K. in recent history. Adjusting for differences in population, the U.S. sees more than four times as many IP cases as the U.K.,[37] and while some of this disparity may be explained by each jurisdiction's respective stance on fee–shifting, we suspect there are many other factors at play as well. Accordingly, even a conservative estimate would place the anticipated number of copyright cases brought in a U.S. version of the IPEC–

31. *See* Helmers et al., *supra* note 6, at 541–43 (listing additional similarities between the U.K. and U.S. with respect to substantive IP law, as well as the cost and conduct of IP litigation).

32. Though suits deemed "troll"–ish most often involve the assertion of patent rights, similar behavior has been documented in copyright enforcement as well. *See* Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105 (2015).

33. Helmers et al., *supra* note 6, at 525 (finding that non–practicing entities filed just eleven percent of U.K. patent cases between 2000 and 2010, compared to about twenty–five percent of U.S. patent suits during the same time period).

34. *See id.* at 544 ("In our view, the most likely explanation for differing rates of NPE litigation is not the low rate of success we observe, but rather that lack of success in a system that routinely awards fees to the winning party"); Love et al., *Patent Assertion Entities in Europe*, *in* PATENT ASSERTION ENTITIES AND COMPETITION POLICY 123 (D. Daniel Sokol ed., 2017) ("[W]e see weak evidence for many other explanations, [but] we do see reason to believe that fee awards are a key reason for the lack of PAEs in [Germany and the U.K.].").

35. For similar reasons, we believe that differences related to the availability of contingency fee representation—another factor that has been raised to explain Europe's relative lack of IP monetization—are unlikely to have a significant impact on comparability of U.S and EU small claims tribunals. Because most parties in small claims proceedings appear pro se (just six of fifty–five claimants in the SCT copyright cases described here hired counsel), differences related to the cost and form of legal representation are unlikely to matter much.

36. *See* Helmers et al., *supra* note 13, at 9 ("18% of interviewees made an additional point about the SCT costs issue: they argued that the cap for legal costs at the SCT is set at far too low a level (£260). Two out of these three interviewees argued that this costs level ought to be raised to £2,000, while the remaining interviewee stated that £1,000 would be a more reasonable figure.").

37. *Compare* Helmers et al., *supra* note 13, at 17 (reporting that there were 3,273 IP suits filed in the U.K. between 2007 and 2013) *with* LEXMACHINA.COM (reporting a total of 71,705 IP suits filed in the U.S. during the same period of time) (on file with authors). The population of the U.S. is roughly five times larger than the population of the U.K. *See Countries in the World by Population (2017)*, WORLDOMETERS, www.worldometers.info/world-population/population-by-country/ [https://perma.cc/8Y5Q-8WMU] (last visited Nov. 30, 2017).

SCT well above the U.K.'s rate of just several dozen per year.[38] If for no other reason, the increased number of cases is noteworthy because it would significantly increase the cost and complexity of running a similar small claims tribunal in the U.S., which may in turn reduce the quality and consistency of adjudication, including the ability to identify and deter bad faith litigation practices. At present, the CASE Act calls for the appointment of just three "Officers" who will hear cases sitting as a panel, rather than divide the caseload among themselves.[39] In addition, the Board's filing fee, which will be set somewhere between $100 and $400 per case, guarantees that the Board will not be self–funding.[40]

We note also that the CASE Act's single, flat filing fee contrasts with that of the IPEC–SCT, which employs a multi–part schedule of fees that varies with the complexity of each case from as low as £60 to as much as £1,310.[41] In addition to accommodating claimants with especially small, simple claims (and thus advancing the court's mission to expand access to justice), the SCT's variable fee structure also tends to dissuade claimants from attempting to leverage litigation costs or inflated damages claims in order to induce outsized settlements or default judgments.

It is also noteworthy that the damages cap currently proposed in the CASE Act ($30,000) is significantly higher that the damages cap in effect in the U.K.[42] Under current exchange rates, the U.S. cap is approximately 125 percent larger than the U.K.'s. Perhaps even more importantly, the CASE Act would allow small claims plaintiffs to pursue statutory damages of up to $15,000 per registered work and $7,500 per unregistered work without presenting evidence that they suffered any actual loss.[43] By contrast, U.K. copyright law, including as applied in the SCT, requires claimants to prove damages in every case according to broadly applicable principles for recovery in tort.[44] Accordingly, it is quite possible that we observe no obvious abuse of the SCT system simply because gamesmanship is not profitable at current recovery levels in the U.K.[45] Similarly, the proposed use of statutory

38. In absolute terms, the U.S. saw almost fourteen times more copyright cases than the U.K. between 2007 and 2013. *Compare* Helmers et al., *supra* note 13, at 17 (reporting that there were 1,595 copyright suits filed in the U.K. between 2007 and 2013), *with* LEXMACHINA.COM (reporting a total of 21,887 copyright suits filed in the U.S. during the same period of time) (on file with authors). A simple extrapolation of this ratio to the SCT caseload would place the annual number of filings in a U.S. version of the SCT at well over 600 cases.

39. H.R. 3945, 115th Cong. § 2 (2017) ("[T]he Librarian of Congress shall appoint 3 full-time Copyright Claims Officers to serve on the Copyright Claims Board").

40. *Id.* (calling for "a filing fee in such amount as may be prescribed in regulations established by the Register of Copyrights, which amount shall be at least $100, shall not exceed the cost of filing an action in a United States district court, and shall be established to further the goals of the Copyright Claims Board"). At present, the cost of filing a civil action in a U.S. District Court is $350 (plus, since 2013, an additional $50 administrative fee). 28 U.S.C. § 1914 (2012). By contrast, the USPTO's self–funded Patent Trial and Appeal Board has a $9,000 "petition" fee for inter partes review (plus an additional $14,000 "post–institution" fee for petitions that the Board agrees to hear). *Patent Trial and Appeal Fees*, U.S. PATENT & TRADEMARK OFFICE (Nov. 1, 2017), https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule#PTAB Fees [https://perma.cc/NF4T-NZWJ].

41. The IPEC-SCT requires claimants to pay a fee that is based on: the amount of damages claimed (£35 to £455), whether or not injunctive relief is sought (£480, if so), and whether or not a hearing is required to dispose of the case (£25 to £335, depending, again, on the damages sought). *See* FOX, *supra* note 9, at 10-016, 10-044. In addition, prior to 2014 (i.e., during the time when all cases in our database were filed), the SCT charged a fee if a party challenged the allocation of the case to the SCT. *Id.* at 10-030.

42. Under current exchange rates, £10,000 is equivalent to about $13,500, less than half the proposed damages cap of $30,000.

43. H.R. 3945, 115th Cong. § 2 (2017).

44. Copyright, Designs and Patents Act, 1988, c. 48, § 97 (Eng.).

45. Helmers et al., *supra* note 13, at 9–10 ("Regarding the SCT damages cap, five out of 17 interviewees stated that the £10,000 level is appropriate, with three out of 17 stating that the prior level (pre-April 2013) of £5,000 had been too low. No interviewee argued in favour of raising the SCT damages cap.")

damages in the U.S. may invite gamesmanship by plaintiffs enforcing rights to works with little or no actual market value simply to leverage the possibility of five–figure statutory damages awards.

IV. HARMONIZATION MAY BE PRUDENT

On the whole, our analysis suggests to us that the U.S. could implement a small claims court that closely resembles the IPEC–SCT and reasonably expect to see similar case–level results. Moreover, the case–level results we see in the SCT appear to benefit small, resource–constrained copyright holders and thus (taking substantive copyright law as given[46]) appear to improve access to justice.

However, in its present form, the proposal outlined in the CASE Act diverges from the IPEC-SCT in a number of important respects that, taken together, prevent us from extending the above conclusion to the current proposal. That said, we also see no reason why the CASE Act couldn't be modified in a number of respects to conform more closely with the U.K.'s procedural choices and, thereby, increase the likelihood that a U.S. Copyright Claims Board would function in a fashion similar to the IPEC–SCT.

At a minimum, we recommend that policymakers prioritize two modifications to the CASE Act: first, the elimination of statutory damages and second, a reduction in the damages cap to the range of $10,000 to $15,000. We share the concern expressed in the BCLT–Hastings report that, as presently drafted, "the likelihood is strong that virtually every claimant will demand statutory damages in the maximum amount."[47] The result, we fear, will be a strong temptation for U.S. copyright holders to uncover (if not indirectly induce) trivial infringement for purposes of pursuing a large statutory recovery. In the absence of a statutory damages regime, we see quite the opposite in the SCT: modest damages requests, frequent admissions of liability, and reasonable settlements. Both changes, we believe, are crucial to balancing the goal of expanding access to justice for individuals and small entities, without at the same time expanding their own exposure to litigation of questionable social value.

In addition, we encourage U.S. policymakers to realistically assess whether a single panel of three Officers can adequately supervise—and whether Congress is prepared to adequately fund—a tribunal that may well have a caseload of several hundred claims per year. Policymakers may be well advised to increase the number and size of fees associated with the Board, both as a mechanism to raise funds and to deter unnecessary procedural complexity. If they choose to do so, we encourage policymakers to adopt a fee structure that varies with the level of damages sought, much like the one employed by the SCT.

46. To be clear, it is not our position that additional U.S. copyright enforcement would be an unambiguously positive development. Many aspects of substantive copyright law are fiercely debated, and we are skeptical of the net social value of many ourselves.

47. Samuelson & Hashimoto, *supra* note 5.

Appendix:

Figure A-1: Percentage of Monthly IPEC-MT Cases Alleging Copyright Infringement

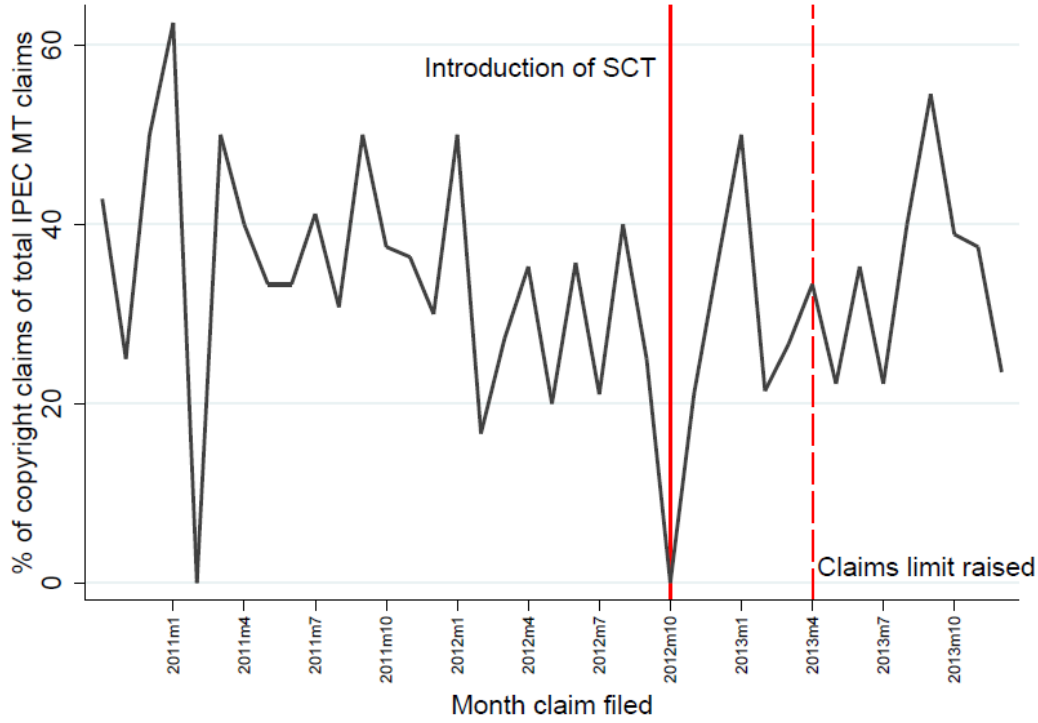


Figure A-2: Monthly IPEC-MT Copyright Case Filings by Claimant Type

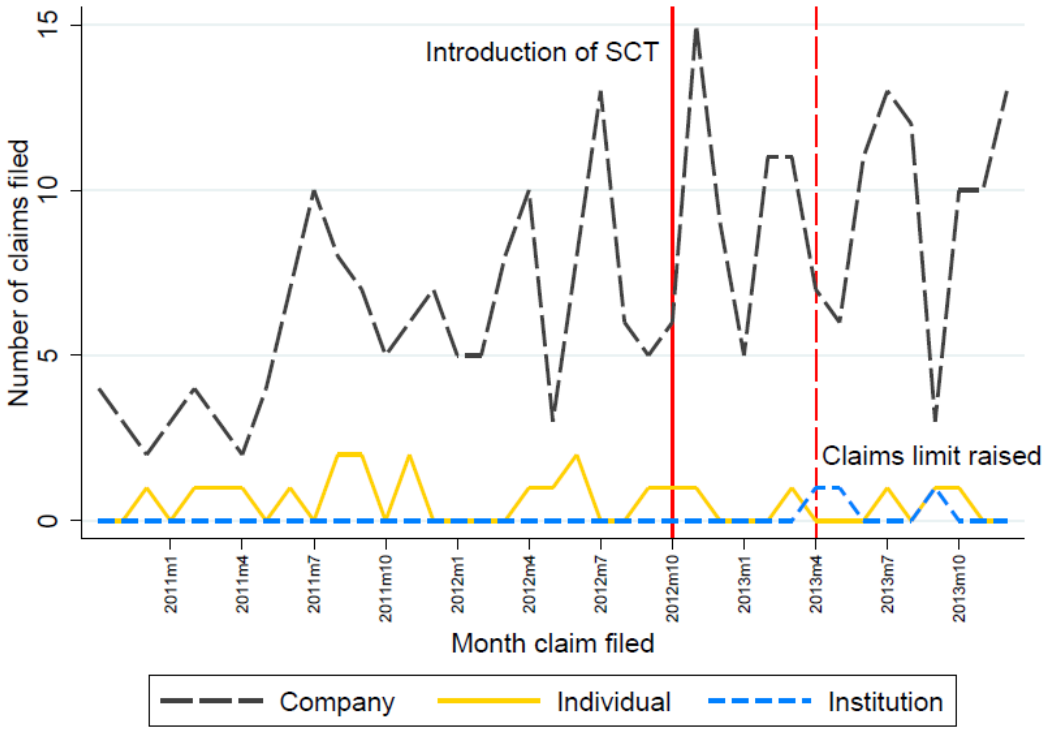


Figure A-3: Percent of Copyright Cases Alleging Infringement of Rights to Photos

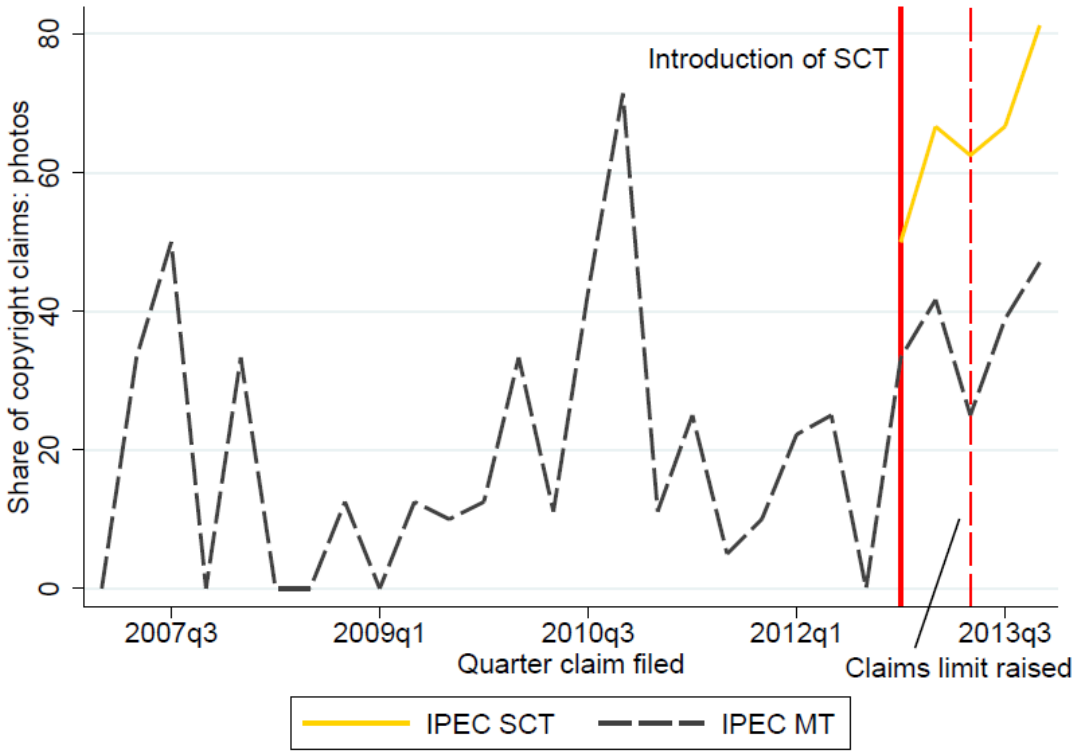
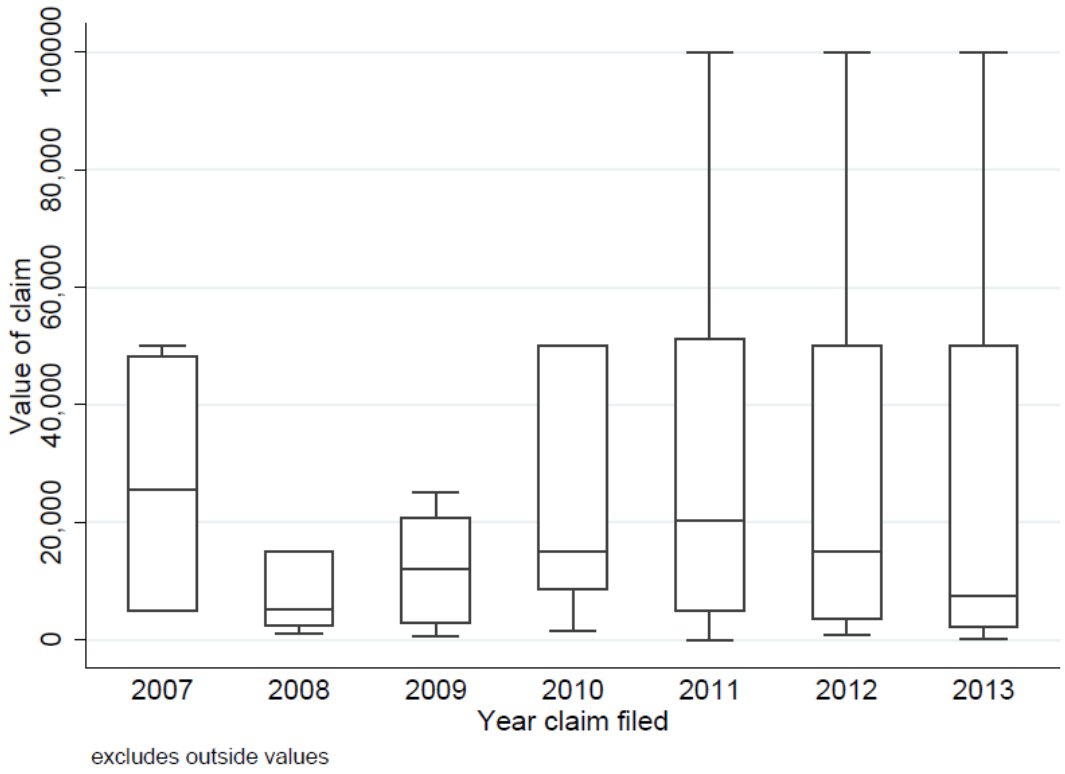



Figure A-4: Distribution of IPEC-MT Copyright Claims Values (in GBP)