



Cooper, E. and Burrow, S. (2019) Photographic copyright and the Intellectual Property Enterprise Court in historical perspective. *Legal Studies*, 39(1), pp. 143-165.
(doi: [10.1017/1st.2018.10](https://doi.org/10.1017/1st.2018.10))

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Photographic Copyright and the Intellectual Property Enterprise

Court in Historical Perspective

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Accepted for publication in *Legal Studies*.

***Abstract:** This article provides an in-depth case study of the enforcement of copyright in photographs by certain rights-owners today: freelance professional photographers who derive income from the exploitation of photographic copyright. Referring to the theoretical framework of Guido Calabresi and A Douglas Melamed, the article reflects on the implications of the case study for the nature and function of copyright in a specific context today. Bringing the experience today into conversation with the enforcement of copyright by professional photographers in past times (the late nineteenth/early twentieth centuries), the article notes the influence of the bureaucratisation of copyright exploitation (ie exploitation through picture libraries) on legal decision making in a particular forum today: the Intellectual Property Enterprise Court Small Claims Track. The article concludes with more general reflections on the case study's implications for the courts and copyright policy-makers today.*

1. Introduction

This article presents a detailed case study of the copyright enforcement practices of certain rights-holders today: freelance professional photographers who derive income from the commercial exploitation of photographic copyright. It also brings those findings into conversation with original research as to the copyright practices of professional photographers historically. In exploring similarities and differences between past and present, the article draws out fresh perspectives on the nature and function of copyright in a particular context today.

Our analysis refers to two concepts from the classic theoretical framework set out by Guido Calabresi and A Douglas Melamed, in their seminal *Harvard Law Review* article *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* which, as we explain below, have been applied in subsequent scholarship to intellectual property rights: ‘property rules’ and ‘liability rules’. A property rule provides the rights-holder with a veto over the use of an entitlement – its use requires a transaction individually negotiated with the rights-holder - whereas a liability rule allows the use of an entitlement so long as a person is willing to pay a collectively determined value for it at a later date (eg the payment of a compulsory licence fee).¹ Copyright doctrine reflects the

* The authors would like to thank Ronan Deazley, Martin Kretschmer, Ruth Towse, Alison Firth, Jessica Sibley, Stephen Bogle, Pauline McBride and Jill

Robbie for comments on an earlier draft of this paper. The authors also benefitted from the discussion of the paper following a presentation as part of the

property rule paradigm; it is premised on the rights-holder's exclusive rights to authorise or prohibit certain restricted acts (eg reproduction) in relation to the protected subject matter.² However, our case study reveals that, as enforced by certain rights-holders, copyright in practice exhibits features of a liability rule.

In making these observations, this article adds to scholarship pointing to other instances of the 'intermediate nature' of intellectual property in the property rule/liability rule framework, in particular the *California Law Review* article by Robert P Merges: *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*.³ Merges highlighted the manner in which the collective agreements concluded by groups of rights-holders, facilitating the collective valuation of intellectual property entitlements (eg by copyright

CREATe Studio seminar series, at CREATe, Glasgow University, in December 2016. The authors also thank the professional photographers who participated in interviews and responded to email enquiries by both co-authors, and CREATe, University of Glasgow, for funding the transcription of cases decided by the Intellectual Property Enterprise Court (Grant no: AH/K000179/1).

¹ 1971-1972, 85 Harvard Law Review, 1089, 1092. This theoretical framework – referred to by one intellectual property scholar as 'the foundational literature on legal entitlements' (Robert P Merges, 'Of Property Rules, Coase and Intellectual Property' (1994) 94 Colum. L. Rev. 2655, 2655) - has been applied by a number of scholars to intellectual property law, perhaps most famously Robert P. Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations', (1996) 84 Cal. L. Rev. 1293, 1303, discussed below. For other examples applying the Calabresi/Melamed framework to intellectual property see Mark A Lemley, 'Contracting Around Liability Rules' (2012) 100 Cal. L. Rev. 463; Dotan Oliar, 'Property Rules, Liability Rules and the Intentional Infliction of Harm' (2012) 64 Stan. L. Rev 951; Jerome H. Reichman, 'Legal Hybrids Between the Patent and Copyright Paradigms' (1994) 94 Colum. L. Rev. 2432.

² Copyright Designs and Patents Act 1988 s.16; Information Society Directive 2001/29/EC, Art 2 and 3.

³ Merges, above n 1, 1392.

collecting societies) turns intellectual property rights into a ‘liability rule-like regime’.⁴ Our analysis reveals the manner in which the enforcement of photographic copyright by the IPEC SCT broadens such trends; court rulings further extend the influence of bureaucratic standards: the licensing practices of picture libraries.

The article begins by developing a central finding of a broader empirical study⁵ into the operation of the Intellectual Property Enterprise Court Small Claims Track (hereafter ‘IPEC SCT’), a specialist list within the Chancery Division, High Court of Justice for intellectual property claims worth under £10,000. A review of all court files,⁶ from the Court’s creation in October 2012 to 31 December 2015, reveals that a substantial number of these cases are successful claims by freelance professional photographers, or their agents, for on-line infringement of photographic copyright. Further, in the overwhelming majority of cases, financial remedies alone are sought and granted. As we show, the IPEC SCT is the freelance professional photographers’ forum of choice, and therefore the cases it hears are representative of these rights-holders’ court enforcement practices.

4 Ibid. 1302, 1303 and 1392.

5 The empirical study carried out by Sheona Burrow, PhD Candidate, CREATE, University of Glasgow, supervised by Martin Kretschmer and Kris Erickson, University of Glasgow and by Ronan Deazley, Queen’s University Belfast: *Access to Justice in the Small Claims Track of the Intellectual Property Enterprise Court (IPEC): An Empirical Enquiry into Use by Creative SMEs*, unpublished PhD thesis, University of Glasgow, 2017.

6 Though as to problems in locating certain court files: see n 29.

In the first section of this article, we contextualise these findings – particularly the observation that, in the main, financial remedies alone are claimed - through an analysis of 21 IPEC SCT judgments on liability and/or quantum obtained from the Court. These cases constitute all IPEC SCT claims brought by photographers/their agents during the period October 2012 to 31 December 2015 in which the Court confirmed that a judgment was delivered and was able to provide the information necessary for transcription.⁷ This section argues that the nature of the relief sought by rights-holders and granted by the courts has implications for the nature of photographic copyright in this context.

In particular, we conclude that the standardisation of photographic copyright licensing, through the widespread use of picture libraries such as Getty and Corbis, impacts on the nature of the damages calculation submitted by claimants and conducted by the Court. The legal test for calculating compensatory damages is premised on a hypothetical bilateral licence concluded between a willing licensor and willing licensee in the particular position of the claimant and the defendant, an approach which

⁷ The review by Sheona Burrow of all Court Files in the period 2012-2015 revealed a total of 28 cases brought by photographers or their agents in which a judgment was delivered. Two of these cases were decided on the papers, but despite two formal requests to the Court, a copy of the judgments was not provided. Of the 26 cases in which a judgment was delivered following a hearing, the Court provided the necessary details for a judgment to be transcribed in relation to 21 of these cases. It was not possible to transcribe the 5 remaining cases because, despite numerous requests, the Court did not provide accurate details of the Court Room number in which proceedings took place, which is an essential pre-requisite for the correct tape to be located by the Court Recordings and Transcription Unit.

reflects copyright's property rule basis; as we explained above, the Calabresi/Melamed framework provides that the use of an entitlement protected by a property rule requires the payment of a price determined by a transaction individually negotiated with the rights-holder, rather than a collectively determined value.⁸ However, we show that the Court frequently resolves this enquiry by applying the collectively determined standard rates offered by picture libraries, even in cases brought by non-member claimants (ie claimants who do not in fact trade through those libraries). As these libraries offer licences to whoever seek them, in this context, photographic copyright in practice exhibits features of a liability rule – as Robert Merges termed, ‘a general rule of compensation applicable to all who take the right’.⁹

In the second part of this article, we turn to the enforcement practices of professional photographers from far earlier times: the time of the establishment of the first picture libraries or agencies for the exploitation of photographic copyright. The late nineteenth and early twentieth centuries saw a number of technological changes that fundamentally altered the practices of professional photographers: the freeing of photography from the confines of the studio and the emergence of new channels of dissemination of photographs with the introduction of

⁸ Text to n 1.

⁹ Robert P. Merges, above n 1, 1303.

the first photographic illustrated newspapers. Drawing on original archival work,¹⁰ we uncover the ways in which professional photographers adapted to these changes including the role played by the first picture libraries.

The concluding section of this article draws together the IPEC SCT and historical case studies. Both case studies concern copyright authors, in the face of technological change (the internet today and the technological changes enabling the emergence of the photographic press in the late nineteenth/early twentieth century) seeking to stabilise their earnings in the face of challenge: the ‘culture of the free’ on the internet today, and attacks on photography’s creative status in the late nineteenth/early twentieth century. We analyse the role, both in the past and present, of the collective organisation of photographers, court enforcement and bureaucratisation of exploitation (ie exploitation through picture libraries), as techniques for averting those challenges and asserting a culture of payment for use. In particular, we argue that an historical viewpoint allows us to chart changes through time in the relationship between court rulings – premised on doctrinal rules that treat copyright as a property rule - and the bureaucratisation of exploitation (ie

¹⁰ This work was conducted by Elena Cooper. These findings are developed further in a monograph to be published by Cambridge University Press,

concerning the history of artistic copyright more generally, in the nineteenth and early twentieth century: *Art and Modern Copyright: The Contested Image*.

exploitation through picture libraries) – in which copyright takes on features of a liability rule.

On one level, the bureaucratisation of exploitation reveals continuity between past and present: the collective management of copyright is far from new. Indeed, we show it to have a far longer history than is currently assumed. Existing scholarship connects the bureaucratisation of copyright exploitation – where parties to copyright transactions ‘deal primarily with a bureaucracy’ (ie a collecting society or picture library) and ‘experience a process more like paying taxes or procuring welfare’ - with developments in the exploitation of broadcast copyright in the 1920s (eg the foundation of ASCAP - the American Society of Composers, Authors and Publishers - ‘that statistically approximates a system of market exchanges of copyrighted goods in situations where such exchanges are unworkable’)¹¹ as well as the emergence of the first music collecting societies following the passage of the Copyright Act 1911.¹² By contrast, we show that the first

¹¹ Thomas Streeter, ‘Broadcast Copyright and the Bureaucratization of Property’ in M. Woodmansee and P. Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (USA: Duke University Press, 1994) pp 303-326, 312 and 310, also published at (1991-1992) 10 *Cardozo Arts & Ent. L.J.* 567.

¹² Jose Bellido and Fiona Macmillan, ‘Music Copyright After Collectivisation’ (2016) *IPQ* 231, 231, arguing that the Copyright Act 1911 set the ‘cornerstone of the modern “music business” with which the emergence of the first music collecting societies was closely connected. Bellido and Macmillan characterise the Performing Rights Society (founded in 1914) as ‘a prime example’ of Streeter’s ‘“ensuing bureaucratisation of copyright” that characterised the 20th

photographic picture libraries were established in the first years of the twentieth century.¹³ Our historical account also differs from scholarship on music and broadcasting copyright: copyright authors instigated the early bureaucratisation of photographic copyright – the establishment of the first picture libraries - rather than publishers (as in the case of music) or other non-authorial interests (in the case of broadcasting).¹⁴

Appreciating this longer history to bureaucratisation - the longstanding role of picture libraries - also enables us to identify what is different today and to assess more critically the significance of IPEC SCT litigation as regards the relation between bureaucratisation (ie the exploitation of copyright through picture libraries) and photographic copyright enforcement: in the IPEC SCT, judicial decisions are shaped by the bureaucratic standards of picture libraries. In contrast to Thomas Streeter's account of broadcast copyright in the 1920s, in which the bureaucratic 'simulation' of property – the exploitation of copyright through collecting societies - is presented as 'a representation once

century' (at 244). For more on the history of music publishing, including the establishment of the first music collecting societies: Ruth Towse, 'Economics of Music Publishing: Copyright and the Market' (2016) *Journal of Cultural Economics* 1-18.

¹³ Our account also differs from the assumptions of certain scholarship about the bureaucratisation of photographic copyright in more recent times: that the emergence of photographic picture libraries is a recent phenomenon. See Brad Holland, 'First Things About Secondary Rights' (2005-2006) 29 *Colum. J. L. & Arts* 295, 295.

¹⁴ Bellido and Macmillan, above n 12, 232: 'Unlike other music collecting societies in Europe, the PRS was initiated by publishers rather than composers.' Streeter, above n 11, p 309.

removed... that has taken on a life of its own, divorced from its referent',¹⁵ we argue that the legal rulings of the IPEC SCT, in providing a central role for certain picture library standards, make aspects of bureaucratisation part of copyright's legal reality. This in turn has implications for the nature of copyright in practice, in this particular context, within Calabresi/Melamed's theoretical framework. The article closes with reflections on the implications for these observations for both the Court and policy-makers today.

2. Photographic Copyright in the IPEC SCT

(a) Introducing the IPEC SCT

By way of background, the Intellectual Property Enterprise Court Small Claims Track was established in October 2012 by way of amendments to the Civil Procedure Rules 1998.¹⁶ Initially, it was part of the small claims track of the Patents County Court. However, with the establishment of the Intellectual Property Enterprise Court, a Court within the Chancery Division of the High Court of Justice, on 1st October 2013, it was reconstituted as a specialist listing for small claims cases at the

¹⁵ Thomas Streeter, above n 11, p 325.

¹⁶ Civil Procedure (Amendment No. 2) Rules 2012/2208.

Intellectual Property Enterprise Court.¹⁷ Litigants seeking resolution of disputes concerning copyright, trade marks and unregistered design rights have the option of using the small claims track for resolution of claims up to a value of £10,000.¹⁸ The small claims track is based in London.

The establishment of the IPEC SCT followed recommendations in the *Review of Civil Litigation Costs* undertaken by Lord Justice Jackson in 2009-2010,¹⁹ which aimed to review ‘the rules and principles governing to costs of civil justice and make recommendations in order to promote access to justice at proportionate cost’; concepts of access to justice are ubiquitous in English civil justice, particularly since the reforms following from Lord Woolf’s 1995/6 report *Access to Justice*.²⁰ Lord Justice Jackson considered intellectual property claims as a particular category. Combining submissions from the legal profession²¹ the Federation of Small Businesses,²² and one commissioned empirical survey undertaken by the Strategic Advisory Board on Intellectual

17 66th Update, Civil Procedure Rules 1998.

18 Initially, the limit was £5,000 but on 1st April 2013 it was increased to £10,000 by the 60th Update to the Civil Procedure Rule 1998.

19 R Jackson, *Review of Civil Litigation Costs: Final Report*, TSO, December 2009 (hereafter Jackson Review).

20 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (London: HMSO, 1995) and Lord

Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (London: HMSO, 1996)

21 The IP Court Users’ Committee and the IP Lawyers’ Association were particularly acknowledged by Lord Justice Jackson as influential in this respect –

Jackson Review, above n 19, p 248, [1.3].

22 Jackson Review, *Ibid.*, p 255, [4.1].

Property,²³ Lord Justice Jackson suggested that there was ‘an unmet need for justice’ for creative Small and Medium Enterprises and recommended the introduction of a small claims track in the Patents County Court for IP claims.²⁴ This recommendation was followed by Professor Hargreaves’ 2011 Review of Intellectual Property and Growth,²⁵ which recommended its introduction as part of a broader scheme of legislative reform relating to intellectual property.²⁶

The following preliminary observations can be made from an unpublished empirical study of the first three years of the IPEC SCT (from its establishment in October 2012):²⁷ in the period 1 October 2012

23 Jackson Review, Ibid, p 249, [1.7].

24 Jackson Review, Ibid, p 255, [4.3] and [4.5].

25 I. Hargreaves, Review of Intellectual Property and Growth (IPO, May 2011).

26 See also Intellectual Property Office, Government Response to the Call for Evidence on Introducing a Small Claims Track into the Patents County Court:

<https://old.ip.o.gov.uk/hargreaves-enforce-c4e-pcc-response.pdf> p 13, [2.8].

27 This was carried out by Sheona Burrow. See n 5. This used a court-file based methodology (following C. Helmers and L. McDonagh, ‘Patent Litigation in the UK: an empirical survey 2000-2008’ (2013) 8(11) Journal of Intellectual Property and Law 846, see also C.A. Cotropia and J. Gibson, ‘Copyright’s Topography: An Empirical Study of Copyright Litigation’ (2014) 92 Texas Law Review 1981) to look at claims brought in the IPEC Small Claims Track between October 2012 and December 2015. This involved the negotiation of access to court files from the IPEC SCT and the extraction of anonymised data from those files through a manual review of paper court files for each claim lodged from the Court’s creation in October 2012 to December 2015. It is estimated that 5 per cent of case files were not sampled because they were not physically available for sampling, eg they were removed to a judge’s desk, referred to another court or otherwise unavailable. Estimates are based on the fact that in 2015, the court began numbering court files sequentially, allowing the author to note the number of files missing at each data collection date. The principal sources of data are the pleadings - claim form and particulars of claim, any defences and replies – as well as procedural notes on case management and any orders made in the case. Email correspondence between the parties and the Court included in the file also provides valuable information, particularly where cases settle during the court process. The data collected as part of the larger

to 31 December 2015, 261 claims were dealt with by the IPEC SCT,²⁸ of which the overriding majority (206/261 – 79 per cent) concerned copyright infringement. Of these claims, a majority (144) concern the infringement of photographic copyright, and the overwhelming majority of these (135/144) concern the unauthorised reproduction of a photograph on a website.²⁹ The claimants in 122 these cases (46 per cent of all claims – 122/261) are freelance professional photographers – photographers who are self employed, and derive income through photography - or their agents: 22 claims were brought by agents and 100 claims by photographers. Further, these cases generally comprise a claim for financial remedies alone: only four of the 122 claims concerning photographic copyright included a claim for an injunction, and all 122 included a claim for damages.³⁰

IPEC SCT claims are representative of the litigation brought by freelance professional photographers. A review of all published judgments in the same period (October 2012-December 2015) delivered

empirical study relates to the dates of cases, the value of claims, court fees paid, details about the claimants and defendants, details about the claims and defences (if any), notes about court procedure, and details of outcomes through settlement or judicial determination.

²⁸ The majority were originally issued at IPEC SCT, but some transferred from County Court or from IPEC SCT Multi Track or IPEC SCT Fast Track. Two cases just concerned costs, and these are not included in the 261.

²⁹ The other nine cases concern use in the physical world, eg printed publicity material.

³⁰ One of these was both for damages *and* an account of profits; as a matter of law, a claimant is required to elect either damages or an account, though see n

83 as to some confusion caused by the inclusion of ‘any unfair profits made by the infringer’ within the ‘damages’ provision of the Enforcement Directive (Art 13(1)(a)).

by other courts open to photographers (High Court, IPEC Fast-Track and IPEC Multi-Track),³¹ shows that the IPEC SCT is the litigation forum of choice for freelance photographers: only two of all the cases which proceeded to judgment in these other forums were brought by freelance photographers or their agents. The first in fact originated as an IPEC SCT claim, but did not proceed to final judgment; it was only transferred to the IPEC Multi-track following an application to set aside an IPEC SCT order for an extension of time, and following this, the claim was struck out.³² The other began as a County Court money claim for ‘unpaid royalties’ under an invoice issued retrospectively to an infringer (as per the pre-IPEC practice discussed below³³) before it was transferred to the Patents County Court for the assessment of damages for copyright infringement (following amendment of the statement of claim).³⁴

This Part of the article seeks to explain, develop and contextualise the finding that freelance professional photographers, in the main, seek financial compensation for copyright infringement alone through, first, an examination of the motivation of claimants, and secondly, an analysis of

³¹ The review was conducted by Sheona Burrow and was based on all published judgments included on Westlaw and the British and Irish Legal Information website (www.bailii.org). The latter website is understood to contain all IPEC Multi-Track and Fast Track judgments (113 judgments in total) and High Court (Patents Court) judgments (a further 113 judgments). The IPEC Multi-Track and Fast-Track was, prior to October 2013, the Patents County Court.

³² *Malcolm-Green v And So To Bed Ltd* [2013] EWHC 4016 (IPEC).

³³ Text to n 49-53.

³⁴ *Sheldon v Daybrook House Promotions* [2013] EWPC 26.

the legal nature of the cases which they bring, including the manner in which financial remedies are calculated. As we conclude below, an analysis of these two points within the Calabresi/Melamed framework reveals that, while copyright doctrine is based on a property rule paradigm, the manner in which photographic copyright is enforced in this particular context exhibits features of a liability rule.

To explore these questions, we applied to the Court for the transcription of all judgments on liability and/or quantum in respect of IPEC SCT claims brought by photographers or their agents in the period under investigation (1 October 2012 to 31 December 2015): we were provided with transcripts of 21 judgments.³⁵ Of these, the claimant was successful in all cases, save for one, which failed due to a limitation issue.³⁶ Further, the overwhelming majority of these judgments concerned remedies or quantum alone: in three of these cases judgment was obtained in default, in five further cases the defendant did not attend a hearing, in one further case the claimant obtained summary judgment on the merits and in most other cases, the defendant either admitted liability or put the claimant to proof in circumstances where there was no

³⁵ On the number of cases transcribed: n 7.

³⁶ *Herringshaw v Runham*, 7.4.2016.

meaningful challenge to the claimant's case on subsistence, title or infringement.³⁷

(b) The Nature of Claims

What does a review of these IPEC SCT judgments reveal about the nature of these claims? The claimants in all of the transcribed cases were freelance professional photographers. As Clarke DJ described in, *Doré v Hendrich*:

There is a difference between no fees which are charged by amateurs who take photographs and make them available and fees which professional photographers believe that they should be paid for use of their work. This is Mr Doré's work. What he does is take photographs. If he was not paid for his photographs he would not be eating and I do have some sympathy for him and that is what this court is here for.³⁸

³⁷ Examples of the latter: *Herringshaw v Everton* 21.8.2014, *Webb v Central Media* 17.7.2014, *Brown v Mayoh* 17.4.2014. Exceptions where substantive issues raised: *Crawley v Burda*, 8.1.2015, dispute over who took the picture at an Essex dog show, ie factual issue over authorship and ownership; *Stockfood v Propaganda* 9.4.2015, picture library's standing to bring a claim, and factual issue over length of defendant's infringement; *Doré v Hendrich*, 16.1.2014, factual issue over whether defendant made the post on the internet; *Seaward v Foxtons* 5.2.2015 and *Yeats v Wright* 6.3.2014 nature of previous dealings between claimant and defendant; *Webb v VA Events* 5.3.2015: status of corporate defendant that had since been liquidated, and personal liability of its directors/shareholders as joint tortfeasors.

³⁸ *Doré v Hendrich* at [19].

Further, the images in question were, in general,³⁹ described as high quality images.⁴⁰ In all the transcribed cases, save for one,⁴¹ the claimants were professional photographers who sought to derive income from licensing their images, or picture libraries that were exclusive licensees of such photographers. Therefore, in the main, the ‘fees’ referred to by Clarke DJ, are royalties for copyright licenses; as Clarke DJ described the claimant’s livelihood in another case – *Walmsley v Education Limited* -

39 For counter example: *Crawley v Burda*: mobile phone photographs of people and their pets taken at Essex dog show.

40 Eg landscape photographs of Bath and Dartmoor by ‘one of the UK’s leading professional landscape photographers’ who licenses his images for reproduction in books and as postcards (*Croxford v Cotswold*, 5.11.2015, at [2]); professional sports photographs taken by a photographer who regularly publishes in daily national newspapers (*Herringshaw v Everton*; *Herringshaw v Runham*); aerial photographs of Manchester at night taken from a chartered helicopter using specialist equipment taken for the purposes of producing a licensing revenue (*Webb v VA Events* at [20]: ‘Mr Webb says that he knows of only one other photographer who has taken similar night time aerial photographs of Manchester’); photographs of a military aeroplane underwater at Goodwin Sands taken by a ‘professional underwater photographer’ for licensing to the press (to illustrate a news story) (*Brown v Mayoh*, at [1]-[2]: the aeroplane was about to be lifted from the seabed by the RAF Museum, in an ‘elaborate and costly project’ (at [7]) and Clarke DJ (at [14]) described the claimant as follows: ‘He is an experienced underwater photographer. He dives to get his photographs. That is a high-risk business. He is put to the expense of going and doing these dives in various places around the world to get his photographs. That is a high-expense business’); ‘an attractive image taken by a professional photographer’ of singer/songwriter Florence Welch (of Florence and the Machine) performing in concert taken for the purposes of licensing (*Sheldon v Johnson*, 21.1.2016, at [10]); an image from an album cover of composer Cornelius Cardew (*Walmsley v Daily Telegraph*, 20.3.2014); ‘glamour photographs’ of fashion models taken ‘by a prestigious photographer’ for the purpose of licensing to magazines (*Bancroft v Harries*, 24.4.2014, at [1] and [6], where Hart DJ also referred to the claimant’s ‘reputation and skill as a photographer and the popularity of her work’); well known photographs of children round a camp fire and the Scottish educator Alexander Sutherland Neill taken in the 1960s that ‘many people in the public’ would recognise (*Walmsley v Education Limited*, 13.3.2014, available on Westlaw 2014 WL 2194626, at [3]).

41 *Gamby v Harrison*, 15.5.2014, which concerned a freelance professional photographer who conducted business on a commission basis. Consequently, the damages calculation was based on the photographer’s daily rate - ‘what a willing photographer would have reasonably charged for the work’ - rather than a royalty basis (per Lambert DJ, at [38]).

‘the business of creating photographs and selling licence fees in them’,⁴² or in the words of Hart DJ in *Webb v VA Events*, the claimant was a ‘professional... photographer who earns a living from licensing of images to which he owns the copyright.’⁴³ Interestingly, the motivation of the overwhelming majority of claimants in bringing these cases appears to be purely financial; to obtain remuneration for unauthorised use, rather than an objection to the use itself. These claimants did not appear to be motivated, for example, by the need to protect their reputation or the integrity of their work or the quality of the reproduction. As Clarke DJ remarked in one case brought by a picture library:

Stockfood Limited, the claimant, is in fact a picture agency and is in the business of licensing photographs to third party end users and would have been delighted to licence this photograph to the defendant had the defendant sought a licence as it should have done.⁴⁴

In only one case – *Croxford v Cotswald* - did the claimant complain that the defendant’s use ‘damaged the exclusivity of his images’, but the claimant’s concern was not to stop the defendant’s use per se; the images would have been available to the defendant for licence on a ‘rights

⁴² *Walmsley v Education Limited* at [17].

⁴³ *Webb v VA Events* at [1].

⁴⁴ At [6].

managed’ basis, requiring the incorporation of metadata identifying the claimant as copyright owner, and the concern was that the removal of metadata might result in further unlicensed uses and therefore loss of further remuneration.⁴⁵ Indeed, even in the case of a photograph taken to illustrate a news story – *Brown v Mayoh* - where there was ‘value to a publisher in being the first with an image of a current event’, the claimant merely sought to ensure that the defendant paid a ‘first publication premium’ on top of the standard royalty, rather than to prevent usage *per se*.⁴⁶

The focus of these claimants on the recovery of lost financial remuneration – is consistent with freelance professional photographers’ pre-IPEC litigation practice. Before the establishment of the IPEC SCT, photographers would respond to copyright infringement by issuing the suspected infringer with an invoice demanding royalties retrospectively for the unauthorised use. When this was unpaid, the photographer would then enforce the sum due under the invoice as a debt – an ordinary money claim - using the small claims procedure of the County Courts. As one photographer with whom we corresponded described:

I don't know how widespread [the practice] was but the Bow County Court worked that way, as did a couple of other London

⁴⁵ At [15].

⁴⁶ *Brown v Mayoh* at [3], [18] and [20]. The first publication premium was calculated as a 100 per cent uplift on the standard royalty.

County Courts that I used. I'd spot an infringement, invoice for it and then, if unpaid, I'd just issue a money claim for the invoice value.⁴⁷

This approach to dealing with infringement is consistent with the findings of an online survey of professional photographers published by the British Photographic Council in 2010,⁴⁸ which found that the 'most common way in which infringements were pursued was to ask for payment for the infringing use.'⁴⁹

Asked whether the practice of pursuing infringements as money-claims in the County Courts continued post-IPEC SCT, the same interviewee explained that while the IPEC SCT procedure, though 'not too complex' was 'much more' complex 'than a simple unpaid debt claim', the IPEC SCT offered a distinct advantage:

On the plus side, IPEC SCT can and does add damages for breach of moral rights, flagrancy and can add exemplary damages. This

47 Email dated 15 October 2016, between freelance professional photographer and Elena Cooper, replying to posting on Editorial Photographers UK website.

See also *Sheldon v Daybrook* discussed at text to n35, which originated as a money claim at Northampton County Court ([8]).

48 The British Photographic Council, *Industry Survey of Photographers 2010: Full Results and Analysis* (London: British Photographic Council: July 2010) available at <http://www.british-photographic-council.org/survey/2010>. The survey covered 1,698 photographers, but the results were 'filtered' to include only the responses of 'professional photographers and/or picture suppliers (p 1, [0.6]); of the 'professional photographers', 91 per cent were 'freelance photographers' (p 4-5, [2.3]).

49 BPC Survey, *Ibid*, [25.3]. A reference to the use of the Small Claims procedure is made in the Survey at p 53 [26.2].

leads to awards greater (sometimes very much greater) than the simple reproduction fee and makes taking a case worthwhile.⁵⁰

The advantage that photographers perceive to be offered by the IPEC SCT, over the County Court money-claim procedure, then, relates to the possibility of increased financial remuneration for use of their work.⁵¹

(c) The Legal Basis of Claims

Returning to our analysis of the transcribed IPEC SCT rulings, the motivation of claimants (as explained in the previous section) focussing on the recovery of lost remuneration, impacts on the basis of their legal case in a number of ways.

First, claims about the infringement of moral rights – rights attaching to the author (who may not also be the copyright owner) concerning non-economic interests in, for example, ensuring attribution (section 77 of the Copyright Designs and Patents Act 1988) and

⁵⁰ Ibid.

⁵¹ The same correspondent pointed out that another weakness of the County Court procedure was that a County Court claim would fail where a substantive copyright issue was raised by a defendant (eg subsistence, ownership, infringement or defences). By contrast, these issues can be resolved by the IPEC SCT. However, as noted at text to n38, the experience so far shows that substantive issues are in practice rarely raised in the IPEC SCT. In any event, as the case of *Sheldon v Daybrook* (discussed above, text to n 35) illustrates, were a County Court money claim to be initiated today, the County Courts would transfer the case to the IPEC SCT, which would allow the statement of claim to be amended to a claim for copyright infringement; indeed the review by one co-author of all IPEC SCT court files in the period 2012-2015, revealed 17 cases brought by freelance professional photographers which were started in the County Courts (two as Money Claims On-line) and subsequently transferred to the IPEC SCT, including four cases in our set of transcribed judgments: review by Sheona Burrow. The transcribed cases are: *Yeats v Wright*, *Bancroft v Harries*, *Gamby v Harrison* and *Crowley v Burda*.

protecting the work against ‘derogatory treatment’ (section 80 of the CDPA 1988) – in fact are utilised as rights concerned with economic interests, rather than the cultural significance of authorship and the integrity of the work; claims to lack of attribution or derogatory treatment succeed in cases where the claimant argues that ‘orphaning’ the work through removal of copyright notices or metadata such that the copyright owner cannot be traced, will deprive the author of future licensing income.

For example, in *Croxford v Cotswolds*, Lambert DJ held that the right of attribution under section 77, was infringed where the removal of the claimant’s metadata and imposition of the defendant’s own watermark on the work, as the result of this was that the claimant was ‘deprived of the right to charge licence fees to other parties’.⁵² Similarly, in *Webb v VA Events*, Hart DJ held that the orphaning of an image through the removal of the claimant’s metadata and the addition of the defendant’s own copyright notice, could amount to derogatory treatment of the work under section 80. Section 80 is infringed where ‘the addition, deletion from or alternation to or adaption’ of a work ‘amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author’. The ruling in *Webb v VA Events* is striking as case law under section 80 concerns changes to the work’s

⁵² *Croxford v Cotswolds*, [47].

‘internal integrity or logic’, rather than the identifying material.⁵³ Yet, in the IPEC SCT, the only claim for derogatory treatment concerning additions, deletions, alterations or adaptations to the work itself - *Webb v Hope Lettings* - failed on the basis that the claimant would have consented to the use of the work, had a licence been sought; the claimant’s objection was not to the use per se, but rather that no remuneration was paid for the use. As Hart DJ explained in *Webb v Hope Lettings*, where the claimant’s photograph was ‘heavily cropped’ and ‘additions to it’ made for ‘marketing purposes’:

... in order to award damages for derogatory treatment I need to be satisfied that there is a distortion or mutilation of the work which is prejudicial to the honour or reputation of the author. I am not satisfied that that criterion is met here. The reality is that Mr Webb would have been perfectly happy with the amendments under an appropriate licensing agreement. So I do not think this really fulfils the test of derogatory treatment.⁵⁴

⁵³ L. Bently and B. Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 4th ed. 2014) p 283, referring to *Pasterfield v Denham* [1999] FSR

168, 180. Other cases on moral rights have also concerned changes to the work itself, eg the reduction in size and addition of colour to drawings (*Tidy v*

Trustees of the Natural History Museum [1996] EIPR D-86) and the superimposition of rap onto a musical work (*Confetti v Warner Museum* [2003] EMLR

790).

⁵⁴ *Webb v Hope Lettings* 10.7.2014 at [12]. This approach to the construction of Copyright Designs and Patents Act s.80, requiring prejudice to the honour or reputation of the author in all cases (rather than as an alternative to showing distortion or mutilation), is consistent with that adopted in the High Court:

Confetti Records v Warner Music [2003] EWHC 1274 (Ch) at [149]-[150].

Secondly, the motivation of claimants colours the nature of the remedies sought for copyright infringement. In all judgments reviewed, the claimant sought damages rather than an account of profits; the purpose of the action in all cases, save for one,⁵⁵ was to receive retrospective payment for the licence fee that should have been paid for the use. This practice is also clear from the review of all Claim Forms on the court files: where a damages calculation was provided in the Claim Form, it was, with just one exception,⁵⁶ on a royalty basis, and this was frequently based on standard licensing schemes, eg, Getty, London Freelance National Union of Journalist rates.⁵⁷

Further, only one case involved a claim for an injunction - *Seaward v Foxtons* – and this was where a defendant, that had no intention of paying for use of the photographs, had repeatedly evaded questions about the extent of use of the photographs.⁵⁸ Similarly, in *Croxford v Cotswolds*, while an injunction was not formally pleaded in the claim form, the claimant, during the course of argument, requested ‘an order that the defendants removed any images which infringed his copyright’ from their websites, in circumstances where the defendant again had

⁵⁵ *Gamby v Harrison*, see above n 42.

⁵⁶ The exception involved a claim for loss of profits.

⁵⁷ <http://www.londonfreelance.org/feesguide/index.php?§ion=Photography&subsect=Online+use+of+photos>, <http://www.gettyimages.co.uk/>

⁵⁸ The claimant had requested that the defendant estate agents use his own photographs of his home for the purposes of selling his property, but, after the property was sold, the defendant used them for other sales/marketing purposes.

failed to be transparent about the use of the claimant's images.⁵⁹ Interestingly, this order does not appear to have been granted, as the focus of the judgment was on the assessment of financial remedies.⁶⁰ Putting *Seaward* and *Croxford* to one side, there was no mention that an injunction was even threatened, for instance, in the pre-action stage of the other IPEC SCT cases we reviewed.

In certain other cases, injunctions were perhaps not requested because take-down was already effected by the defendant, but this was not the position in all cases; in one case the infringing use had persisted for over a year after the claim was notified, and continued at the time of the hearing on quantum, which took place a month *after* summary judgment for the claimant had been granted.⁶¹ Further, injunctive relief also concerns the prevention of future use,⁶² and this does not appear to be a concern articulated by claimants (except, as in *Seaward* and *Croxford* where a defendant appeared to have been untrustworthy). A possible explanation for the lack of concern about future use may be the

⁵⁹ *Croxford v Cotswold*, [8] and [21].

⁶⁰ The details of the Order in this case can be found at [42], [45] and [47], [48-9], [50].

⁶¹ *Success Photography v Tempest* 21.11.2013, [6] and [7]. Clarke DJ commented that the claimant could have claimed an 'increased licence fee' in respect of the continuing use.

⁶² In *Spectravest v Aperknit*, [1988] FSR 161, 174, Millett J: 'In intellectual property cases a plaintiff is concerned not only to stop exact repetition of the defendant's current activity which can be described with particularity, but to prevent fresh invasions of his rights in ways which cannot be foreseen or described exactly.'

more general objective of certain freelance professional photographers revealed in interviews conducted by one co-author: on discovery of an infringement, the objective is ‘to turn’ an infringer ‘into a customer’ by charging a licence fee. As one photographer expressed:

if you want to go on using [my picture] that’s fine but you need to pay me something for this use, this is my copyright... this is how I make my living...⁶³

Indeed, the interviews revealed that some photographers were prepared to spend substantial proportions of their working time (15-20% of their working week) locating infringements (whether through their own efforts or using an infringement search agency) targeting those infringers who might be ‘people who I want to buy a licence’.⁶⁴ In particular, the absence of claims to an injunction cannot be attributed to ignorance of the law. Claimants appear to have good knowledge of copyright law; while Claim Forms are rarely drafted by legal representatives (only in 8/122 cases), 45 per cent of all cases brought by photographers or their agents cited relevant provisions of the CDPA 1988 (55/122). Therefore, claimants are likely to be aware of the availability of an injunction under s.96(2) CDPA 1988.

⁶³ Interview conducted by Sheona Burrow in July 2016 with a freelance photographer working in photography for commercial and advertising sectors.

⁶⁴ Interview conducted by Sheona Burrow in July 2016 with a freelance professional photographer working in news and social affairs reportage. The same interviewee also discussed the charges imposed on infringers, with those that admitted infringement being turned ‘into a customer’.

Finally, in framing their claims, photographers often treat the infringing use as a supply of services and claim for VAT, as if the claim was for an unpaid invoice. This perhaps reflects the manner in which photographers framed claims concerning photographic copyright infringement prior to the IPEC SCT: as money claims in the County Court (discussed above). Claims for VAT are generally not accepted by the Court in copyright infringement actions.⁶⁵ damages, unlike disputes for unpaid invoices, are not considered to be a supply for VAT purposes.⁶⁶

(d) The Assessment of Financial Remedies

How are financial remedies assessed by the IPEC SCT? The legal test for general compensatory damages for copyright infringement in cases where intellectual property rights ‘are exploited through the grant of licences for royalty payments’, is the sum that the defendant ‘would have paid by way of royalty’⁶⁷ and the IPEC Multi-track has ruled that the UK approach to compensatory damages is left unchanged by the EU Enforcement

⁶⁵ Eg: *Webb v Central Media* [36]. *Walmsley v Telegraph* [7], though for a counter-example: *Walmsley v Education Limited* [10] and [13].

⁶⁶ <https://www.gov.uk/hmrc-internal-manuals/vat-supply-and-consideration/vat36100> and <https://www.gov.uk/hmrc-internal-manuals/vat-supply-and-consideration/vat36300>

⁶⁷ *General Tire v Firestone*, [1975] FSR 273, 278

Directive.⁶⁸ Accordingly, the approach in the IPEC SCT in the vast majority of cases,⁶⁹ follows that explained by Lord Wilberforce in *General Tire v Firestone*: this involves the court enquiring into, not just the ‘going rate’, but also the ‘circumstances’ in which the claimant and defendant are ‘assumed to strike their bargain’.⁷⁰ In the majority of IPEC SCT judgments reviewed, the courts take, as a starting point for the hypothetical licence negotiations, either the claimant photographer’s own standard licensing terms⁷¹ or, in the case of an action brought by a picture library (as the photographer’s exclusive licensee) that library’s own licensing terms,⁷² and/or the terms of well known photographic picture libraries, such as Getty and/or Corbis, or, in the case of photographs in newspapers, the standard licensing terms of the National Union of Journalists.⁷³ This reflects the way in which damages calculations are

68 *Absolute Lofts v Artisan Home Improvements*, [2015] EWHC 2608 (IPEC) at [11]. Art 13(1) of the Enforcement Directive, which concerns ‘damages’ awards against infringers who engaged in an infringing activity ‘knowingly, or with reasonable grounds to know’, expressly mentions that damages can be calculated by reference to ‘the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question’ (Art 13(1)b).

69 Exception: *Gamby v Harrison*, see above n 43.

70 At 279

71 Eg *Webb v Central Media*; *Webb v Hope Lettings*; *Webb v VA*; *Walmsley v Education Limited*; *Success Photography v Tempest*.

72 Eg *Stockfood v Quality Garden* 14.5.2015; *Stockfood v Red Pub* 4.9.2014. For the relationship between Stockfood and photographer: *Stockfood v Red Pub* at [2].

73 Eg *Doré v Hendrich*; *Seaward v Foxtons*; *Sheldon v Johnson*; *Bancroft v Harries*, *Brown v Mayoh*.

presented in Claim Forms (discussed above⁷⁴) and which in turn reflects the high degree of collective discussion on the part of photographers on how infringement and IPEC litigation should be approached (through the education initiatives of photographer membership organisations as well as collective discussion in on-line forums).⁷⁵ The exception to this starting point is where prior dealings between the claimant and defendant provide more direct evidence as to their likely agreement, but there were few cases of this nature; in the overwhelming majority of cases the claimant and defendant were not previously acquainted.⁷⁶ Further, our analysis reveals that in the majority of cases in which standard rates formed the starting point of negotiations, the IPEC SCT has held that the result of the hypothetical ‘negotiations’ would have been the application of those standard rates without any modification;⁷⁷ in most of these cases,

⁷⁴ Text to n 58-59.

⁷⁵ Eg education initiatives are run by the Association of Photographers and Editorial Photographers UK and Ireland. A further 11 membership organisations are referred to in the survey of photographers conducted by the British Photographic Council, above n 49, 1 [0.1]. The collective organisation of photographers was referred to by photographers in interviews conducted by Sheona Burrow. One freelance professional photographer interviewed in May 2013 mentioned the use of online forums where photographers discussed infringement and court action.

⁷⁶ Eg *Croxford v Cotswald*; *Crawley v Burda*; in only three of the 21 cases considered did the claimant and defendant know each other prior to the infringement.

⁷⁷ *Webb v Central Media* at [21] and [33]; *Webb v Hope Lettings* at [11] and [15]; *Stockfood v Quality Garden* at [7]; *Success Photography v Tempest* at [8]; *Stockfood v Red Pub* at [40] (the rates of Getty Images and Corbis were also considered as comparators at [39]); *Seaward v Foxtons* at [25] (Corbis rates applied); *Sheldon v Johnson* at [13] (Getty rates applied); *Bancroft v Harries* at [5] and [7] (Getty and NUJ standard rates applied).

these are the standard rates of picture libraries.⁷⁸ Indeed, picture library rates have been applied in cases regardless of whether the claimant in fact licences through those libraries.⁷⁹

In addition to compensatory damages, in a significant number of cases (7 of 21 transcribed cases), the claimant also seeks damages for non-attribution of authorship under section 77 of the Copyright Designs and Patents Act 1988,⁸⁰ and/or additional damages under section 97(2) of the Copyright Designs and Patents Act 1988⁸¹ (12 of 21 transcribed cases).⁸² The latter section empowers the court to award ‘such additional damages as the justice of the case may require’ taking into account all the circumstances, in particular ‘the flagrancy of the infringement’ and ‘any benefit accruing to the defendant by reason of the infringement’. In the IPEC SCT, claimants usually refer to the latter as damages for

78 *Stockfood v Quality Garden* at [7]; *Stockfood v Red Pub* at [40] (the rates of Getty Images and Corbis were also considered as comparators – at [39]);

Seaward v Foxtons at [25](Corbis rates applied); *Sheldon v Johnson* at [13] (Getty rates applied); *Bancroft v Harries* at [7](Getty and NUJ standard rates applied).

79 Eg *Sheldon v Johnson*; *Bancroft v Harries*.

80 Moral rights are actionable as breach of statutory duty: Copyright Designs and Patents Act 1988 s.103(1).

81 In *Absolute Lofts*, at [42], the IPEC Multi-Track held that Art.13(1) of the Enforcement Directive entitles a defendant to claim a defendant’s ‘unfair profits’ as an *alternative* to additional damages under s.97(2), whichever is greater. This approach sits uneasily with the domestic law distinction between damages and an account of profits. The confusion on this point is perhaps the result of the ‘broad sense’ in which the term ‘damages’ is used in Art 13 of the Directive (noted by the Court of Appeal in *Hollister v Medik Ostomy Supplies* [2012] EWCA Civ 1419 at [60]).

82 Five out of the 21 transcribed cases included claims for both non-attribution and additional damages. Only one case concerned a successful claim for damages for derogatory treatment: *Webb v VA Events*, at [28], where DJ Hart awarded 500 per cent uplift by way of additional damages and derogatory treatment together.

‘flagrancy’, and IPEC SCT judgments approach this as requiring ‘conduct which is in some way scandalous or deceitful’; ‘some deliberate or calculated infringement which must go beyond the usual position where someone publishes without permission...’⁸³ This interpretation accords with that adopted by the High Court;⁸⁴ the impact of Art 13(1) of the Enforcement Directive - which concerns ‘damages’ awards against infringers who engaged in an infringing activity ‘knowingly, or with reasonable grounds to know’ – on the interpretation of section 97(2) was not raised in the IPEC SCT judgments which we reviewed.⁸⁵

The usual approach in IPEC SCT cases is to assess damages under both section 77 and section 97, as each justifying a 100 per cent uplift on general damages.⁸⁶ An explanation for this starting point is not given in any of the judgments reviewed. However, it may stem from the fact that

⁸³ *Walmsley v Daily Telegraph*, [15] per Hart DJ.

⁸⁴ In *Flogas Britain v Calor Gas* [2013] EWHC 3060 (Ch) [136] defining ‘flagrancy’ as requiring ‘scandalous and deceitful conduct’ on the part of the defendant. In *Nottinghamshire Healthcare v News Group* [2002] RPC 49 at [52], it was held that deliberation included recklessness – a ‘couldn’t care less’ attitude – to infringement.

⁸⁵ The European Court of Justice has recently held that damages for ‘moral prejudice’ can be claimed in addition to damages calculated on a royalty basis (‘the amount of royalties or fees which would have been due if the infringer had requested’ a licence) despite the fact that ‘moral prejudice’ is not expressly mentioned in the relevant provision of the Directive (Art 13(1)b, *Christian Liffers v Producciones Mandarin SL*, Case C-99/15), however this only applies to cases falling within Art 13(1), ie where the infringement was committed by a defendant knowingly or with reason to believe (*Irina Nikolajeva v Multi Protect*, C-280/15, ECJ 7th Chamber, [54]).

⁸⁶ 100 per cent uplift under s.77: *Stockfood v Quality Garden* at [8]. 100 per cent uplift under s.97(2): *Sheldon v Johnson* at [15]; *Webb v Central Media* at [44]; *Brown v Mayoh* at [17]. For an exception where an unexplained figure of £1,000 was awarded, the general damages award being £360: *Webb v Hope Lettings* at [15].

this is the way photographers, in the main, calculate damages under both section 77 and section 97 in their Claim Forms, which again reflects the high degree of collective organisation on the part of photographers in using the IPEC.⁸⁷ It was observed that the majority of Claim Forms included a 100 per cent uplift for additional damages and there was evidence of collective practice in drafting Claim Forms: some 28 per cent of Claim Forms/Particulars of Claim (35/122) followed a recognisable standard format, including a standard damages calculation, claiming 100 per cent uplift for ‘flagrancy’, and 100 per cent uplift for removal of metadata, in addition to a basic licence fee, interest and administration costs. Further, an early IPEC SCT judgment - one of the few judgments that is publicly available – *Walmsley v Education Limited*, the claimant referred to a 100 per cent uplift, which was applied in that case by the Court, as the ‘standard’ royalty ‘in the industry’ for reproduction without attribution.⁸⁸

(e) Analysis: Freelance Professional Photographers and the IPEC SCT

As the above discussion shows, the role of the IPEC SCT, as Lambert DJ has expressly acknowledged in a number of cases, is to give effect to the

⁸⁷ See above n 77.

⁸⁸ *Ibid.*, at [13].

fact that ‘a photographer is entitled to a realistic remuneration for his work’;⁸⁹ this reflects the fact that, in the overwhelming majority of cases, the complaint is not about the use itself, but about lack of payment for that use. The role of the Court, in this context, is to order a defendant to pay retrospectively the licence fee that would have rendered that use legal.

Further, we observed that the Court, in giving effect to the photographer’s right to remuneration, is playing an active role in supporting a culture of payment and denying legitimacy to the assertion that works are free to use in the internet environment, requiring neither authorisation nor payment. In a number of cases, the defendants argued that they assumed they did not require a licence as images found on Google Images were either generally ‘understood to be free’⁹⁰ or that ‘images... on Google images without a copyright notice on ... were free to use...’⁹¹ This was also a common argument in Defences generally in the IPEC SCT.⁹² Whilst innocence is no defence to copyright infringement, a plaintiff is not entitled to damages where a defendant ‘did not know and had no reason to believe, that copyright subsisted in the

⁸⁹ *Herringshaw v Everton* at [22] per Lambert DJ; *Stockfood v Red Pub* at [32] per Lambert DJ.

⁹⁰ *Webb v Central Media* at [5] per Lambert DJ: ‘His instructions were to use Google Images, which he understood to be free.’

⁹¹ *Walmsley v Education Limited* at [6] per Clarke DJ: ‘the teacher responsible for the blog post found the images on Google images without any copyright rubric upon them and believed that if those images were on Google images without a copyright notice on them that meant that they were free to use...’

⁹² As observed in the review of IPEC SCT Court files conducted by Sheona Burrow.

work’ (section 97(1) CDPA 1988). The Court has stressed that section 97(1) is a ‘very narrow’ provision⁹³ and rejects such arguments, characterising them as ‘naïve’ and evidencing a ‘shocking lack of understanding’ about copyright.⁹⁴

How does the analysis in the last two sections relate to the theoretical framework provided by Calabresi and Melamed? Our review of the IPEC SCT judgments in the first three years since its establishment reveals an interesting inter-relation between the bureaucratisation of photographic copyright (ie exploitation through picture libraries) and the nature of the remedies granted by the IPEC SCT. The bureaucratisation of photographic copyright has brought about a standardisation in licensing. On the one hand, copyright doctrine continues to reflect a property rule paradigm: claimants can request an injunction, should they wish to do so, and the legal test in *General Tire* requires the courts to consider the hypothetical negotiations in a bilateral licensing contract (an

⁹³ *Webb v VA Events*, per Hart DJ.

⁹⁴ At [20]. *Webb v Hope Lettings* at [7] per Hart DJ: ‘It is naïve for anyone to believe that just because an image is available on Google copyright does not subsist in that image.’ *Bancroft v Harries* at [3] per Hart DJ: ‘he used these images which he obtained on the web, they were freely available on the web and that there was no metadata attached to them. ... It is ... simply not sufficient, in my view, for a defendant to say that the reasonable starting point would be that any image they come across on the internet that does not have metadata attached to it is necessarily free from copyright protection. That would be a naïve standpoint for somebody like Mr Harries operating a commercial website to take.’ *Walmsley v Education Limited* at [16] per Clarke DJ: ‘the teacher assumed any image found on Google without a copyright notice attached would be free to use shows a shocking lack of understanding of copyright protection. ... I do not think, in this day and age to look online and see what are clearly professional photographs and to say to oneself “if there is no copyright notice it must be all right for me to use them”.’

approach which, in the Calabresi/Melamed framework, corresponds with copyright's nature as a property rule). However, on the other hand, injunctions are rarely claimed and the calculation of damages most frequently merely involves the application of rates which are generally available to all who seek them. This provides photographic copyright, as litigated in the IPEC SCT, with features of a liability rule – ‘a general rule of compensation applicable to all who take the right’⁹⁵. In this way, this case study contributes to scholarship noting other instances in which intellectual property rights are of an ‘intermediate nature somewhere between pure individual property rights and pure government-determined liability rules’.⁹⁶ In *Contracting into Liability Rules*, Robert Merges, applying the Calabresi/Melamed framework, described the circumstances in which intellectual property rights, while ‘quintessential property rule entitlements’ at first instance, can lead to a ‘liability rule-like regime’: where transaction costs are high, rights-holders will agree to collective valuation through collective organisations (eg collecting societies) as opposed to ‘strictly individual’ or ‘specific bilateral’ terms. Consequently, argues Merges, the distinction between property rules and liability rules becomes a ‘false dichotomy’; instead the standards of such collective organisations represent ‘intermediate forms of collective

95 Merges, above n 1, 1303.

96 Ibid, 1392.

valuation’ as ‘firms work together to establish a collective price charged to licensees for use of the members’ IPRS’.⁹⁷ Our case study illustrates how the practices of such collective organisations can also shape more general enforcement by the courts, including in litigation brought by claimants who are not members of collective organisations. We return to this finding in the final concluding section of the article.⁹⁸ Before we do so, we turn to the experience from earlier times, that saw the foundation of the first photographic picture libraries.

3 Photographic Copyright and Enforcement in Historical Perspective

(a) Introducing the Historical Case Study

In the previous section, we reported a number of findings about photographic copyright litigation in the IPEC SCT, placing them in the context of the motivation of photographers and practices of copyright exploitation. While the establishment of a specialised Court for intellectual property small claims is a new development - exclusive to the twenty-first century – some of our underlying observations (made in the last section) pre-date the IPEC SCT. In particular, the first picture

⁹⁷ Ibid. 1302, 1303 and 1392.

⁹⁸ Text to n 169.

libraries were established in the first years of the twentieth century. How and why did this occur, and how might the experience of past times help us more critically engage with our analysis in the last Part about the enforcement of photographic copyright in the IPEC SCT today?

By way of background, photography was invented in 1839, but first emerged as a medium of mass reproduction in the 1850s, with the advent of the collodion or wet-plate process.⁹⁹ The first copyright statute expressly protecting photographs was passed in 1862 – the Fine Arts Copyright Act¹⁰⁰ - and during the middle decades of the nineteenth century photographers utilised this legal protection to prevent the unauthorised reproduction of photographs which they sold to the public in the form of *cartes-de-visite* (collectors cards size 6 x 10cm) or larger cabinets (measuring 10 x 16cm, so-called as they could be displayed on a cabinet or bureau). Photographers sold *cartes* and cabinets through a wide range of retailers such as print shops, stationers, booksellers and novelty shops,¹⁰¹ and the celebrity *carte* trade also had their own London wholesaler – Marion & Co –stocking thousands of celebrity photographs,

99 M Langford *The Story of Photography: From its Beginnings to the Present Day* (Oxford: Focal Press, 2nd ed., 1997), pp 11-16, 22-34 and 35.

100 25 & 26 Vic. c.68.

101 A Linkman *The Victorians : Photographic Portraits* (London: Tauris Parke, 1993) p 66.

with some 50,000 *cartes* passing through the firm's hands every month by 1862.¹⁰²

Technological change in the 1890s, however, changed these business practices. The introduction of 'process' reprographic techniques, for the first time enabled photographs to be printed alongside typeset material.¹⁰³ This opened up new channels for photographic reproduction in the illustrated press that, in turn, extinguished trade in *cartes* and cabinets. The 1890s saw the advent of a large number of illustrated papers reproducing photographs,¹⁰⁴ including the *Daily Graphic*, 'the first really successful picture paper' owned by advocate of social reform William Luson Thomas.¹⁰⁵ By 1899, an article in the *Contemporary Review* observed that 'some-half dozen journals' were 'entirely run' by the publication of photographs.¹⁰⁶ In 1904, the *Daily Mirror* was launched by Alfred Harmsworth, the proprietor of the *Daily Mail*, as the first half-penny daily illustrated newspaper,¹⁰⁷ and this was followed by the *Daily Sketch* in 1909, owned by Manchester based proprietor Edward

102 J Plunkett 'Celebrity and Royalty' in J. Hannavy, *Encyclopedia of Nineteenth-century Photography* (New York & London: Routledge, 2008) p 281.

103 L Brake, M Demoore, *Dictionary of Nineteenth Century Journalism* (Gent and London: Academia Press and The British Library, 2009) pp 304-6.

104 *Ibid.* 496.

105 *Ibid.* 157.

106 C Shorter, 'Illustrated Journalism: Its Past and Its Future', (1899) 75 *Contemporary Review* 481. 489. Reviewing a sample of illustrated papers for March

1899, Shorter noted that photographs outstripped the number of drawings for papers such as *The Illustrated London News* and *Black and White*. *Ibid.*

107 D Griffiths, *Fleet Street: Five Hundred Years of the Press* (London: The British Library, 2006) p 145.

Hulton.¹⁰⁸ While the *Daily Graphic* of the 1890s could print illustrated pages at a mere 10,000 copies per hour, by 1904 printing technology had improved so that the *Daily Mirror* could print 24,000 per hour.¹⁰⁹

Unlike the trade in *cartes* and cabinets, where the reproductions sold to the public were made by the photographers themselves, the new opportunities offered by the illustrated press took the reproduction and dissemination of photographs out of the photographers' 'own hands'.¹¹⁰ Photographers now sought to make a living through licensing the copyright in their images. Establishing a licensing income from press reproduction, however, was an uphill battle. By the 1890s, photographs were widely reproduced in the illustrated press, but these reproductions were generally unauthorised and no payment was made to the photographer. For photographers of the 1890s, then, the illustrated press were a new 'class of pirates'.¹¹¹

(b) *Broad v Baines* and the Photographic Copyright Union

¹⁰⁸ *Ibid.* 143-5 and 192-3; J. Everard, *Photographs for the Papers: How to Take and Place Them* (London: Adam and Charles Black, 1914) p 12.

¹⁰⁹ Griffiths, above n109, p 145.

¹¹⁰ Frank Bishop, President of the Photographic Copyright Union, commenting in 1897: 'Photographic Copyright by Frank Bishop', *British Journal of Photography* (hereafter BJP) 23.7.1897 471.

¹¹¹ BJP 2.10.1891 626.

Broad v. Baines, decided in 1891, drew attention to how photographic copyright law might transform the photographers' fortunes.¹¹² In that case, Lord Randolph Churchill had agreed to write a series of letters about his tour in South Africa to be published in the *Daily Graphic*. With one such letter, Churchill included a photograph of a coach being upset in South Africa, and the *Daily Graphic* proceeded to reproduce the photograph alongside the letter. The copyright of the photograph was in fact owned by the photographer Mr Broad, who applied for an injunction in the Court of Chancery to restrain the issue of any further copies of the *Daily Graphic*. Following the grant of the injunction, settlement was reached, obliging the defendant pay to Mr Broad an agreed sum by way of damages and costs.

While the ruling in *Broad* reflected copyright's nature as a property rule, for the photographic trade press, the focus was on the financial outcome; the case drew attention to the potential for photographers to turn the widespread reproduction of their photographs in the press to their financial advantage. After all, at the root of photographers' grievances was money, as the usual sources of income through the sale of *cartes* and cabinets was 'pretty well exterminated' by press reproductions.¹¹³ As the *British Journal of Photography* commented in considering the case:

¹¹² BJP 2.10.1891 627.

¹¹³ 'Photographic Copyright by Frank Bishop', BJP 23.7.1897 471.

Many of the illustrated papers pay large sums for the privilege of copying a painting; why should not a photographer receive something for permission to reproduce his pictures?¹¹⁴

Some two years later, complaints of ‘piracy’ by the illustrated press continued to be made, the photographic press noting that photographs were treated as ‘common property’, there being no culture of authorisation or payment.¹¹⁵ In July 1893, a meeting was held at the Hotel Victoria near Trafalgar Square of representatives of leading firms specialising in celebrity portraits. These included Alexander Bassano whose portrait studio on Old Bond Street was one of the ‘model establishments of the West End’,¹¹⁶ William Downey junior of W&D Downey whose studio in the ‘neighbourhood of Buckingham Palace’ who were specialists in ‘photographing titled personages’,¹¹⁷ Joseph J. Elliott of Elliott & Fry the ‘eminent firm’ based in Baker Street whose success in portraiture could ‘run portrait painters hard’,¹¹⁸ in addition to Frank Bishop of photographic wholesaler Marion & Co. At this meeting, a resolution was passed:¹¹⁹

114 Ibid.

115 ‘Piracy’, BJP 20.10.1893 667.

116 ‘At Home: Mr Alexander Bassano of Old Bond Street’, *Photographic News* (hereafter ‘PN’), 27.2.1880 98.

117 ‘At Home: W&D Downey at Ebury Street’ PN 30.4.1880 206.

118 ‘At Home: Messrs Elliott & Fry and Baker Street’ PN 30.1.1880 50.

119 ‘The Illustrated Papers and Copyright Photographs’, BJP 17.11.1893 732.

that a fee should be charged for all *copyright* photographs reproduced in any illustrated paper or periodical, and that the minimum charge should be one guinea; also that the name and address of the photographer should be legibly printed under each impression.¹²⁰

This resolution set the basis for the approach of photographers to the illustrated press going forward.

This approach was given a three month trial, following which the representatives held a further meeting, and it was unanimously agreed to renew the resolution.¹²¹ In January 1894, wider participation was sought, which resulted in the formation of the Photographic Copyright Union which invited membership from ‘photographers’ throughout the country.¹²²

The Union was established under the auspices of the London Chamber of Commerce, which allowed its members to form a ‘Trade Section’ for the purposes of ‘representing more effectually the interest of any particular trade.’¹²³ The Union was therefore formed to protect trade interests, with the focus on responding to the loss of a ‘once... lucrative

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² ‘A Photographers’ Copyright Union’, BJP 12.1.1894 20.

¹²³ Art.38, London Chamber of Commerce’s Articles of Association 1897, in ‘Papers and Minutes of the Photographic Trade Section of the London Chamber of Commerce’ held at Guildhall Library, London.

branch' of work to the illustrated press.¹²⁴ At the helm of the Union was a Committee comprised of representatives of the leading portrait studios mentioned above, including Frank Bishop, William Downey junior, Joseph Elliott, in addition to J. Lillie Mitchell of the London Stereoscopic Company, another leading firm in the celebrity portrait trade.¹²⁵ During the course of 1895, they were joined by representatives of leading firms in landscape photography, for example Frith & Co of Reigate (that had been founded by Francis Frith),¹²⁶ and others such as Gambier Bolton, a Fellow of the Zoological Society who lectured in natural history and specialised in photographs of animals.¹²⁷

The Union's first actions were to reduce the minimum royalty from one guinea to half a guinea for the use of 'each subject, for one issue only', in response to objections on the part of the illustrated press. It was reported that this new royalty level was communicated by the Union to the illustrated press in London, and that it was 'generally accepted.'¹²⁸ Attention was also given to spreading awareness of photographic copyright law amongst photographers, with a pamphlet explaining the general principles of photographic copyright law by Joseph Elliott sent to

124 'A Photographers' Copyright Union', BJP 12.1.1894 20, 21.

125 Ibid.

126 Paragraph 10 of the Union's Report 22.11.1895 at 'Photographers' Copyright Union', The Amateur Photographer 29.11.1895 361.

127 'Mr Gambier Bolton FZS', The Amateur Photographer, 20.12.1895 414.

128 'A Photographers' Copyright Union', BJP 12.1.1894 p.20, 21.

all members for free.¹²⁹ Just one month after its launch, in February 1894, it was reported that nearly 700 replies had been received expressing a wish to join the Union.¹³⁰ By April, membership had risen to 800, and a fund was set up for paying the cost of legal advice for members engaged in copyright disputes,¹³¹ with standard form licence agreements issued to all members by June.¹³² The result was that by November of the same year, the Union could declare that its members had recovered ‘upwards of 1,000*l*... in the shape of fees for the use of ... copyrights and penalties’ (around £120,000 today).¹³³ From that point onwards, the Union became a subscription based organisation, members paying a membership fee of 10s 6d per annum, and one third of any compensation received through an action brought by the Union’s solicitors was to be retained by the Union.¹³⁴

The illustrated press, however, argued that there was a lack of legitimacy to the photographers’ demands for licence fees; photographers, the press argued, were ‘ethically to blame for making ...

129 Ibid. JJ Elliott, *A Few Facts Relating to Photographic Copyright* (London: London Chamber of Commerce, 1894)

130 ‘Photographic Trade Section of the London Chamber of Commerce’, BJP 23.2.1894 123.

131 ‘The Photographic Copyright Union’, BJP 20.4.1894 241.

132 ‘Photographic Sections, Photographers’ Copyright Union’, BJP 22.6.1894 396.

133 ‘Photographers’ Copyright Union’, BJP 30.11.1894 765. The currency conversion into today’s values is based on the Inflation Calculator on the Bank of England website: <http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/flash/default.aspx>

134 Ibid.

money out of copyrights'¹³⁵ because 'a photograph is such a machine-made production that it is absurd, if not immoral, to put a value on any copyright in it....', in particular where the 'big price' demanded related to the notoriety of the subject, rather than the 'virtue or effort' of the photographer.¹³⁶ As a result, from 1895, the Union was put on the defensive in defending the legitimacy of the culture of payment that it sought to establish. Debates about photographic copyright became intertwined with wider questions of photography's artistic status. In this context, recognition of photographic copyright's parity with painting copyright became key to the Union's strategy. As one article in the *British Journal of Photography* commented:

No question has ever been raised as to the price that a painter may charge for his work... yet he has no greater property in his copyright than the photographer has in his. Both have the right to fix what price they like upon it...¹³⁷

Indeed, British photographers, following the passage of the US International Copyright Act of 1891,¹³⁸ were entitled to photographic

135 'The Enjoyment of Copyrights', BJP 20.9.1895 593.

136 Ibid.

137 'The Illustrated Press and Photographers', BJP 29.11.1895 755.

138 The Chase Act 1891 (26 Stat. 1106) hereafter, 'US Act 1891'. On this Act: C Seville *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth century* (Cambridge: Cambridge University Press, 2006), chapter 5.

copyright in the United States of America¹³⁹ and would have heard of reports of radical attacks that had been launched there against photographic copyright by the illustrated press. In 1898 the *British Journal of Photography* reported two attempts by the American illustrated press to have legislation passed restricting photographic copyright. The Shofroth Bill sought to abolish photographic copyright altogether for photographs that were not works of ‘fine art’, and the Hicks Bill provided a defence to infringement where a newspaper reproduced a photograph which was not a work of ‘fine art.’¹⁴⁰ Accordingly, the Photographers’ Copyright League of America, the Photographic Copyright Union would have been aware of the importance of ‘energetically agitating’ its cause to annihilate such threats.¹⁴¹

The complex and dynamic relation between copyright and wider debates about photography’s artistic status in the UK in the late nineteenth century, are fully explored elsewhere.¹⁴² The current analysis instead focuses on the factors that contributed to the stabilisation of photographic copyright as a right to remuneration by the first decade of

139 This was on the condition that, on or before publication in the USA or any foreign country, two copies of the photograph were delivered or deposited at the Library of Congress which had been printed from negatives *made within the United States* (US Act 1891 s.3).

140 BJP 26.8.1898 546.

141 Ibid. The Photographers’ Copyright League of America was established in 1895 to defend the interests of photographers against the illustrated press.

Napoleon Sarony was one of its prominent members. ‘Concerning Copyright in America’, PN 24.5.1895 333.

142 *Art and Modern Copyright: The Contested Image* by Elena Cooper to be published by Cambridge University Press.

the twentieth century, such that press photography became a lucrative business. As the Photographic Copyright Union could declare in 1903, unlike the 1890s, when ‘the publishers and proprietors of newspapers could not understand the demand for payment to the photographers’:

Now we are glad to say that there are no respectable publishers of books, newspapers or magazines who desire to make use of a photographer’s work without payment. It is a very great advantage to all photographers, whether members of the Union or not, to have got firmly established this principle, which all sensible men admit the justice of.¹⁴³

Indeed, by 1905, photographers were advised that ‘reasonably obtainable fees’ for press photography were at least double the minimum rate set by the Union of 10s 6d per reproduction, with between £5 5s to £10 10s obtainable for a whole page reproduction and £2 2s to £3 3s for a half page.¹⁴⁴

What explains the stabilisation of photographic copyright as a right to remuneration by the early twentieth century? Alongside the increasing commercial organisation by photographers, and the standardisation of licensing terms promoted by the Photographic Copyright Union, were

143 Address of Frank Bishop, the Photographic Copyright Union’s President, in 1903. ‘Photographic Copyright Union’, BJP 6.2.1903 815.

144 HS Ward, CW Ward Photography for the Press (London: Dawbarn & Ward, 2nd ed., 1905) pp 20-21.

two other developments that exhibit parallels with the operation of photographic copyright in more recent times. We examine these in turn.

(c) The Emergence of Picture Libraries

First, the early twentieth century saw the emergence of the first bureaucratic management of photographic copyright, facilitating reproduction in the illustrated press of any subject that might become topical (eg celebrities, places, animals, famous landmarks). In 1901, the first picture library was established - the Illustrated Press Bureau¹⁴⁵ - and by 1909 there were at least a dozen such agencies.¹⁴⁶ Photographers would send their photographs to the agency, which would centrally store and index the photographs according to their subject matter. Should a particular subject become of interest to the press (eg a particular celebrity or a landmark featured in a newsworthy story), the role of the agency was promptly to offer photographs to all editors, and then collect a royalty for reproduction: the agency would pay the royalty to the photographer, subject to the agent's commission, of around twenty five per cent in respect of 'good' agents.¹⁴⁷

¹⁴⁵ 'The Illustrated Press Bureau', BJP 11.1.1901 17.

¹⁴⁶ Ibid. HS Ward, CW Ward, *Photography for the Press* (London: Dawbarn & Ward, 3rd ed., 1909) p 70.

¹⁴⁷ Ward and Ward, *Ibid.* pp 28-29.

The agencies also sourced news photographs: photographs that recorded topical events, often referred to as ‘photograms’ to denote their nature as the photographic equivalent of a telegram communicating the essential facts of a news story. As the *British Journal of Photography* noted in 1903, ‘the modern craving is for facts’ and a photograph ‘certifies as well as illustrates the incident’; photographs had a ‘‘certificate’ character’ as ‘the photographer must have been on the spot’ unlike ‘the artist in a studio on the Thames Embankment’ that would give a story ‘his fancy rein’.¹⁴⁸ Indeed, in a bid to ensure photographs of newsworthy events could be sourced, agencies often appointed ‘special press photographers’: photographers to whom the agency would provide ‘suggestions of speculative work likely to be profitable’, as a particular news story emerged.¹⁴⁹

In this way, agencies became a central feature of trade in photographic copyright. As the practical manual *Photography for the Press* advised photographers in 1909:

148 ‘Some Aspects of Photographic Copyright’, *BJP* 1.9.1905 683. Henry Snowden Ward’s guide to press photographers states: ‘A press photograph ‘must tell its story plainly. Its value depends on this and on the importance of the theme of which it treats. A bad print of a good subject may be worth pounds where the best print of a subject without interest will not be looked at by any editor.’ (Ward and Ward, above n 145, p25). Also: ‘real pictorial work gets very little appreciation in the daily illustrated press... Pictures that are news, and that tell their own tale, are what are demanded, even when devoid of all pictorial character’ (Ward and Ward, above n 147, p27).

149 *Ibid* pp 29-30.

...only in exceptional cases can one afford to do without a press agent... by means of these agents a photographer is able to get his work offered to a much larger field than if he handled it himself. ... You receive a greater income from your photograms than you would if handled by yourself.¹⁵⁰

The bureaucratisation of the photographic trade through picture libraries facilitated the conclusion of transactions between photographers and the illustrated press, and in turn, the collection of royalties. Indeed, as one co-author explains in detail in a monograph to be published next year,¹⁵¹ the bureaucratisation also stabilised photographers' income, by diffusing arguments about the relation between photography's creative status and copyright; copyright transactions were experienced (as Thomas Streeter argues in relation to the role of collecting societies as regards broadcast copyright) in a manner akin to 'paying taxes',¹⁵² and this obviated the need for any substantive discussion of copyright principles such as authorship and originality, which had dominated the copyright debates in the late 1890s.

(d) Press Photography and the Courts

¹⁵⁰ Ibid. pp 28-29.

¹⁵¹ *Art and Modern Copyright: The Contested Image* by Elena Cooper to be published by Cambridge University Press.

¹⁵² Streeter, above n 11, p 312.

The second factor that contributed to the entrenchment, by the early twentieth century, of the photographers' right to remuneration from reproduction in the illustrated press, was the support of the Courts for the basic principle that underpinned photographers licensing practices: the principle of a payment per use. While, as we will now see, the courts were sometimes unsympathetic to claims for damages (section 11 1862 Act), claims for statutory penalties (section 6 1862 Act) were successful;¹⁵³ following the ruling in *Ex parte Beal*, the courts were obliged to grant a penalty per infringement¹⁵⁴ and this principle was applied, apart from one early exception (*Melville v Mirror of Life*, decided 1895),¹⁵⁵ in a number of cases against the illustrated press. In these cases, the courts considered themselves obliged to grant a penalty of one coin of the realm per infringement,¹⁵⁶ and, as we will now see, in

153 The nature of statutory penalties was discussed by Wright J in *Sherras v De Rutzen* [1895] 1 QB 918, 922 as 'acts which... are not criminal in any real sense, but are acts which in the public interest are prohibited under penalty'.

154 *Ex parte Beal* (1868) LR 387, 395 per Blackburn J, Mellor and Lush JJ concurring.

155 *Melville v Mirror of Life* [1895] 2 Ch. 531. *Melville* concerned the unauthorised reproduction of a photograph of the athlete George Crossland in a weekly paper *The Mirror of Life*. Kekewich J awarded a single penalty of 5*l*, rejecting the claimant photographer's submission that a penalty at the statutory maximum – 10*l* – should be awarded for each of the 8,000 unauthorised copies made (532-533 and 537). Kekewich J. considered that, as the defendant had published the photograph on the direction of the sitter, the defendant had 'not acted in a way to expose themselves to any serious penalty' (at 537).

156 This approach, followed in *Ellis v Horace Marshall* and *Nicholls v Parker*, discussed below, is explained in a later case of *Hildesheimer v WF Faulkner* (1901) Vol.70 LJ Ch. D 800, 802-803, which did not concern the illustrated press; the judges in *Hildesheimer* (a case in which the defendant, who reasonably believed that it owned copyright in the works in question, printed over a million infringing copies as small pictures included with packets of cigarettes) instead favoured the approach of assessing penalties 'by some relation to the offence' or what 'in justice ought to be awarded' even if the result was that each penalty was only a fraction of a single coin of the realm (*Ibid.* 803 per Collins LJ, 804 per Romer LJ).

actions against the illustrated press where the print run was high, this inevitably produced a significant amount, even though a penalty of only a farthing (the lowest coin of the realm) was applied.

For example, in *Ellis v Horace Marshall* (1895) which concerned the unauthorised reproduction of a photograph of an actress in an illustrated paper – a Miss Moore in *The Ludgate Monthly* - Charles J awarded ‘no damages, since they are but nominal’ but proceeded to award 26l 0s 10d by way of penalties (calculated as one farthing per infringement¹⁵⁷) on the basis that ‘I have, according to the authorities no alternative... since each copy constitutes a separate offence’.¹⁵⁸ Similarly, in *Nicholls v. Parker* (1901),¹⁵⁹ Wright J., commented that he did not see any ‘way to get out of the law laid down’ in *Re Beal* and applied in *Ellis v Marshall*, and held that a penalty of a farthing was to be paid by the defendant for each of the 86,230 infringing copies printed in a paper called the *Golden Penny*, resulting in an award of £89 11s 8d by way of penalties (around £10,000 today); in that case, the claimant was a photographer based in Johannesburg, and the defendant had obtained a

¹⁵⁷ The calculation of penalties in *Ellis* – as a farthing per infringement – appears in the report of a subsequent case: *Hildesheimer v WF Faulkner* (1901)

Vol.70 LJ Ch. D 800, per Collins LJ at 803.

¹⁵⁸ *Ellis v Horace Marshall* (1895) LJQB 757,759. There is no detail given as to the number of unauthorised copies printed by *The Ludgate Monthly*. The leniency of the Court as regards damages, is perhaps explained (as in *Melville*) by the fact that the photograph had been published on the directions of the sitter.

¹⁵⁹ ‘Nicholls v. Parker’, *The Times* 8.5.1901 p.3.

licence to reproduce the photograph in question - of 'Officers buying Shells as Curios from Kaffir Women' - in one newspaper they owned (the *Graphic*) but not in the publication in question, which they also owned (the *Golden Penny*).¹⁶⁰ In the 21st century, the enforcement of photographic copyright by the IPEC SCT, dispels the argument commonly advanced by defendants, that everything on the internet is understood to be made available for free reproduction;¹⁶¹ so, in the early twentieth century, court judgments played an important role in supporting the successful efforts of photographers in establishing a culture of payment for reproduction in the illustrated press.

4 Conclusions

The IPEC SCT and historical case studies explored in this article, while rooted in the contexts of very different times, exhibit remarkable similarity. In both case studies, copyright authors seek a culture of payment for use in the face of resistance from potential licensees following relatively new technological developments: the assertion today by certain users that works on the internet are free for use and the attacks

¹⁶⁰ The case was subsequently appealed on quantum and was ordered to be sent back to Wright J. for reconsideration. However, there is no report of a further hearing: 'Nicholls v. Parker', *The Times*, 21.3.1902 p.12. The currency conversion into today's values is based on the Bank of England Inflation Calculator, above n134.

¹⁶¹ Text to n 92-96.

on photography's artistic status at the turn of the twentieth century following the emergence of the illustrated photographic press. A number of common elements feature in photographers' attempts to counter these arguments today and in the past. For example, in both the past and today, photographers are collectively organised and standardise their approach to infringement: today through the influence of photographer membership bodies and informal chat groups, and in the past the initiatives of the Photographic Copyright Union.¹⁶² Further, both case studies reveal the importance of court judgments in providing legal force to the underlying principle of payment for use: today the rulings of the IPEC SCT, and in the past High Court actions awarding a penalty for each infringement.

These points of similarity aside, however, a broad historical perspective also highlights an important difference about the IPEC SCT, within the Calabresi/Melamed framework: a change in the relation between court rulings – applying doctrinal rules in which copyright is framed as a property rule – and the bureaucratisation of exploitation (ie exploitation through collecting societies/picture libraries) – in which copyright takes on features of a liability rule by providing, as Robert Merges described, ‘a general rule of compensation applicable to all who take the right’.¹⁶³ The bureaucratisation of copyright exploitation, as we

¹⁶² Text to n 124 and n 77.

¹⁶³ Merges, above n 1, 1303

have shown, is far from new; indeed, as we have shown, it has a longer history than accounted for in existing scholarship.¹⁶⁴ Yet, in the late nineteenth and early twentieth centuries, court rulings on photographic copyright were relatively well insulated from the influence of picture libraries; cases against the illustrated press were, in general, framed as actions to recover statutory penalties for infringement, probably because *ex parte Beal* made clear that a penalty was to be recovered per reproduction. By contrast, our analysis of IPEC SCT photographic copyright rulings reveals cases to be closely shaped by the licensing practices of a particular sector (freelance professional photographers). IPEC SCT cases predominantly concern quantum of damages, and the licensing rates offered by picture libraries serve as an important benchmark. Copyright doctrine reflects a property rule rationale: rightholders may request an injunction and the test for calculating damages set out by the House of Lords in *General Tire*, requires the Court to enquire into a ‘strictly individual’ bilateral bargain between willing licensor and licensee in the position of the claimant and defendant (an approach which

¹⁶⁴ Thomas Streeter connects bureaucratisation with developments in broadcasting copyright in the 1920s (above n 11) and Bellido and Macmillan see the emergence of similar trends in music copyright as stemming from changes introduced by the Copyright Act 1911 (above n 12), discussed at text to n12-14.

Our account also differs from the premises of scholarship about the bureaucratisation of photographic copyright in more recent times, assuming the emergence of picture libraries to be a recent phenomenon: Holland, above n 13, 295.

reflects copyright's 'property rule' rationale).¹⁶⁵ However, in the IPEC SCT, injunctions are rarely threatened or claimed, and collectively determined standard picture library rates, offered to whoever seek them, often serve as an important proxy in calculating damages; indeed, as we have seen, in a large number of cases, picture library rates are applied to calculate damages without any modification. In this way, in IPEC SCT rulings, unlike the rulings of the High Court in the historical case study, the bureaucratisation of copyright exploitation infiltrates the interpretation of copyright doctrine, through the influence of standards set by picture libraries. Whereas Thomas Streeter – in his study of broadcast copyright – presented bureaucratisation (ie exploitation by collecting societies) as an administrative 'simulation' of property - 'a representation once removed... that has taken on a life of its own, divorced from its referent'¹⁶⁶ - the legal rulings of the IPEC, in utilising picture library standards, provide aspects of the bureaucratic 'simulation' of property with legal force; bureaucratic standards – rather than mere 'representations' - become part of copyright's legal reality through their judicial application in court decisions. This impacts on the nature of

¹⁶⁵ Merges, above n 1, 1392: '... liability rules entail 'collective valuation'... Property rules are the opposite: strictly individual valuation with prices set by the right holder alone.' Also Merges, *Ibid*, 1303, referring to licences offered by collecting societies: 'The generality of these policies merits the label "rule" as distinguished from mere "terms" of a specific bilateral contract.' See also text to n 1-4.

¹⁶⁶ Streeter, above n 11, p 325.

copyright within the Calabresi/Melamed framework, as applied in this particular context: copyright law as applied by the IPEC SCT to the practices of freelance professional photographers, takes on features of a liability rule.

Our observations about the nature of photographic copyright as applied in the IPEC SCT, opens up a number of avenues for critical reflection about both how the law today is applied by the IPEC SCT, as well as how the law might be re-imagined by policy-makers. First, copyright's property rule basis raises the question of the appropriateness of the IPEC SCT's frequent resort to picture library rates as a proxy for what would have been agreed in a bilateral bargain between licensor and licensee in the particular position of the claimant and defendant. This is especially the case where the claimant has expressly decided not to be a member of a picture library;¹⁶⁷ the effect of applying picture library rates to non-members is to extend the influence of picture library standards beyond their contractual mandate.

Secondly, our case study also enables us also to think critically about the approach of policy-makers to changing copyright rules, particularly with a view to reducing transaction costs in the internet environment. Copyright policy initiatives, most recently, for example, the proposal for a new press-publishers neighbouring right as part of the

¹⁶⁷ Eg, *Doré v Hendrich* at [16].

Digital Single Market proposals put forward by the European Commission, continue to start from a property rule premise; an essential attribute of intellectual property rights is that they are rights to authorise or prohibit restricted conduct.¹⁶⁸ While there are examples of recent legislative initiatives reducing copyright to a liability rule, interestingly, this is premised on the unworkability of a property rationale in certain circumstances. For example, the Collective Rights Management Directive, facilitating multi-territorial licensing of music through collecting societies, concerns rightsholders being ‘remunerated for uses which they would not be in a position to control or enforce themselves’.¹⁶⁹ Similarly, under the Orphan Works Directive, copyright is only reduced to a right of remuneration for the period in which the rights-owner could not be identified or located after a diligent search; where a rights-owner wishes to put ‘orphan work status’ to an end, the property rule model of copyright is reinstated.¹⁷⁰ In both these examples, therefore, copyright is reduced to a liability rule only in circumstances where a property rule paradigm is seen as unworkable. The analysis in this paper suggests that both today and historically, certain groups of rights-holders

168 Art 11(1), Proposal for a Directive on Copyright in the Digital Single Market, COM(2016) 593, of 14/9/2016, providing ‘publishers of press publications’ with the rights of reproduction and communication to the public (under the Information Society Directive, 2001/29/EC Art 2 and 3) in respect of the ‘digital use of their press publications’.

169 Directive 2014/26/EU, Recital 2.

170 Directive 2012/28/EU, Art.5 and 6(5).

may primarily be interested in copyright as a source of remuneration. Further, empirical work may show that certain rightsholders are happy to default to picture library rates in the calculation of that remuneration. This observation highlights the need for further empirical investigation about the needs of rights-holders by those seeking to reform the law, which may, in turn, re-open debates about the desirability of a departure from a property rule framework in a broader range of circumstances.¹⁷¹

¹⁷¹ Eg, Séverine Dusollier and Caroline Colin, 'Peer-to-Peer File Sharing and Copyright: What Could be the Role of Collective Management?' (2010-2011)

34 Colum. J.L. & Arts 809; Rebecca Giblin, 'Reimagining Copyright's Duration' from Rebecca Giblin & Kimberlee Weatherall (eds) *What if We Could Reimagining Copyright?* (forthcoming ANU Press, 2017, available on SSRN) p23; Christian Handke, Bodo Balazs, Joan-Josep Vallbé, 'Going Means Trouble and Staying Makes it Double: The Value of Licensing Recorded Music Online' (2016) 40 *Journal of Cultural Economics* 227. Neil W. Netanel 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing' (2003) 17 *Harv. J. L. & Tech*, 1; Mark A Lemley, above n 1; Dotan Oliar, above n 1. For pre-internet debates: Jerome H. Reichman, above n 1 cf. Robert P Merges, above n 1.