

# Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010-2013

Christian Helmers<sup>a</sup>

Yassine Lefouili<sup>b</sup>

Luke McDonagh<sup>c</sup>

<sup>a</sup> Santa Clara University

<sup>b</sup> Toulouse School of Economics

<sup>c</sup> Cardiff University

June 22, 2015

## ABSTRACT

*Over the course of this report, we analyse both quantitatively and qualitatively the impact of the 2010-2013 reforms undertaken at the former Patents County Court (PCC), now the Intellectual Property Enterprise Court (IPEC). The reforms introduced a number of changes staggered over the period 2010-2013, including a cap on recoverable costs and damages, a reduction of the length as well as complexity of court actions, and a reconstitution of the PCC as the IPEC. In our quantitative case counts we find that there has been a large increase in the quantity of cases filed at the IPEC, post-reforms, while through a comparative study of the High Court (HC) and Patents Court (PHC) we show that with the exception of patent cases, there has not been a corresponding increase in cases at the higher level. We find quantitative and qualitative evidence that the costs cap and active case management by the IPEC judge have been the most influential reforms with respect to the large increase in cases filed at the IPEC post-reforms. We also note that case filings by SMEs have increased substantially following the reforms, fulfilling one of the key aims of the reforms. Importantly, we find that this effect is driven by changes at the extensive (more claimants) and intensive (more cases per claimant) margins of litigation behaviour at the IPEC. Finally, we provide a theoretical model that allows us to gauge the effect of the reforms on those IP disputes that never reach a court. Our theoretical predictions suggest that in addition to encouraging more IPEC case filings, the reforms have had the effect of increasing the quantity of out-of-court settlements as well.*

**KEYWORDS:** Litigation, intellectual property, court reform, UK

# 1 Introduction

Following the Intellectual Property Court Users Committee's final report in 2009 and the [Jackson Review](#) of the Civil Litigation Costs published in 2010, the Intellectual Property Enterprise Court (IPEC) – which was until October 2013 known as the Patents County Court (PCC) – has undergone a series of comprehensive [reforms](#).

The aim of the reforms was to improve access to the court, especially for small and medium-sized enterprises (SMEs), primarily through streamlining the court's procedures, lowering the costs of litigation, and speeding up the resolution of claims at both the IPEC 'streamlined multi-track' (MT) level and the newly inaugurated [small-claims track](#) (SCT) level. Importantly, the reforms sought to achieve a greater separation in practice between the types of cases heard at the IPEC and those heard at the High Court (HC) and Patents Court (PHC). The objective was to ensure that the IPEC hears less complex claims than those heard at the HC/PHC, while also offering litigants a speedier resolution system within which both recoverable costs and damages awards are limited. In particular, a recoverable costs scale was introduced, featuring an overall cap of £50,000 and a £500,000 limit was placed on damages.

To some extent the reforms have already been heralded as a success,<sup>1</sup> despite the fact that no systematic impact evaluation has been carried out up to this point, and reliable data concerning the types and amounts of cases taken to the court have not been available to researchers. With this in mind, in April 2013 the IPO commissioned this piece of research with the aim of comprehensively evaluating the effectiveness of the IPEC reforms with respect to the above objectives, with a focus on analysis of both quantitative and qualitative data.

The report first outlines the legal and procedural background of the IPEC and HC/PHC; then examines the reforms which have taken place since 2010; and finally it provides (i) an examination of qualitative data on the IPEC reforms gathered during 2014, (ii) quantitative analysis of litigation at the IPEC and HC/PHC for the period 2007-2013, as well as (iii) an assessment of the impact of the reforms on IP disputes that are not taken to court.

## 2 Legal background

Before the motivations behind the reforms and the specific reforms themselves are examined, it is important to take note of a number of relevant characteristics of the PCC/IPEC and the HC/PHC within the legal system in England and Wales, as these characteristics frame the relationship between the IPEC and the HC/PHC, both before and after the reforms.

The Patents County Court (PCC) was established in 1990 with a 'special jurisdiction' to hear proceedings related to patents and registered designs, and the 'ordinary jurisdiction' of a County Court to hear tortious actions, such as copyright infringement, trade mark infringement, and passing off claims (though initially not all IP matters, such as certain trade mark and designs issues, unless these claims were ancillary to claims arising within

---

<sup>1</sup>Fox (2014: 1) states 'The IPEC now offers a highly efficient and cost-effective means of resolving intellectual property disputes for individuals and businesses of all sizes, but with a string emphasis on providing access to justice for small and medium-sized enterprises (SMEs).'

the special jurisdiction).<sup>2</sup> As detailed below, the 2010-2013 reforms have now placed the IPEC on an equal footing with the HC/PHC with respect to its ability to hear the vast majority of IP matters.

As stated above, in IP cases the Chancery Division of the High Court of England and Wales is split into the HC and the more specialist PHC.<sup>3</sup> The HC typically hears cases concerning copyright, trade marks (UK/Community) and passing off, unregistered designs (UK/Community) and breach of confidence; meanwhile, the PHC typically hears cases which involve patents, registered designs (UK/Community) and plant variety rights.

It is worth noting that the common law legal system operates within England and Wales, which means that lower courts, such as the IPEC, are bound by the decisions of higher courts, such as the HC/PHC, via the system of precedent. In line with this, appeals from the IPEC and the HC/PHC are heard by the Court of Appeal (though the HC can hear appeals on interim matters from the IPEC). Appeals on a point of law may be further heard by the UK [Supreme Court](#). Where relevant, reference can be made to the Court of Justice of the European Union (CJEU).

The Civil Procedure Rules (as amended following the recent reforms) govern litigation at the IPEC and HC/PHC.<sup>4</sup> Of particular note within the HC/PHC is the disclosure requirement, which is wide-ranging and on-going throughout the duration of the case, and the ability to call expert witnesses. These were present at the pre-reform PCC as well. However, as discussed further below, in line with the active case management (ACM) that now takes place at the IPEC – which includes the limiting of claims – both the requirement of disclosure and the use of expert evidence are now much more limited at the IPEC level than at the HC/PHC level.

With respect to the relationship between the IPEC and the HC/PHC, the various jurisdictional changes in place at the IPEC between the period of our study – 1 January 2007-31 December 2013 – are detailed below (and are further outlined in Appendix D). A key aspect of this relationship relates to transfers: the IPEC may transfer cases to the HC/PHC of its own accord (and the HC/PHC may do likewise by transferring cases to the IPEC), in consideration of the size and resources of the parties and the value and complexity of the claim(s) (Fox, 2014: 169-172).

In England and Wales the substantive legal issues and the issues of costs and damages are dealt with separately, and the losing party will typically bear the brunt of the costs of the case on an issue-cost basis – the so-called ‘loser-pays rule’ (McDonagh and Helmers, 2013a). The specific ways in which both the IPEC reforms and the general reforms to civil litigation, which arose from the Jackson reforms, have altered the administration of costs at the IPEC and HC/PHC are dealt with below.

At the IPEC and the HC/PHC litigants may be represented before courts by appropriately qualified and certified barristers, solicitors, patent attorneys and trade mark attorneys.<sup>5</sup> Legal representation is not required at the IPEC SCT level, though parties are free to obtain

---

<sup>2</sup>Fox (2014: 3) referring to s.15(1) County Courts Act 1984, Patents County Court (Designation and Jurisdiction) Order 1990, and Patents County Court (Designation and Jurisdiction) Order 1994 and noting that the PCC’s ability to hear trade mark and designs matters was extended during 2005-6 with the enactment of The Community Designs (Designation of Community Designs Courts) Regulations 2005 and The Community Trade Mark Regulations 2006.

<sup>3</sup>See [MoJ](#).

<sup>4</sup>See [MoJ](#).

<sup>5</sup>See [Right to Conduct Litigation and Rights of Audience 2012](#).

it if they wish.

### 3 The Motivations Behind the Reforms

Although the aim of the establishment of the PCC was to enable SMEs (in particular) to access justice, during its first two decades of existence there was a perception that the court had struggled to achieve this goal (Fox, 2014: 3-4). In particular, the PCC was perceived as featuring a number of major ‘procedural shortcomings’ which affected its ability to hear low value claims (Fox, 2014: 4):

- The PCC ‘lacked any mechanisms for controlling what parties filed in a case or for keeping cases moving’ (Fox, 2014: 4).
- The PCC lacked the ability to place limits on the value of a case brought before it.
- From 1999 onwards, the Civil Procedure Rules (CPR) applied equally to the PCC and the HC/PHC, though patent attorneys retained the ability to conduct litigation at the PCC (the County Court procedures that had been used by the PCC up to 1999 were abolished).<sup>6</sup>

The cumulative effect of these three shortcomings was that litigation could be undertaken at the PCC and the HC/PHC ‘with the same procedures and the same price’ - a situation that was perceived as blurring the lines between the types of cases heard at the PCC and the HC/PHC, and which did little to encourage SMEs to enforce their IP rights at the court (Fox, 2014: 4).

In addition to the shortcomings described above, there was one other significant issue:

- The PCC was split between ‘special’ and ‘ordinary’ jurisdictions – an awkward status which among other things restricted to some extent the types of remedies that were available in certain cases, such as asset freezing orders and orders for search and seizure (Fox, 2014: 7-9).

In light of the above perceived problems, the motivations behind the reforms were primarily threefold: (i) a perceived need to encourage and enable SME access to justice in IP matters; (ii) a drive to streamline the PCC’s procedures (including allowing it to place limitations on costs); and (iii) the necessity of ensuring fairness and legal certainty by putting the PCC on an equal footing with the HC/PHC in terms of the types of cases heard and the remedies available.

### 4 Overview of the PCC/IPEC Reforms from 2010 to 2013

The procedural reforms began with the coming into force of the Civil Procedure (Amendment No. 2) Rules 2010 (and related amendments to the Practice Directions). These reforms took effect from October 1, 2010 (a new judge – Mr Justice Colin Birss, who has since moved on to the HC/PHC – took over at the PCC at the same time). The reforms consisted of several stages, and were staggered over a number of years between 2010 and 2013:

---

<sup>6</sup>See [MoJ](#).

### **1. October 2010 – Procedures and Costs cap:**

- Procedural changes at the PCC – the most crucial of these are the introduction of active case management (ACM), early identification of the issues by the judge, and a limit on the time to be taken at trial;
- Introduction of a recoverable costs scale with a total cap of £50,000 (with an additional cap of £25,000 relating to hearings concerning damages).

### **2. June-October 2011 – Damages cap:**

- June 2011: £500,000 damages (and accounts of profits) cap applied to patents and designs;
- October 2011: £500,000 damages cap extended to all IP claims.

### **3. October 2012–April 2013 – Introduction of Small Claims Track and implementation of Jackson Review costs changes:**

- October 2012-April 2013: Introduction of the small claims track (SCT) in October 2012. Under CPR part 63.27 the SCT can hear copyright, trade marks and passing off, databases, breach of confidence, and unregistered designs matters – but not cases concerning patents, registered designs and plant variety rights. The SCT consists of informal hearings heard by a District Court judge without the need for legal representation. Although final injunctions and damages can be awarded, interim injunctions are not available on the SCT. Decisions of the SCT may be appealed to the judge at the IPEC main track (MT). SCT claims are limited to a value of £5,000; SCT Costs recovery – as with all small claims track matters – is set at a level of £260. In April 2013, the SCT Claims limit was raised to a value of £10,000.
- April 2013: Coming into force of the general civil litigation reforms (in most cases applicable to both IPEC and HC/PHC) arising from the Jackson Review. Under the new rules judges are to apply stricter case management rules – with a focus on litigant compliance with court directions and orders, such as under CPR 3.1(8) – and a new proportionality test in the assessment of costs and in the HC/PHC new costs management and budgeting procedures for cases with claims valued at less than £2million (CPR 3.12-3.18, PD 3E and CPR 31.5). There are also changes to costs arrangements between clients and legal representatives – successful parties who have ‘Conditional Fee Agreements’ (CFAs) or ‘after-the-event’ (ATE) litigation insurance in place can no longer claim the CFA ‘success fee’ and ATE premium as part of costs recovery from the other side; instead damages-based agreements (DBAs) are permitted in contentious litigation. In addition, CPR Part 36 (offers to settle) is reformed to include new sanctions aimed at encouraging early settlement of disputes.

### **4. October 2013: IPEC**

- The Intellectual Property Enterprise court (IPEC) takes over the jurisdiction of the PCC. The IPEC’s jurisdiction as a specialist court operating within the Chancery

Division of the High Court of England and Wales means that it is now equal to that of the HC/PHC in virtually all IP matters.<sup>7</sup> Thus, in accordance with CPR part 63 and Practice Direction (PD) 63 the IPEC can hear cases concerning patents, designs (registered/unregistered, UK/Community), trade marks (UK/Community), passing off, copyright, database right, other rights conferred by the Copyright Designs and Patents Act 1988 and actions for breach of confidence.<sup>8</sup> From 1 October, existing PCC cases became IPEC cases. For cases filed after 1 October 2013, the costs cap is exclusive of court fees, court order enforcement costs and wasted costs.

The cumulative effect of these reforms is that the IPEC has been utterly transformed as a venue for IP litigation.<sup>9</sup> The remainder of this report examines the qualitative and quantitative impact of these reforms.

## 5 Overview of Qualitative Research

The qualitative research was undertaken from May 2014 through December 2014. The objective was to complement the quantitative data analysis by collecting and analysing

- (i) the views of legal practitioners possessing IPEC experience concerning the impact of the IPEC reforms
- (ii) the views of patent litigants/companies who have used the IPEC and PHC concerning their experience of using the courts system pre- and post-reforms

### 5.1 Interview Methodology and Analysis

In-depth interviews took place (via phone or in person) with a total of 17 participants during the period May 2014-October 2014. The participants were all drawn from the legal sphere. The interviewees break down into the following categories: 9 were solicitors, three were senior barristers, two were patent attorneys, one was a trade mark attorney, and the final two were UK judges.

The interview questions are shown in the appendix F. For the purposes of undertaking this case study, two interviews with judges and one with a solicitor were undertaken during May-June 2014 in order to pilot the interview questions. These questions received positive feedback from the interviewees, and the interview responses provided the authors with a great deal of useful data. Thus, no changes were made to the questions for the remaining interviews – undertaken during June-October 2014 – and the questions remained as indicated in the appendix. For reasons of anonymity, the interviewees quoted below are not

---

<sup>7</sup>Fox (2014: 10) noting, however, that unlike the HC/PHC the IPEC cannot hear appeals from decisions of the UK IPO. See also Section 17 and Schedule 9 of Crime and Courts Act 2013 and Article 3(a) Crime and Courts Act 2013 (Commencement No.3) Order 2013.

<sup>8</sup>See [MoJ](#) p. 4.

<sup>9</sup>In line with PD 63, paragraph 16, County Courts with a Chancery District Registry may also hear IP matters - though not claims concerning registered rights such as patents, registered designs and plant variety rights. County Court IP cases can be transferred to the IPEC MT (or HC) from the various County Courts if appropriate e.g. due to case complexity.

identified by the various categories listed above e.g. solicitor, barrister, patent attorney – instead, they are simply referred to as ‘interviewees.’

***Has access to justice for SMEs and Individuals improved since the reforms came in?***

The consensus that emerged from the interviews with participants from the legal community is that the reforms have been successful with respect to the goal of increasing access to justice for IP right holders. Indeed, the interviewees were unanimous in their assessment that the ability of SMEs and individuals (in particular) to gain access to justice has greatly improved – in this regard, it was noted that the reforms have been successful at broadening and increasing access for all types of litigants, from small-scale inventors and SMEs, to mid-range and large-size companies. On this point, one interviewee remarked:

*“The reforms have led to a vast improvement in access for SMEs and individuals.”*

Meanwhile, another interviewee stated:

*“Access has certainly increased for SMEs and individuals – and even some of our big clients are using it.”*

Furthermore, the qualitative interview data illustrate that the impact of the IPEC reforms has been felt in every area of IP, with 88% of interviewees noting that clients holding patents, copyrights, trade marks and designs now feel more confident about undertaking litigation at the court – regardless of whether they tend to act as claimants or as defendants. On this point, one interviewee stated:

*“In addition to there being more claimants, the defendant side of things has increased since the reforms because unlike before it is now actually practical to defend a case at the IPEC. Under the previous regime clients tended to give in early on rather than defend themselves because of the costs of litigation.”*

88% of interviewees stated that they have a highly positive overall perception of the reforms, while the remaining two interviewees stated that while access has improved, more can be done. Overwhelmingly, therefore, there is a perception within the legal community that the reforms represent an improvement on the prior situation with respect to enabling access to justice.

***Which of the reforms - costs cap, damages cap, ACM, SCT - has had the biggest impact? Is there anything more that can be done with respect to these reforms to improve the situation further?*** (questions 2 & 3 of the interview)

Overall, the majority of interviewees – 53% – stated that the decision to cap the costs at a ceiling of £50,000 at the IPEC MT has proven to be the most important reform with respect to attracting litigants to the court. The reason for this is that post-reform the litigant knows what his or her exposure to costs will be in the event of loss. In other words, the existence of the cap gives litigants confidence that the costs of litigation – either as a

claimant or defendant – will not outweigh the benefits. As one interviewee observed:

*“The costs cap gives certainty to litigants about their potential exposure.”*

Regarding the £50,000 level of the IPEC cap, the majority of interviewees – 82% – stated that the £50,000 level is appropriate for the type of litigation that takes place at the IPEC. Nevertheless, five interviewees made the additional point that the actual costs awards granted by the IPEC judges never actually reach £50,000 – in fact, awards are typically below £40,000. The reason for this is that the judge has discretion to determine the level of costs for each stage based on the complexity of the relevant issues involved – even if a party has exceeded the amount of the scale, the judge may decide not to award the maximum amount. On this point, one interviewee remarked:

*“My view is that the £50k cap is the right one. However, in practice the cap is more like £30-35k because the caps in relation to individual stages of the action tend to add together to ensure that costs recovery never gets close to £50k. Indeed, I think that the largest costs recovery to date in the IPEC is sub-£40k, at least based on reported decisions. I suspect this doesn't much matter – it is the overall cap which most attracts litigants to this court, followed by the streamlined procedure (which in turn reduces overall costs compared to the typical High Court IP infringement action).”*

17% of interviews gave an alternative view on the issue of whether £50,000 represents the optimum level. One alternative view given was that the current £50,000 level is too low in light of the fact that, as noted above, in practice the maximum awards are typically substantially less than this (at a level below £40,000); he further argued that the inability of his clients to recover a greater proportion of their costs would affect his ability to represent them at the IPEC MT, and would also limit his ability ‘to engage top quality counsel’ to argue the case. Another alternative view given was that although the £50,000 cap is broadly reasonable – and the various levels within the cap system are useful – there ought to be an additional pre-action level, with an additional sub-cap of £3,000 to cover pre-action work e.g. the work undertaken by legal representatives before and during the initial correspondence with potential infringers, before a claim is filed.

An additional alternative view given was that even though the £50,000 cap represents an improvement on the previous situation, it ‘still excludes some small clients’. Nonetheless, it is worth noting that none of the other interviewees expressed the view that the MT cost cap should be lowered – indeed, as noted above, the interviewees either stated that the current £50,000 cap is appropriate, or that it should actually be increased slightly.

This brings us to the second most popular reform: ACM, which was cited as the most important reform by 35% of interviewees. As detailed above, what ACM means in practice is that the IPEC judge now takes a much more ‘hands-on’ role at the case management stage than the judge would have been able to do in the pre-reform PCC era. In this respect, the judge can limit disclosure, expert evidence and even the arguments to be made at trial – and the judge can also give a preliminary assessment of his/her thoughts on the case (if both parties agree to receive this). When discussing the importance of ACM, one interviewee remarked:

*“Active case management is really what makes the court an attractive venue for SMEs – though it is not necessarily what SMEs themselves initially see as the most attractive aspect of the court.”*

Echoing this point, another interviewee stated:

*“Active case management has led to speedy trials, and what’s more the parties go to trial with a clear picture of the issues at stake. By the case management conference the parties have a good idea of each other’s case - which makes it a good time to settle.”*

However, while acknowledging that ACM had some benefits, one interviewee out of 17 – a participant possessing significant experience of patent litigation – also perceived the limiting of claims at ACM as a downside of the reforms:

*“The time constraint of a maximum of two days in the IPEC for hearings means that at the ACM your ability to make certain claims e.g. for invalidity of a patent is limited, which means you can’t always make the full revocation claim you want to.”*

Nonetheless, the usefulness of ACM was strongly felt amongst interviewees. Indeed, there was a clear consensus on what the most important and influential changes have been, with the cost cap and ACM being rated as the most significant of the reforms. Those who had experience of the SCT also rated it as important. Giving a positive perspective of the SCT, one interviewee observed:

*“My practice is doing much more litigation – at the IPEC and the SCT levels – than before, with clients who would not previously have been able to undertake litigation. The SCT in particular is very useful in this regard.”*

12% of interviewees had alternative views, reflecting the diversity of those in the legal sector. One alternative view given was that the SCT ought to be expanded to include registered designs and another converse view given was that ‘the availability of the small-claims track means that at little cost a party can make spurious claims in order to intimidate competitors’. Nonetheless, this point was not echoed by any other interviewees, which indicates that the overall perception within the legal field is that the SCT has been a positive reform.

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

Finally, it is necessary to consider the damages caps at the IPEC MT and SCT. It is interesting to note that the IPEC MT damages cap of £500,000 is perceived as the least influential reform – in fact, 82% of all interviewees stated that the cap is either ‘irrelevant’ or ‘of little significance’, largely because the central remedy sought at the IPEC MT is an injunction. Nonetheless, the remaining three out of 17 interviewees stated that while not as crucial as the costs cap or ACM, the MT damages cap is nonetheless important – and moreover they argued that there is room to raise this cap above the current level, noting that SME cases are not necessarily of low or mid-value. Regarding the SCT damages cap, five out of

17 interviewees stated that the £10,000 level is appropriate, with three out of 17 stating that the prior level (pre-April 2013) of £5,000 had been too low. No interviewee argued in favour of raising the SCT damages cap.

***Is there anything about litigation that makes it more attractive to SMEs than other forms of achieving a resolution such as mediation or alternate dispute resolution (ADR)?***

Unsurprisingly, all interviewees were of the opinion that litigation is typically a last resort in the IP context – in other words, it is only when all other attempts at resolving the situation have failed that parties decide to litigate. Nonetheless, all interviewees noted the usefulness of the existence of an accessible lower court for IP claims with respect to enabling ‘access to justice’. There were a number of negative comments on the usefulness of ADR in the IP context, but given the fact the interviewees were drawn from the legal-litigation sector, this was perhaps to be expected.

***Is it common for SMEs to settle during disputes at the PCC/IPEC? What most affects a party’s decision to settle? Why do parties settle late in the process e.g. after the CMC or after the trial has commenced, when it would make more economic sense to settle pre-trial?***

All interviewees reported that settlements are a common occurrence in cases filed at the IPEC. Nonetheless, 5 out of 17 interviewees made the further point that settlements are rarer in IP cases than in other forms of civil litigation. For instance, one of these interviewees remarked:

*“IP cases are complex, which makes it tough to settle. Also, the nature of IP cases is that it is often a case of trade rivals fighting each other. It’s oppositional.”*

Similarly, another of these interviewees remarked:

*“A wide range of facts and theories emerge during the process of litigation, and by the time it gets to court things are much clearer.”*

Universally, interviewees reported that when settlements do arise, the reason litigants often don’t settle until comparatively late on in the process is because the facts of the case often do not hit home until the ACM stage (or sometimes even a later hearing date). On this point, one interviewee stated:

*“Until the ACM stage, when the claims are clarified, settlements can’t really happen. Defendants are not willing to compromise until they see the strength of the case against them.”*

In line with this, a further interviewee stated that ‘the opinion of a neutral IPEC judge, examining the merits of the case at the ACM stage, is usually respected by both parties’ and consequently, may lead the parties to undertake a reasonable settlement.

***Could more be done, pre-trial, to encourage parties to settle? Could the IPO do***

*anything more to encourage parties to engage in mediation, for example? Does the allocation questionnaire play its role appropriately in this regard?*

24% of interviewees stated that they see a value in redesigning the allocation questionnaire to force parties to take further steps to convince judges that they have engaged in mediation/settlement negotiations before commencing litigation, noting that the current form is sometimes treated as a 'box-ticking exercise' by potential litigants. Given their experience of litigation, it is unsurprisingly that interviewees from the legal field generally found it difficult to conceive of an expanded role for ADR/mediation in the IP context – generally, they noted that while mediation and ADR can prove useful in some cases, once cases are filed IP litigation tends to proceed on an adversarial, and even combative, basis, something that makes mediation/ADR difficult.

*How have the reforms affected legal representation at the IPEC?*

Although this was not a specific interview question, the issue came up via an interviewee comment on the above reforms question in 11 out of 17 interviews. These 11 interviewees reported that the reforms have opened up the IPEC MT to representatives who are not solicitors or barristers. For instance, one interviewee stated that patent attorneys and trade mark attorneys are now representing their clients more frequently in court than they were prior to the reforms. Additionally, all the interviewee solicitors and barristers also remarked that they have seen an overall increase in their IPEC workloads post-reforms.

## **5.2 Survey of corporate litigants**

We also designed an online survey to explore the views of litigant users of the courts – a sample survey is shown in the annex. Given that our quantitative analysis leans on our complete set of patent cases for 2007-2013, and we only possess streamlined data on other IP rights at the High Court for 2009-2013 (see Section 6.1), we decided to focus our survey on patent litigants. However, due to the restrictions applicable under HMCTS guidelines for use of court data, we were unable to contact individuals and very small enterprises that do not have a publicly accessible corporate presence/address. For this reason we concentrated on all corporate litigants registered in the UK (with Companies House) who had been involved in patent litigation at the IPEC and PHC during 2007-2013. We were able to obtain accurate email contact details for 204 PHC patent litigants, 30 IPEC patent claimant litigants, 56 IPEC patent defendant litigants, and 9 patent litigants whose cases transferred from one court to the other. We sent the survey to these litigants, and also followed up with these litigants to encourage them to participate. Ultimately, however, we received a low response rate of 6% to our survey, and given the low response rate, the data cannot be said to be representative. For that reason we do not include the business survey data within this report.

### 5.3 Summary of Qualitative Findings

In this section we summarize the main insights from our qualitative research.

- Legal practitioners are unanimous in their assessment that the ability of SMEs/individuals to gain access to justice has been greatly improved by the reforms;
- The costs cap (recoverable scale up to £50,000) and ACM by judges are clearly identified as the most important reforms;
- Regarding the costs cap, the benefit is that litigants know their potential exposure before initiating a claim; in practice, a costs award of less than £40,000 is commonly awarded to the winning party;
- Meanwhile, ACM clarifies and limits claims – greatly speeding up the process of litigation;
- The SCT is seen as a useful option – particularly for individuals and small enterprises that previously may not have attempted to litigate;
- The damages cap (£500,000) is seen as relatively unimportant (in most cases the interim and/or final injunction is seen as the main goal for litigants);
- The reforms have opened up the IPEC MT to a wider range of representatives – there has been greater participation by patent attorneys and trade mark attorneys, in addition to the continuing presence of solicitors and barristers.

## 6 Quantitative Research Methodology

The analysis undertaken in this report required the collection and analysis of detailed information about IP case filings at the IPEC and the HC/PHC for 2007-2013. The authors first devised a quantitative data collection methodology aimed at collecting accurate case counts and extracting case data from the IPEC and the HC/PHC IP case files for 2007-2013; and secondly, the authors devised a methodology to assess the impact of the IPEC reforms based on the collected data. We give an outline of the methodology here, and we give the precise details of the data collection, and the challenges we faced in this regard, in the annex.

### 6.1 Data Collection

In undertaking the data collection we proceeded as follows: first, we evaluated the available published empirical research on the topic; secondly, we drew lessons from our experience of analysing case-level data for all claims filed at the PHC between 2000 and 2008 for which there was an entry in the Patents Court Diary (and/or where some online records were available) (Helmets and McDonagh 2013b); thirdly, in light of this second aspect, we obtained permission from HMCTS for access to the physical court records at the Rolls Building in London. Appendix E provides additional information on our data collection.

### **6.1.1 Literature Review and Assessment of Prior Projects**

With respect to the published literature, it is clear that for much of the recent past there has been little available empirical evidence on IP litigation in the UK, as noted by Weatherall et al. (2009). Nonetheless, several studies have been published in recent years on the subject of UK patent litigation. For instance, Moss et al. (2010) examine the outcomes of a sample of 47 validity and infringement claims undertaken between January 2008 and August 2009 at the PCC/IPEC, the PHC, the Court of Appeal, and the House of Lords. Meanwhile, Helmers and McDonagh (2013a and 2013b) offer a more comprehensive analysis - examining types of patents litigated, outcomes and costs - of all patent cases filed/heard at the PHC between 2000 and 2008 for which some information was publicly available, as well as all IP cases decided at the PCC/IPEC in 2007 and 2008. In addition, Greenhalgh et al. (2010) collected survey data on a small sample of patenting and non-patenting companies (alive between 2002 and 2009) in order to analyse the IP litigation activity of micro firms and SMEs, focusing on IP disputes that never made it to court. We took into account the findings of the above papers when designing our methodological approach to this project, particularly taking account of the fact that none of the above papers contains a complete dataset drawn from the relevant physical court records – in each case either the available online records or a very limited dataset is used. For our project, collecting and analyzing data from the physical files was an imperative because information on all case filings is not available online - the only way for us to obtain a full and accurate dataset was to examine the physical records at the IPEC and HC/PHC.

### **6.1.2 IP Cases at the IPEC 2007-2013**

In the context of the IPEC, it is worth noting that in our prior research we analysed anonymised claim-level data – provided to us by the UK IPO – for all IP claims decided at the PCC in 2007 and 2008 (Helmers and McDonagh 2013a). This gave us an idea of the types and volume of cases taken to the PCC in the pre-reform era. For this project we needed to collect information on all IP cases filed at the IPEC MT and SCT for the entire period 2007-13. In order to do this, we developed the following methodology: first, we – along with a team of five research assistants – collected and compiled the physical IPEC court records/files and associated information held at the Rolls Building for all cases filed 2007-13; secondly, we used a set of specially devised IP right-specific spreadsheets to extract and organize the relevant information gathered from these often extremely detailed and complex records; thirdly, we compiled the different files into a single database which we could use for data analysis.

For IPEC cases, the information that we collected on IP cases filed 2007-13 contains detailed information on the start date of the case, the initial and counter claims (infringement, revocation etc.), the names of the litigating parties, information on the relevant IP right (including patent numbers, trademark numbers etc.), and the outcomes of the cases. We also gathered information on whether cases were transferred from the IPEC to the PHC or vice versa. These data were collected during the period September 2013-July 2014 and these spreadsheets are up to date in terms of outcomes (decided cases, settlements etc.) up to July 2014.

### ***Verifying the IPEC dataset 2007-2013***

In light of the challenges presented by the nature of case file storage at the court, in September 2014 we examined the IPEC judgments for 2007-13 available online (via BAILII). Importantly, we did not find any cases that we did not already have a record of from our search of the physical files. Thus, our IPEC case dataset includes data drawn from all physical files found at the Rolls Building and all available digital court records. In this respect, it is as complete as possible.

#### **6.1.3 IP Cases at the HC/PHC**

Regarding the HC/PHC level, in line with the IPEC data collection outlined above, our initial plan was to obtain direct access to all HC/PHC records to enable us to extract full case data for all IP cases filed 2007-2013. However, difficulties arose due to the nature of the physical storage of files, and a lack of access to some files, necessitating a reduced assessment (the precise details of these challenges are given in the annex). The reduced assessment that we undertook involved differentiating between (i) HC/PHC copyright, trade mark, database and designs cases and (ii) PHC patent cases:

- (i) For copyright, trade mark, database and designs cases, we focused our aim on collecting solely the following streamlined data using newly designed spreadsheets for all HC/PHC cases filed 2009-2013, as we were unable to gain access to the 2007 and 2008 copyright, trade mark, database and designs cases and had limited access to the relevant 2009-2013 files:
  - Case numbers;
  - Parties to the claim;
  - Initial claim(s);
  - Type of IP right(s) litigated – noting differences within IP rights where relevant – for instance, whether the right was a Community TM, or a UK TM (registered or unregistered), or a UK or Community unregistered/registered design right.
- (ii) For the PHC patent cases, we were able to undertake a specific, detailed comparative study between PHC patent cases and IPEC patent cases. To do this we collected full detailed templates for all PHC patent cases filed 2007-2013. In order to ensure consistency with our IPEC data, we followed largely the same methodology as we used in the IPEC collection (described above). We also gathered information on whether claims were transferred from the IPEC to the PHC or vice versa.

### ***Verifying the PHC patent dataset 2007-2013***

Given that our detailed data collection case study is limited to PHC patent cases 2007-13, it is worth discussing how we ensured the reliability of this dataset. In order to verify the accuracy of our PHC patent case dataset, alongside the physical count and data extraction we developed a multi-pronged approach:

- For the years 2011 and 2012, we were able to cross-reference via a list that the law firm Powell Gilbert had provided us of case file numbers drawn from a physical search of files they had undertaken during early 2013.
- We used the Patents Court Diary in order to cross-reference the listed cases with what we found in the physical records to ensure no cases were missed.
- We liaised with HMCTS regarding their published records for the amount of PHC cases filed per year. However, on completion of the search what we found was that the published HMCTS statistics are not an accurate reflection of the amount of cases actually filed per year.
- HMCTS informed us that some 2007 Chancery files were destroyed in a fire during 2008. Unfortunately HMCTS could not give us any more information as to which files were destroyed. As a result our PHC numbers for 2007 have to be treated cautiously as it is likely some PHC claims were destroyed before we could examine them. However, there are no such worries for the 2008-13 files.
- As with the IPEC, from September-October 2014 we examined the available PHC patent judgments for 2007-13 online (via BAILII). Thus, as with the IPEC, while there are a very small number of patent PHC cases for which we are missing data, we are confident that our PHC dataset comprehensively includes all available physical and online records.

## 6.2 Firm-level data

We obtained the names of all litigating parties from the court records as described above. We first cleaned and standardized these names as they often appear in different ways on different court records. In a second step we classified litigants into 3 categories: (i) companies, (ii) individuals, and (iii) government, universities and not-for-profit. In a third step, we identified non-UK litigants where possible (e.g. through information available in the court records, or corporate designators such as ‘inc’). Finally, we searched for all UK companies on Companies House’s online [WebCheck](#) as well as Bureau van Dijk’s FAME database. We obtained basic information on companies from Companies House (SIC code, incorporation date, current status etc.) and detailed financials from FAME (assets, turnover, employees etc.). The combination of information from Companies House and financials from FAME allowed us to classify companies into size categories (micro/SME, large).<sup>10</sup>

## 6.3 Analysis

### 6.3.1 Case counts

Table 1 shows the total case counts by IP right for the PCC/IPEC (including the IPEC SCT) during the period 2007-2013. The largest number of cases concerns trade mark/passing off claims (365 cases) followed by copyright (338) and design (159) cases. Regardless of

---

<sup>10</sup>We follow the standard [EU definition](#), which relies on information on a firm’s number of employees, turnover, and total assets.

the type of IP, a notable jump in case numbers is observable between 2010 and 2011, which coincides with the coming into force of the IPEC reforms (namely, the procedural changes and the costs cap in October 2010, as well as the damages cap in June/October 2011). A similar jump is observable between 2012 and 2013, mostly driven by a strong increase in copyright cases, which coincides with the implementation of the IPEC SCT in October 2012.

It is tempting to conclude from the figures shown in Table 1 that case numbers for all IP rights have substantially increased at the IPEC as a result of the reforms i.e. that there is a causal effect of the reforms on observed case filings.<sup>11</sup> Table 2, however, cautions against drawing hasty conclusions with regard to the effect of the introduction of the costs cap and ACM in October 2010 with respect to patent cases. This table shows the number of cases at the PHC/HC over the same time period.<sup>12</sup> As expected, for all IP rights (except designs), total case counts are significantly larger than at the IPEC. That said, it is notable that a large majority of copyright cases are filed by the music rights collecting societies – Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS). If we exclude these cases the number of copyright cases drops dramatically.<sup>13</sup> In fact, the increase in the number of copyright cases between 2010 and 2011 is only 11.8% once we discard the music rights collecting society cases. Nevertheless, we see a large jump in patent case counts between 2010 and 2011 (an 84% increase). If we exclude the music rights collecting society cases the total case counts at the IPEC increased by 55% – but at the PHC/HC by only 12% – between 2010 and 2011. This suggests that on the one hand the IPEC reforms appear to have contributed to a large increase in case filings at the IPEC; yet, on the other hand it leaves open the possibility that factors other than the IPEC reforms might have affected the number of IP cases – specifically, the number of patent case filings – during the critical time period. Taking a closer look at the data is necessary in order to probe this further.

Figure 1 investigates this, by plotting all cases by the filing date of the claim over time, in quarterly intervals (since we only possess only the data for patent cases filed at the PHC/HC before 2009, we only show PHC/HC case counts from 2009 onward). Here we drop all music rights collecting society cases at both the IPEC and PHC/HC. The vertical lines represent the three most important reform steps: the ACM and costs cap in October 2010, the damages cap in June 2011 (for patents and registered designs) and in October 2011 (for all other IP rights), and the introduction of the SCT in October 2012. Notable here is a clear increase in filings at the IPEC during the quarter following the introduction of the costs cap and streamlined procedures e.g. ACM. This is in line with the evidence gathered from the qualitative interviews and surveys where participants indicated that the costs cap and the ACM have proven to be the key reforms with respect to encouraging litigants to take cases forward.<sup>14</sup> That said, Figure 1 also shows an increase in case filings at the PHC

---

<sup>11</sup>Figure A-1 in the appendix shows the share of IPEC cases according to the value of the claim at issue between 2007 and 2013 for all types of IP (excluding SCT cases). The figure indicates an increase in case counts between 2010 and 2011 for cases above £25,000 but just below £50,000. This provides further evidence that the introduction of the costs cap at £50,000 is likely to have influenced the claims brought before the IPEC.

<sup>12</sup>As explained in Section E.0.2, we possess only the data for patent cases for the entire 2007-2013 period at the PHC. For all other IP rights, our data is limited to 2009-2013.

<sup>13</sup>Excluding music collecting society cases at the IPEC has no big effect on case counts as there are only 12 copyright cases brought by these societies between 2007 and 2013.

<sup>14</sup>The spike in case filings at the pre-reform PCC in the last quarter of 2009 is due to the idiosyncratic filing of a large number of trade mark cases by one company (see also Table 1).

Table 1: PCC/IPEC: Case counts, 2007-2013

Year	Patent	Trade mark	Design	Copyright	Database	Total
	(1)	(2)	(3)	(4)	(5)	(6)
2007	6	7	7	11	0	31
2008	4	17	3	31	0	55
2009	8	61	16	30	2	117
2010	8	45	18	37	2	110
2011	27	57	27	57	3	171
2012	26	82	39	66	1	214
2013	17	96	49	106	4	272
Total	96	365	159	338	12	970

**Notes:** Note: trade mark case count includes passing-off claims; design cases includes registered and un-registered design rights. Counts include SCT as follows: 2012: 14 copyright, 1 trade mark case; 2013: 41 copyright, 2 design, 10 trade mark cases; there are an additional 2 SCT cases for which we do not have any information on the IP right involved.

Table 2: PHC/HC: Case counts, 2007-2013

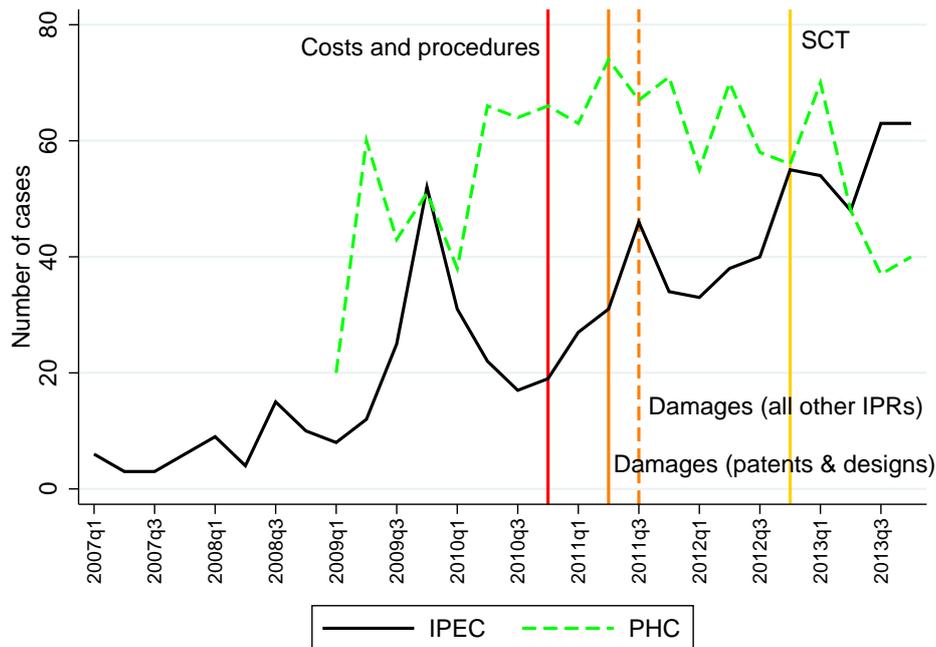
Year	Patent	Trade mark	Design	Copyright	Database	Total	Copyright <sup>◇</sup>	Total <sup>◇</sup>
	(1)	(2)	(3)	(4)	(5)	(6)	excl. PPL	(8)
2007	33					33		33
2008	71					71		71
2009	49	66	14	265	4	398	57	190
2010	50	107	42	156	16	371	68	283
2011	92	107	21	324	22	566	76	318
2012	89	97	13	271	7	477	51	257
2013	61	60	19	241	6	387	77	223
Total	445	437	109	1,257	55	2,303	329	1,375

**Notes:** No data available for trade marks, design, copyright and database rights prior to 2009; trademark case count includes passing-off claims; design cases includes registered and unregistered design rights.

◇ Copyright case counts exclude music rights collecting society cases.

during the second quarter of 2011. Given that we know from Table 2 that this increase was due to an increase in patent filings, this could imply that the increase at the IPEC was to some extent the result of a general trend towards more patent case filings.<sup>15</sup> Nonetheless, a crucial point can be observed: the average growth rate of case filings during the first three quarters of 2011 is zero at the HC/PHC whereas it is over 35% at the IPEC. In other words, the IPEC saw substantial growth in case filings immediately following the initial reforms.

Figure 1: Comparison IPEC/PHC: all cases



Note: Copyright case counts exclude cases brought by Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS).

As mentioned above, we possess data on patent cases at both courts for the entire 2007-2013 period. Figure 2 shows the number of patent cases (by filing date of the claim form) by quarter. The figure shows a clear difference in the levels of patent litigation at the PHC and the IPEC. We see a noticeable increase in patent cases following the introduction of the IPEC MT costs cap and ACM in October 2010 (from 2 case filings in the last quarter of 2010 to 7 in the first quarter of 2011). However, as noted above, case counts at the PHC also increased substantially between October 2010 and early 2011 (from 12 cases in the last quarter of 2010 to 26 in the second quarter of 2011). Nonetheless, as stated above, it seems likely the PHC litigation rate increased due to additional factors, such as a generally increased rate of litigation in the area of information and communication technologies (for

<sup>15</sup>There is a possibility that the IPEC reforms immediately pushed high value and highly complex IP cases into the PHC rather than the IPEC. However, given the relatively low rate of patent litigation at the PCC prior to the IPEC reforms coming into force, it seems unlikely that this effect would be large enough to explain the large increase in case filings at the PHC after the IPEC reforms set in. Moreover, Figure A-2 in the appendix shows actual case transfers between the two venues before and after the reforms. There is no evidence for any significant changes in cases being transferred either from the HC/PHC to the IPEC or vice versa following the reforms.

example Nokia filed 4 cases in the first half of 2011 compared to just 1 case in the first half of 2010).<sup>16</sup> The introduction of the damages cap in June 2011, in contrast, does not appear to have had any effect on case filings at the IPEC, something that is in line with the qualitative interview analysis shown above.

Figure 2: Comparison IPEC/PHC: patent cases

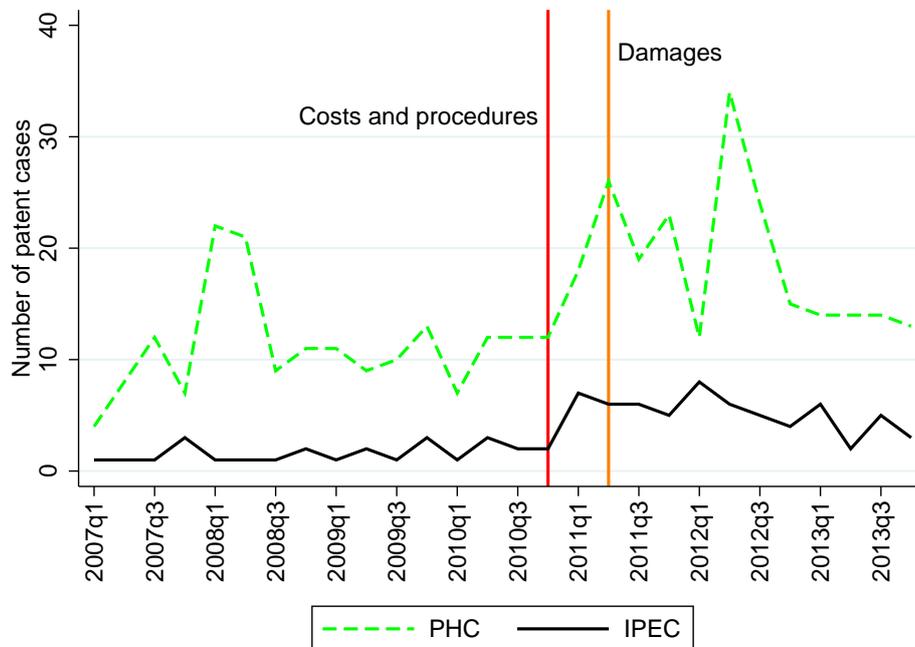


Figure 3 shows the corresponding plot for design cases. The plot contains a vertical line for the introduction of the SCT since it includes unregistered design rights. The case counts fluctuate substantially due to the relatively small numbers. Still, a clear increase in case counts at the IPEC can be seen beginning with the introduction of the costs cap and the ACM in 2010.

Figure 4 shows copyright case counts (excluding music rights collecting society cases). The plot shows a large increase in case filings at the IPEC following the introduction of the SCT. In fact, the case count at the IPEC surpasses the count at the HC/PHC for the first time in the quarter when the SCT is introduced. Case counts also more than double between the second and third quarter of 2011, which suggests that the introduction of the costs cap and ACM might have had an effect with some lag. However, case counts drop shortly after where the drop coincides with the introduction of the damages cap. It is therefore unclear whether the costs and damages cap have had any effect on copyright case filings at the IPEC.

Figure 5 shows trade mark case counts at the HC/PHC and IPEC. Again, we see a clear upward trend in filings at the IPEC starting with the introduction of the costs cap and ACM

<sup>16</sup>It is also possible that the PHC patent case count is a poor control because different factors affect litigation in both courts. For instance, it is possible that the factors that have led to the large increase in patent case filings at the PHC did not affect the IPEC to the same extent and hence the increase observed at the IPEC can in fact be largely attributed to the reforms.

Figure 3: Comparison IPEC/PHC: design cases

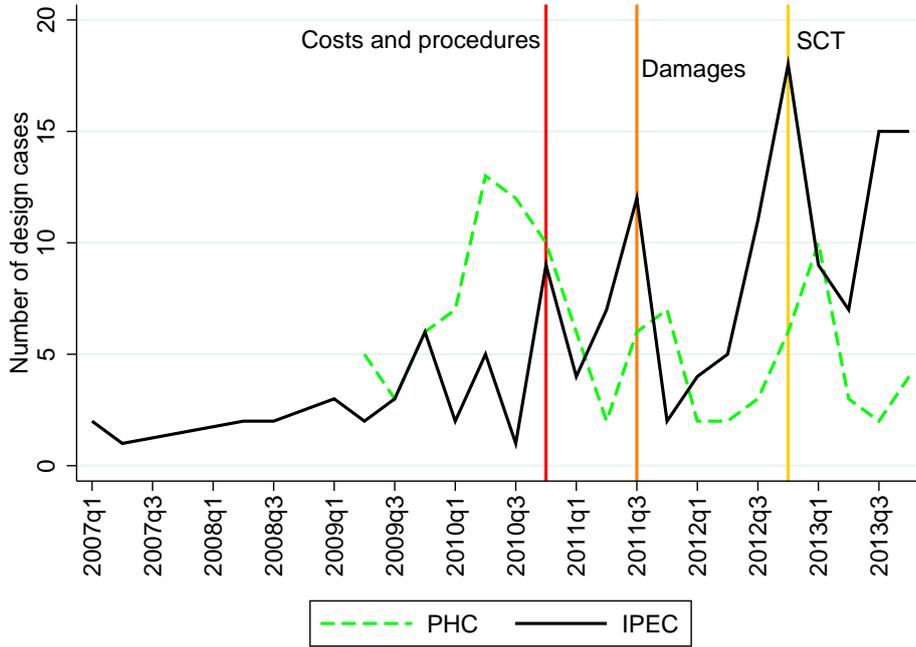
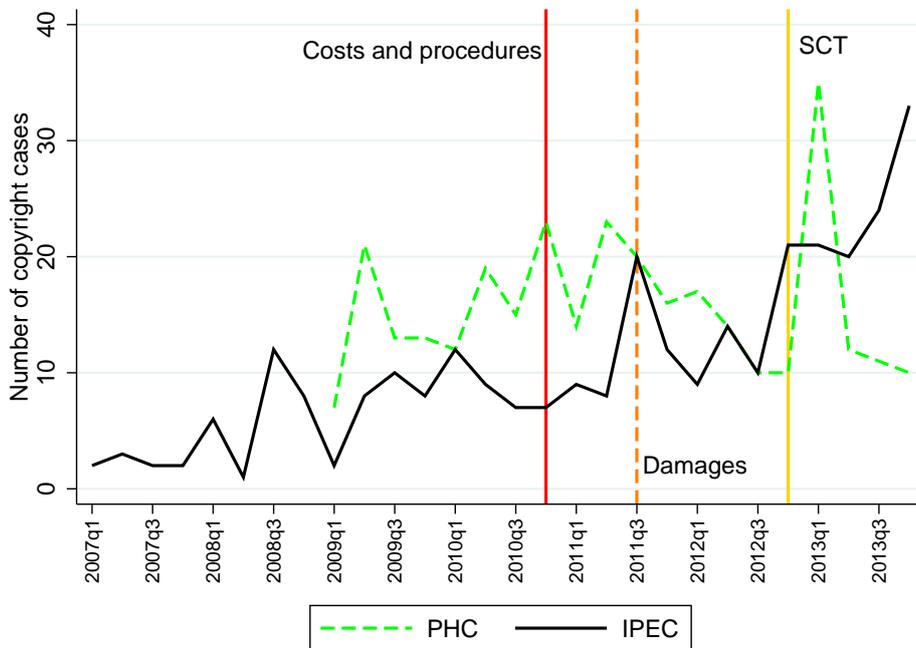


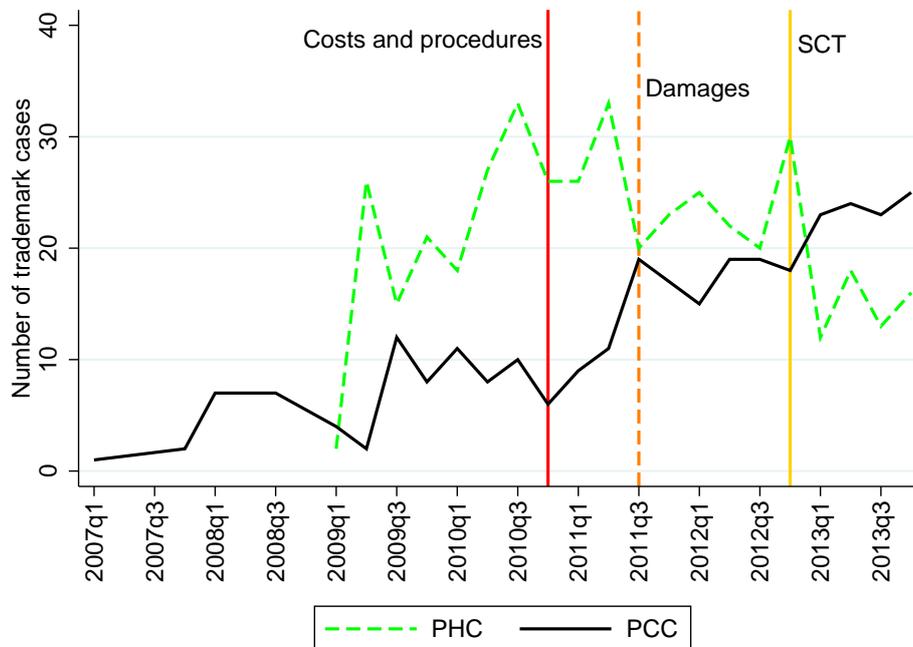
Figure 4: Comparison IPEC/PHC: copyright cases



Note: Case counts exclude cases brought by Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS).

in October 2010. In contrast, the number of case filings at the HC/PHC steadily decline during the same period. Consistent with the qualitative survey evidence, the plot suggests that the costs cap and ACM as well as the SCT have had important effects on case filings at the IPEC whereas the damages cap does not appear to have had any discernible effect.

Figure 5: Comparison IPEC/PHC: trade mark cases



Finally, A-3 in the appendix looks at database cases. However, we note that there are very few such cases and that there is no discernible pattern at either the IPEC or HC/PHC.

Judging by the different plots, there is clearly substantial variation in case counts over time across the different IP rights. Notably, the introduction of the IPEC MT costs cap and ACM appear to have had an effect on the rate of design, copyright, and trademark case filings at the IPEC – this is visible in absolute terms but also relative to the HC/PHC. The plots also show that the damages cap appears to have had no effect on case counts for any of the IP rights at the IPEC. In contrast, there appears to be an increase in trade mark and copyright case filings at the IPEC (also relative to the PHC/HC) following the introduction of the IPEC SCT in October 2012.

Examining this issue in further detail, Table 3 shows regression results from an OLS regression where we regress the total number of cases by month on a dummy (0/1) variable that is equal to one for all cases heard at the IPEC (*IPEC*) – a dummy variable that indicates when the reforms began at the IPEC (*Postreform*) which is equal to one from October 2010 onward and their interaction (*IPEC*×*Postreform*). The coefficient on the interaction term captures the differential effect of the reforms on case filings at the IPEC. The estimates in Column (1) show that when we focus on the cases at the IPEC we observe a large positive coefficient on the *Postreform* dummy variable, which implies that the number of cases increased at the IPEC following the reforms. In columns (2)-(4) we use both the IPEC and PHC data. The PHC data controls for any confounding factors that could have affected IP

litigation in the UK more generally, and this allows us to isolate the impact of the reforms on case counts. In column (2) we use all types of claimants whereas in Columns (3) and (4) we distinguish between cases where the claimant is a SME and cases with all other types of claimants.<sup>17</sup> Looking at Column (2), we observe a large positive coefficient on the *Postreform* dummy which reflects the increase in the number of case filings at both the IPEC and PHC. The coefficient on the IPEC dummy is negative which reflects the level of differences in litigation shown in Figures 1 and 2. The interaction term  $IPEC \times Postreform$ , in contrast, is positive which suggests the reforms have increased case filings at the IPEC, even accounting for confounding factors, although the coefficient is not statistically significantly different from zero due to the small number of observations. Interestingly, if we split the sample into cases with SME claimants and all other cases (Column (3)), we find a large positive coefficient on the interaction term that is statistically highly significant with respect to SMEs – it suggests that the number of cases brought before the IPEC by SME claimants has increased significantly following the reforms, even relative to the PHC. In Column (4) we see that this not the case when we focus on all other types of claimants.

Table 3: IPEC and PHC/HC: total number of court cases by month, 2009-2013

	IPEC		IPEC & PHC	
	All claimants		SMEs	Not SMEs
	(1)	(2)	(3)	(4)
IPEC		-8.333*** (2.191)	-2.428*** (0.862)	-5.904*** (1.873)
Postreform	6.022*** (1.890)	13.782** (6.133)	-0.855 (0.931)	14.637** (5.856)
IPEC×Postreform		2.436 (2.764)	4.711*** (1.128)	-2.274 (2.258)
Month FE	NO	YES	YES	YES
R2	0.172	0.557	0.492	0.632
Number obs.	60	120	120	120

**Notes:** OLS regression. Dependant variable number of cases by month. The mean of the dependant variable in Column (1) is 11.866, in Column (2) 15.242, in Column (3) 5.100, and in Columns (4) 10.142. All regressions include a constant. Time period 2009-2013 because no data are available for trademarks, design, copyright and database rights at the PHC/HC prior to 2009; trademark case count includes passing-off claims; design cases includes registered and unregistered design rights. Case counts exclude cases brought by Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS). Robust standard errors. \* significant at 10%, \*\* at 5%, \*\*\* at 1%.

Figure 6 investigates further potential changes with regard to the types of claimants who filed cases at the IPEC before and after the reforms. In Figure 6, we plot the *share* of the total number of cases brought per type of claimant – we focus on individuals and

<sup>17</sup>This includes individuals (11%), institutions, universities, and government bodies (1%), although the majority are large companies (88%). Note that grouping SMEs and individual claimants together does not change the results.

SMEs.<sup>18</sup> By focusing only on sub-sets of all claimants the data become sparse – for ease of presentation we aggregate the data into 6-month intervals. This provides additional evidence concerning any potential impact – at the extensive margin – in terms of providing incentives for individuals and SMEs to enforce their IP through litigation. The plot in the upper part of Figure 6 shows the share of cases at the IPEC and the PHC/HC that were brought by individuals. As expected, the share is significantly larger at the IPEC than at the PHC/HC. However, the plot does not provide any clear evidence that the different reform steps have affected the share of cases filed by individuals at the IPEC – the share also remains stable at the PHC/HC. A similar conclusion emerges from observing the lower graph of Figure 6 where we look at the share of cases brought by SMEs among all cases. Again, the share at the IPEC is substantially larger than at the PHC. Meanwhile, the share of cases with SME claimants at the IPEC oscillates somewhat between 2008 and 2011, but there is no clear break following any of the different reform steps. Appendix Table A-1 shows the actual case counts underlying the shares shown in Figure 6. It is clear that the number of individuals and SME claimants has increased substantially in absolute terms at the IPEC since 2010, but in proportion with overall case counts. This is backed up by the perception of legal practitioners, as described in Section 5.1 above, and the results in Table 3 showing that more SMEs (and individuals) are using the IPEC post-reforms. Nevertheless, this does not mean that the number of individuals and SMEs that have brought a case before the IPEC has increased *disproportionately* following the reforms; on the contrary, while the absolute number of individual/SME filings has increased, their share has remained remarkably consistent.

Figure 7 repeats the plots shown in Figure 6 for patent cases. This is useful because, as noted above, we have data on patent cases at the PHC for the entire 2007-2013 period as well as the IPEC patent case data for the same period. As in Figure 6 we observe here no strong evidence of changes in the share of individual or SME claimants at the IPEC following the reforms. That said, there does appear to be a small increase in the share of patent cases brought by individual claimants following the introduction of the costs cap and the ACM, while at the same time, the share of SME patent claimants appears to have dropped slightly following the introduction of the costs cap and the ACM. Nonetheless, the above point still stands: overall there has been a large increase in patent filings at the IPEC post-reforms, and there are more patent filings involving SMEs and individuals than there were previously. What is perhaps unexpected is that the SME/individual share of filings has remained fairly consistent, both with respect to patents and all other IP rights.

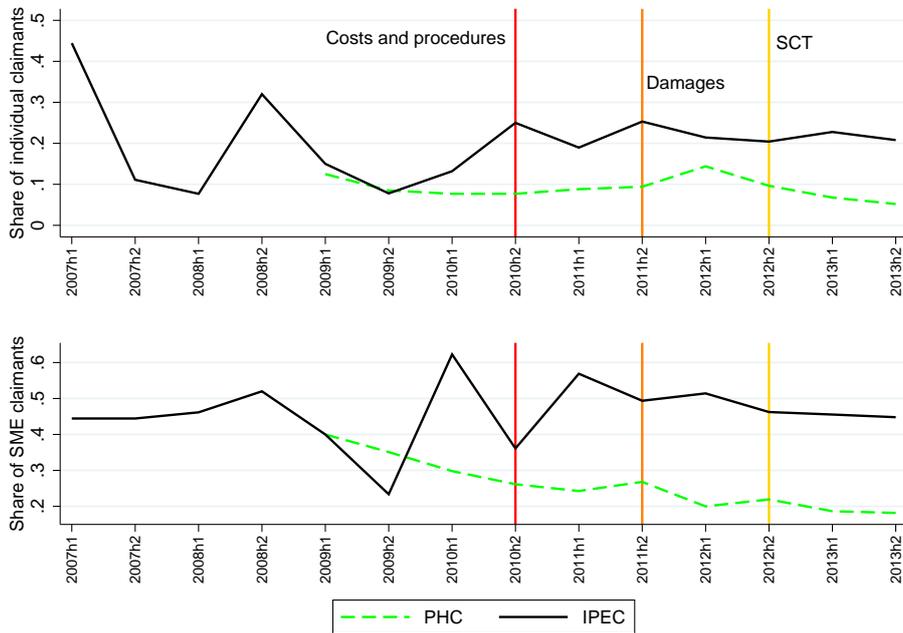
Our analysis of the total case counts given above shows that the introduction of the SCT has affected the number of case filings for copyright and trade marks at the IPEC MT level. In fact, a total of 55 copyright cases and 11 trade mark cases (81% and 16% of all SCT cases respectively) were filed at the SCT following its introduction in October 2011. Figure 8 plots the number of SCT cases separately and compares them to the number of IP cases at the IPEC (excluding patents as they are not within the jurisdiction of the SCT).<sup>19</sup> The figure

---

<sup>18</sup>Note that the potential problem of using the PHC as a control (including the additional factors noted above) is unlikely to apply when we look at differences in claimant characteristics between the IPEC and the PHC.

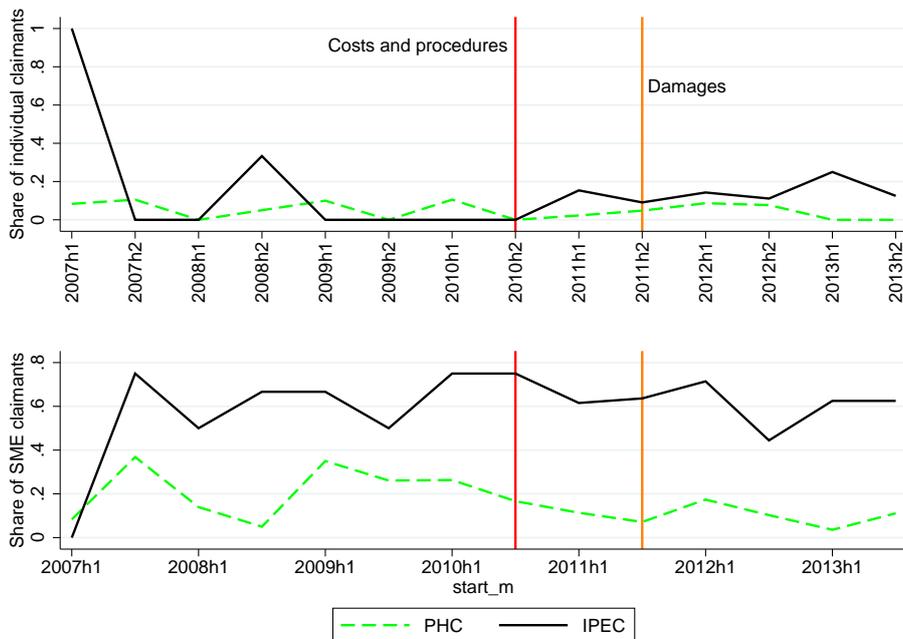
<sup>19</sup>It is worth emphasising that no registered designs cases can be heard on the SCT. However, the distinction between registered and unregistered design rights is not consistently available for all design cases in our dataset and for that reason we consider designs collectively rather than bifurcate between registered and

Figure 6: Comparison IPEC/PHC: case counts by claimant type



Note: Case counts exclude cases brought by Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS).

Figure 7: Comparison IPEC/PHC: patent case counts by claimant type



shows a few SCT cases that appear to have been initiated before the SCT was available (in October 2012). These 4 cases were filed at different County Courts and were eventually transferred to the IPEC SCT.<sup>20</sup> The figure might also suggest that the dip in case filings at the IPEC MT observed during the first two quarters of 2013 could be a result of a replacement effect (cases going to the SCT instead of the IPEC MT); nevertheless, this is not supported by the data. In fact, the dip is the result of fewer design cases – a drop from 18 to 7 cases between the last quarter of 2012 and the second quarter of 2013. In fact, there was only a single design case filed at the SCT during the first two quarters of 2013, which means the drop in design cases at the IPEC MT is unlikely to be linked to the introduction of the SCT.

Figure 8: IPEC/SCT: case counts

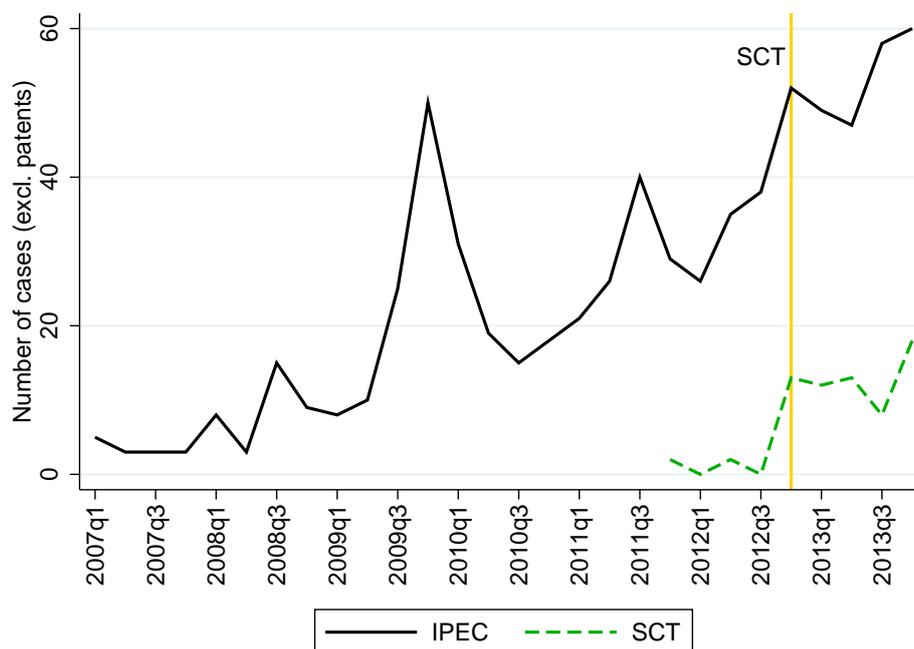
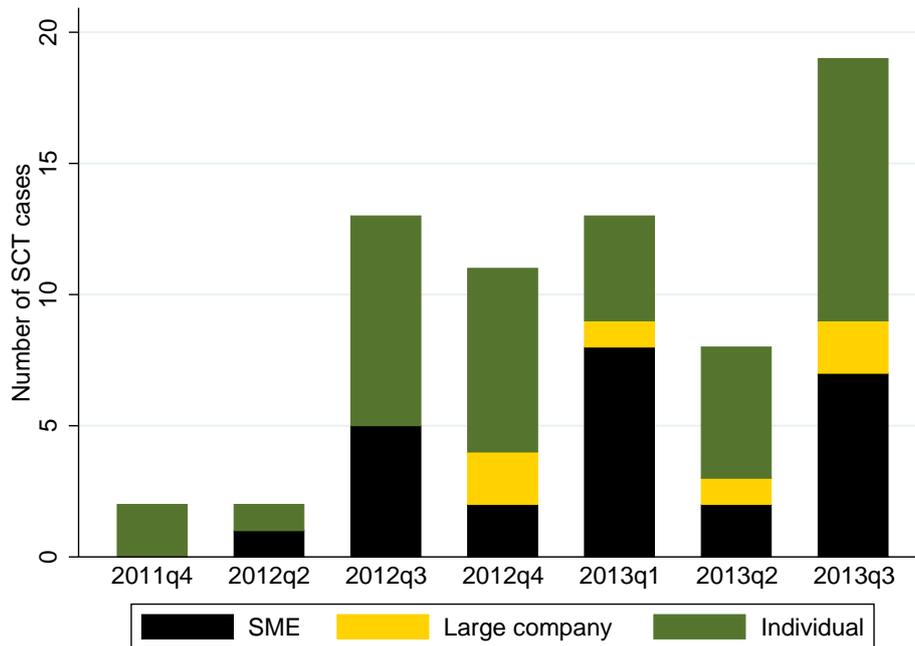


Figure 9 shows case counts at the IPEC SCT by claimant type. It shows that nearly all cases (over 90%) are brought by individuals or SMEs. Nevertheless, there are six cases that were brought by large companies, including a US pharmaceutical company and a US car manufacturer. The overwhelming share of SCT cases observed here adds to the above discussion on IPEC MT case shares: while the share of the individual/SME cases at the IPEC MT has remained consistent, it is clear that the SCT has become a forum dominated by individuals and SMEs. In other words, both courts are providing access to justice for individuals/SMEs, but crucially both appear to be working towards this goal in parallel rather than in competition with one another. Each venue hears different types and sizes of claims, and it seems that claims are either suited to one track, or the other – something that fits with the intention behind the creation of the SCT, that is, to provide a unique, small claims venue for IP litigation (and not to provide a court that would hear similar claims to the IPEC MT).

unregistered designs.

<sup>20</sup>These cases are included in 2012 in Table 1.

Figure 9: Comparison IPEC: SCT case counts by claimant type



Notes: There can be a combination of different claimant types for a given case – we count the case once for each claimant type.

### 6.3.2 Mechanisms

Next we ask what explains the increase in case filings at both the IPEC and PHC. We distinguish between two mechanisms:

1. **Extensive Margin:** more cases as a result of an increase in the number of claimants taking an IP dispute to court;
2. **Intensive Margin:** more cases as a result of an increase in the number of cases per claimant.

Table 4 reports results from the same specification as in Table 3 above, although the dependant variable we use is now the number of claimants per month. We regress this variable on the *IPEC* dummy variable, the *Postreform* dummy variable and their interaction *IPEC*×*Postreform*. The estimates in Column (1) show that when we focus on the cases at the IPEC we see a large positive coefficient on the *Postreform* dummy variable, which implies that the number of claimants increased substantially at the IPEC following the reforms. Columns (2)-(4) use data for both the IPEC and PHC. In column (2) we again use all types of claimants whereas in Columns (3) and (4) we distinguish between SME claimants and all other types of claimants. The results are similar to the ones reported in Table 3 on total case counts: the negative coefficients on the *IPEC* dummy reflect the large differences in levels between the IPEC and PHC; meanwhile, looking at the interaction term *IPEC*×*Postreform*, we only observe evidence for an increase in the number of claimants when we restrict the sample to SME claimants (Columns (3)).

Table 4: PHC/HC: Extensive margin (number of claimants by month), 2009-2013

	IPEC	IPEC & PHC		
		All claimants	SMEs	Not SMEs
	(1)	(2)	(3)	(4)
IPEC		-13.286*** (1.929)	-2.857*** (0.805)	-10.428*** (1.436)
Postreform	8.150*** (1.206)	20.626*** (6.507)	-1.300 (1.545)	21.926*** (5.088)
IPEC×Postreform		3.747 (2.643)	4.601*** (1.020)	-0.853 (1.994)
FE	YES	YES	YES	YES
Month FE	NO	YES	YES	YES
R2	0.377	0.677	0.519	0.759
Number obs.	60	120	120	120

**Notes:** OLS regression. Dependant variable number of claimants by month. The mean of the dependant variable in Column (1) is 11.917, in Column (2) 17.341, in Column (3) 4.933, and in Column (4) 12.408. All regressions include a constant. Time period 2009-2013 because no data is available for trade marks, design, copyright and databases at the PHC/HC prior to 2009; the trade mark case count includes passing-off claims; design cases includes registered and unregistered design rights. Case counts exclude cases brought by Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS). Robust standard errors clustered at claimant-level. \* significant at 10%, \*\* at 5%, \*\*\* at 1%.

So far we have shown evidence that the reforms have led to an increase in both the number of case filings by SMEs and the number of SME claimants involved in cases at the IPEC. Table 5 investigates the intensive margin: changes in the number of cases brought by claimants following the reforms at the IPEC. The table reports results from a fixed effects OLS regression where the unit of observation is the number of cases brought by a single claimant in a given month. We regress the number of cases by claimant-month on a dummy variable that is equal to one for all cases heard at the IPEC (*IPEC*, a dummy variable that indicates when the reforms began at the IPEC (*Postreform*) which is equal to one from October 2010 onward and their interaction (*IPEC*×*Postreform*). Column (1) indicates that the number of cases per claimant has increased at the IPEC following the reforms. When we use the PHC data in Column (2), we find no statistically significant evidence for a general increase in case numbers per claimant. When we limit the sample to SMEs (Column (3)), we find a positive and statistically significant coefficient on the *IPEC*×*Postreform* term. This suggests that the number of cases per SME claimant increased relatively more for claimants at the IPEC following the reforms compared to claimants at the PHC.

Table 5: PHC/HC: Intensive margin (number of court cases by claimant), 2007-2013

	IPEC	IPEC & PHC		
	All claimants	SMEs	Not SMEs	
	(1)	(2)	(3)	(4)
IPEC		-0.368 (0.361)	-1.629*** (0.293)	-0.014 (0.865)
Postreform	0.572** (0.306)	1.125 (0.707)	-2.689*** (0.578)	0.671* (0.397)
IPEC×Postreform		0.183 (0.318)	2.164*** (0.324)	-0.138 (0.807)
FE	YES	YES	YES	YES
Month FE	NO	YES	YES	YES
R2	0.009	0.024	0.027	0.030
Number obs.	713	2,075	592	1,483

**Notes:** OLS FE regression. Dependant variable number of cases by claimant and month. The mean of the dependant variable in Column (1) is 1.042, in Column (2) 1.124, in Column (3) 1.094, and in Column (4) 1.135. All regressions include a constant. Time period 2009-2013 because no data available for trade marks, design, copyright and databases at the PHC/HC prior to 2009; trademark case count includes passing-off claims; design cases includes registered and unregistered design rights. Case counts exclude cases brought by Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS). Robust standard errors clustered at claimant-level. \* significant at 10%, \*\* at 5%, \*\*\* at 1%.

### 6.3.3 Settlement rates

We now turn to analyzing potential changes in settlement behaviour following the IPEC reforms. We first present the main conclusions of a model that examines the effects of

the reforms on settlement rates. We then perform an empirical analysis that shows that the theoretical conclusions regarding the effects on the observed settlements i.e. those that take place after a claim is filed, are supported by our data. Our model therefore provides a causal hypothesis for the observed changes in settlement behaviour that occurred after the reforms. It also offers interesting predictions regarding the effects of the reforms on unobserved settlements, i.e. those that take place before any claim is filed. Those predictions should however be considered cautiously as they cannot be tested using our data.

**Theoretical model** We provide here a non-technical summary of our model and its main conclusions. A fully-fledged version of the model can be found in Appendix A.

Consider a dispute between an IP right holder (it could be any IP right) and an alleged infringer. The defendant is assumed to have some private information concerning whether he does, in fact, infringe the claimant's IP. On the basis of his information, he estimates the likelihood of the IP holder prevailing in a trial.

We assume that the two parties conduct settlement negotiations before any claim is filed. If this first round of negotiations fails then they also have an opportunity to settle after a claim is filed. More specifically, we consider the following three-period 'game':

- **First period:** The IP holder makes a take-it-or-leave-it pre-trial settlement offer to the alleged infringer, which the latter chooses to accept or not. If the offer is accepted, the game ends; otherwise, it proceeds to the next period.
- **Second period:** The IP holder decides whether to file a claim. If he does not file a claim, the game ends. If he does, he makes a settlement offer to the alleged infringer. If the offer is accepted, the game ends; otherwise, it proceeds to the next period.
- **Third period:** The IP holder decides whether to drop the case or not. If he does, the game ends. Otherwise, he incurs additional litigation costs, the alleged infringer also incurs litigation costs, and a decision – a judgment – regarding the infringement is issued by the court.

Hence, disputes can be either (i) settled before any claim is filed, or (ii) settled after a claim is filed, or (iii) resolved in court. Solving the model allows to compare the settlement rates before and after the reforms took place. From this comparison, we draw the following conclusions:

1. The **costs cap** leads to an increase in the share of disputes settled before any claim is filed and a decrease in the share of disputes settled after a claim is filed.
2. For disputes involving claims for which the **damages cap** is binding, the latter induces an increase in both the share of disputes settled before any claim is filed and the share of disputes settled after a claim is filed.
3. For cases that can be heard at the **Small Claims Track**, the SCT induces a decrease in both the share of disputes settled before any claim is filed and the share of disputes settled after a claim is filed.

**Empirical analysis** We now investigate empirically the effects of the reforms on settlement rates to verify whether our data is consistent with the empirical predictions. Figure 10 looks at changes in settlement behaviour for patent cases following the reforms.<sup>21</sup> The figure suggests that settlement rates of patent cases filed prior to the reforms were close to 100%. In other words, very few patent cases reached a full judgment at the pre-reform PCC. Crucially, in the quarter following the onset of the reforms in October 2010, settlement rates plummet to zero, although they recover quickly. Still, during the year following the first step of the reforms (costs and procedures), settlement rates are substantially lower than during the pre-reform period. Clearly, litigants needed to adjust to the new system post-reforms, which due to the presence of ACM (as explained above) is far quicker with respect to hearing cases and reaching a judgment. In other words, pre-reforms, settlements in patent cases were the norm; post-reform that is not necessarily the case.

Figure 10: IPEC: patent case settlements

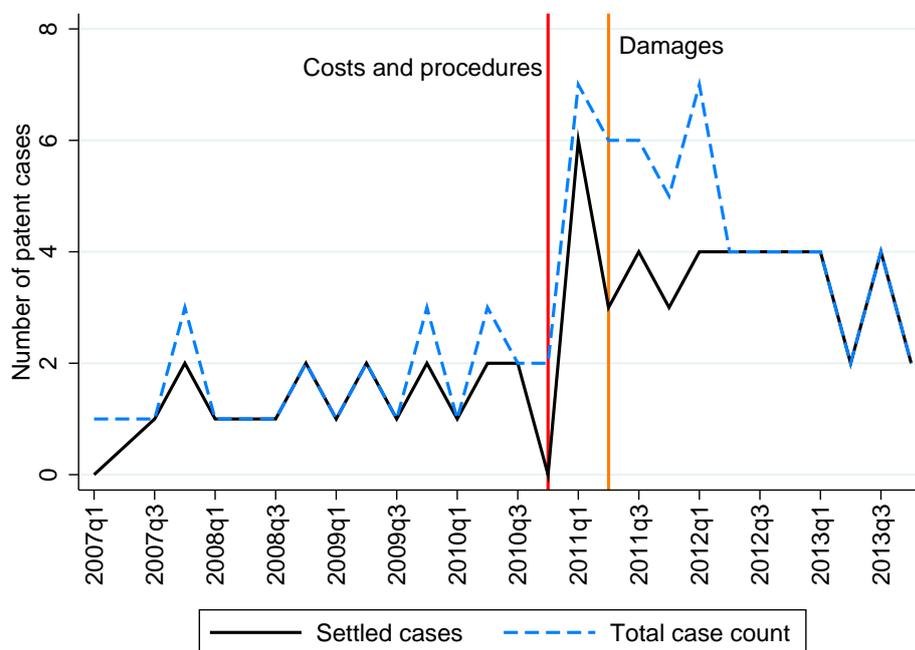
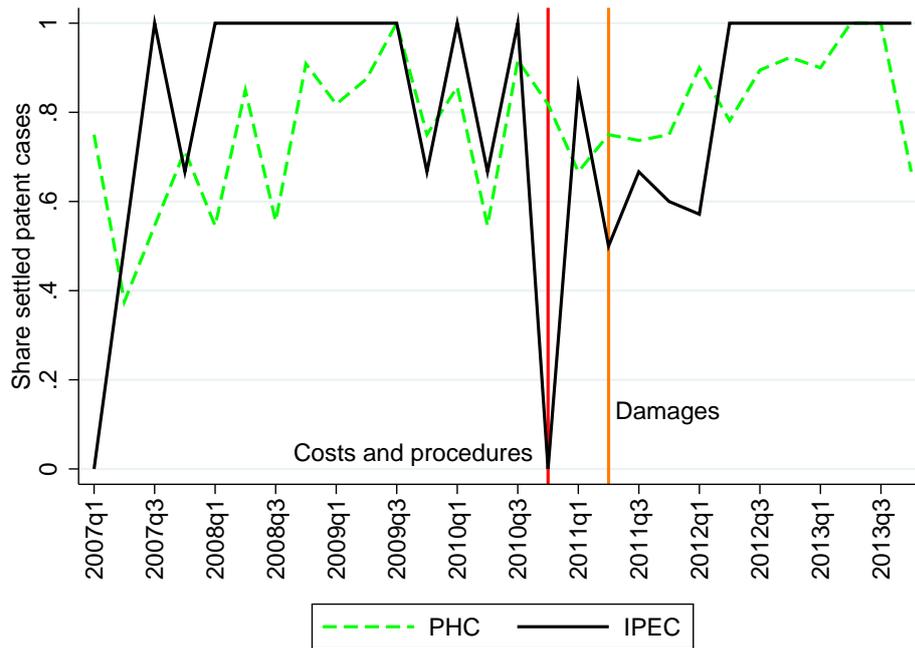


Figure 11 compares settlement rates of patent cases between the IPEC and the PHC. We observe again the drop in the settlement rate at the IPEC following the reforms. The figure also shows that there was no comparable strong drop in settlement rates at the PHC during the same time period. This shows the potential impact the reforms had with respect to hearing cases more quickly and the consequent impact this had on litigant behaviour: litigants are more willing to continue cases to trial post-reforms than they were pre-reforms.

Before testing more formally for changes in settlement behavior at the IPEC, Figure 12 shows the average timespan cases took to resolve at the two venues, distinguishing between cases that settled and those that were decided by the court. The figure reflects the low number of cases that were decided by the judge at the IPEC before the reforms set

<sup>21</sup>For the HC/PHC we only have reliable data on settlements for patent cases, which means we focus on patent cases in our analysis of settlement behaviour.

Figure 11: Comparison IPEC/PHC: patent case settlements



in. That said, the figure suggests that the cases that ended with a court decision took a lot less time to resolve after the reforms were introduced – a finding which is consistent with the views expressed in the qualitative interviews by legal practitioners about the effect of the ACM (although the figure in itself does not reveal any causal relationship). The figure also suggests that cases are settled faster following the introduction of the reforms – also relative to the PHC.

To test for changes in settlement behaviour at the IPEC following the reforms more formally, Figure 13 shows the predicted probabilities of settlement before and after the introduction of the costs cap and the ACM for the IPEC and the PHC. The predicted probabilities are obtained from a logit regression  $settle_{im} = \beta_0 + \beta_1 IPEC_i + \beta_2 Postreform_m + \beta_3 IPEC_i \times Postreform_m + \varepsilon_{im}$  where  $settle_{im}$  denotes whether case  $i$  filed in month  $m$  was settled (the variable is equal to one if the case was settled),  $IPEC_i$  denotes whether a case was brought before the IPEC (the variable is equal to one if the case was brought before the IPEC and zero if it was brought before the PHC), and  $Postreform_m$  is equal to one after the introduction of the costs cap in October 2010. The figure shows a sharp drop in the settlement probability for patent cases at the IPEC during the 8 months following the introduction of the costs cap and ACM (the sample period extends only to May 2011 to avoid conflating the effect of the costs cap on settlement with the effect of the damages cap). In contrast, the predicted probability of settlement remains unchanged at the PHC following the reforms.<sup>22</sup>

Figure 14 shows the corresponding plot for the introduction of the damages cap (where the predicted probabilities were obtained from the same logistic regression as in Figure 13

<sup>22</sup>Note however that  $\beta_3$ , the coefficient on the interaction term  $IPEC_i \times Postreform_m$  is statistically indistinguishable from zero.

Figure 12: Comparison IPEC/PHC: average duration of cases

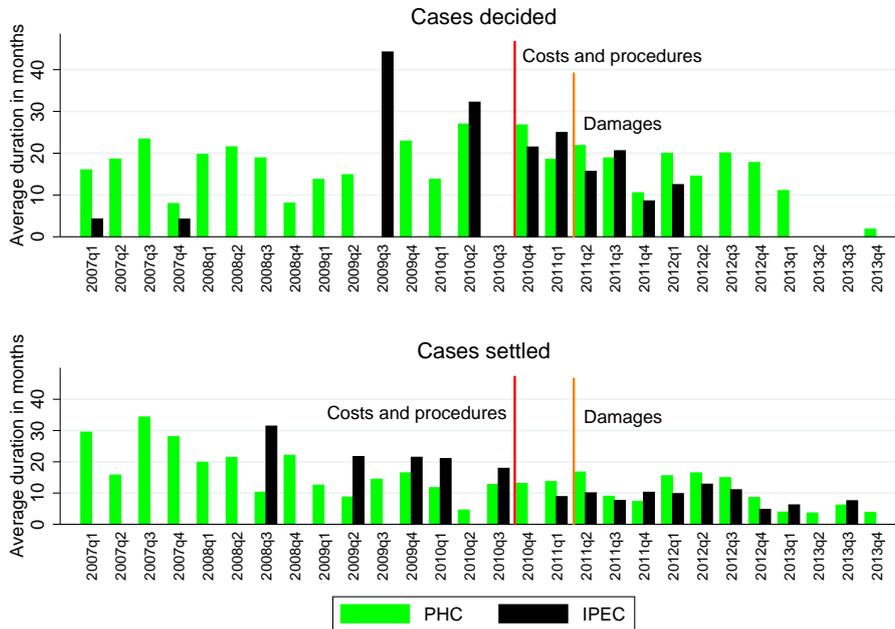
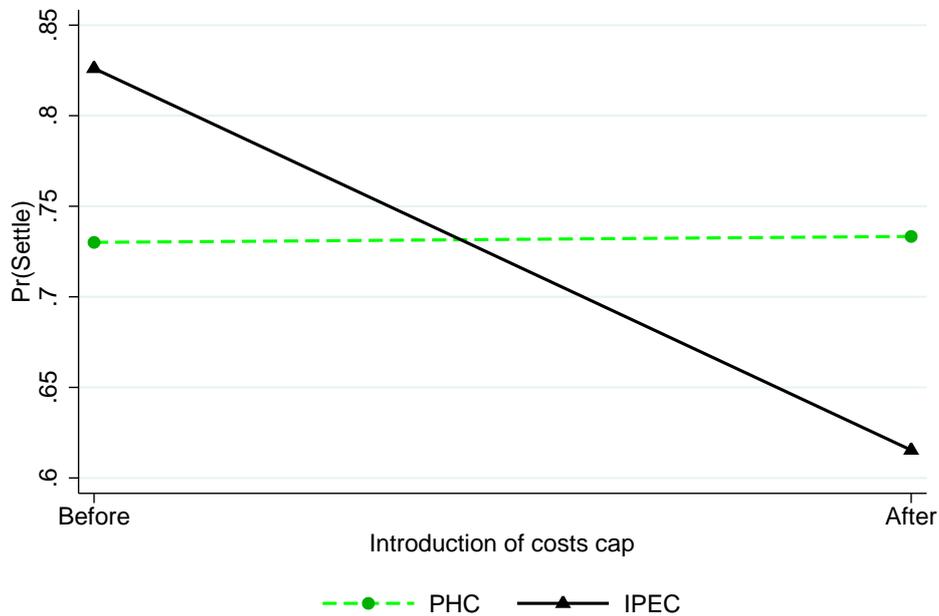


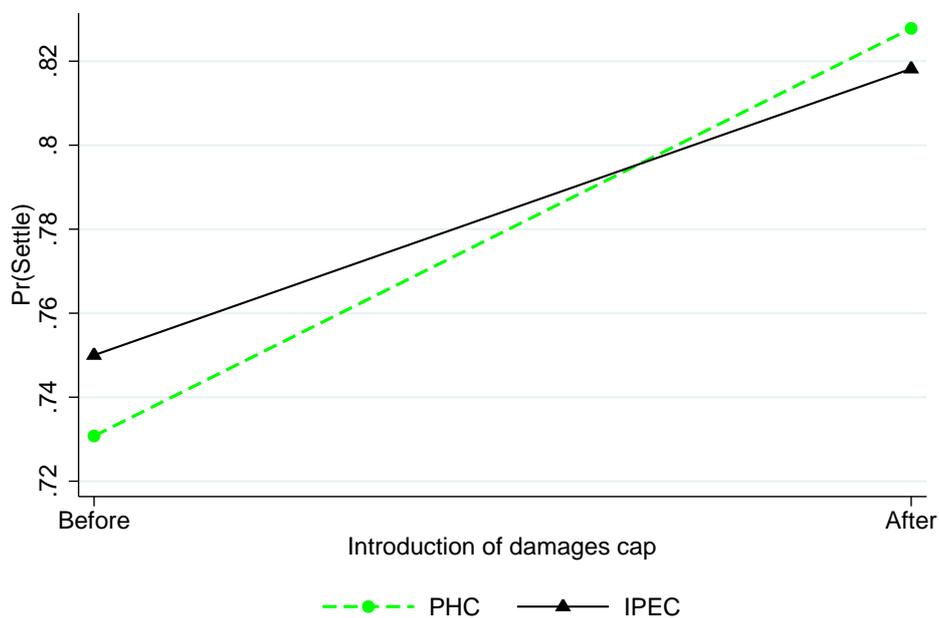
Figure 13: Comparison IPEC/PHC: predicted probabilities of settlement before and after the introduction of the costs cap – patent cases 2007-2011



Notes: Predictive margins from logit regression  $settle_{im} = \beta_0 + \beta_1 IPEC_i + \beta_2 Postreform_m + \beta_3 IPEC_i \times Postreform_m + \epsilon_{im}$  where  $settle_{im}$  denotes whether case  $i$  filed in month  $m$  was settled (the variable is equal to one if the case was settled),  $IPEC_i$  denotes whether a case was brought before the IPEC (the variable is equal to one if the case was brought before the IPEC and zero if it was brought before the PHC), and  $Postreform_m$  is equal to one after the introduction of the costs cap in October 2010. Note that we truncate the data series in May 2011 to avoid conflating the effect of the costs cap with that of the damages cap which was introduced in June 2011 for patents.

with the difference that  $Postreform_m$  is equal to one after the introduction of the damages cap in June 2011). The change in predicted probabilities of settlement at the IPEC is in the opposite direction: after the damages cap was introduced, patent litigants at the IPEC became more likely to settle than before. That said, the ‘probability to settle’ at the PHC also increased following the introduction of the IPEC damages cap.<sup>23</sup> Hence, it is unclear whether the increase in the probability to settle at the IPEC can in fact be attributed to the damages cap. The increase in ‘probability to settle’ post-May 2011 may be a response to patent litigants getting used to the new system, or it may simply be coincidental. Nonetheless, it is quite possible that the introduction of the damages cap did increase the likelihood that parties would settle.

Figure 14: Comparison IPEC/PHC: predicted probabilities of settlement before and after the introduction of the damages cap – patent cases 2007-2011



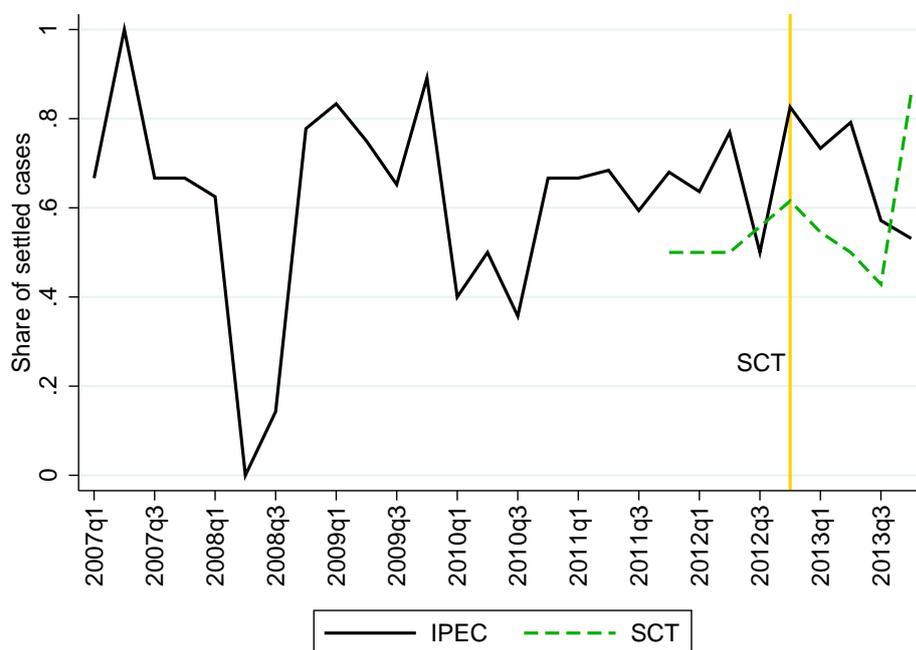
Notes: Predictive margins from logit regression  $settle_{im} = \beta_0 + \beta_1 IPEC_i + \beta_2 Postreform_m + \beta_3 IPEC_i \times Postreform_m + \epsilon_{im}$  where  $settle_{im}$  denotes whether case  $i$  filed in month  $m$  was settled (the variable is equal to one if the case was settled),  $IPEC_i$  denotes whether a case was brought before the IPEC (the variable is equal to one if the case was brought before the IPEC and zero if it was brought before the PHC), and  $Postreform_m$  is equal to one after the introduction of the damages cap in June 2011.

Finally, Figure 15 compares settlement rates within the IPEC between the MT and the SCT (where we ignore patents and instead focus on trade marks and copyright to ensure the figures are comparable between the IPEC MT and SCT, which does not hear patent cases). The settlement ratio is between 42% and 62% for the first four quarters after the introduction of the SCT. Only in the last quarter of 2013 does the share of cases that settle increase to 86%. During the previous four quarters, however, settlement rates are consistently lower than those observed at the IPEC for the same IP rights. However, given that there is only data for the SCT from its initiation in late 2011 until 2013, it is difficult to draw definitive

<sup>23</sup> Again, the coefficient on the interaction term obtained from the logistic regression is not statistically significant.

conclusions.

Figure 15: Comparison IPEC/SCT: trademark and copyright case settlements



## 7 Conclusion

The quantitative analysis we provide in this report demonstrates that there has been a substantial increase in case counts for all IP rights at the IPEC following the introduction of the costs cap and the ACM in October 2010, something which is especially evident with respect to IPEC patent and copyright cases.

Our qualitative interview data show that those in the legal field (judges, solicitors, barristers, patent attorneys, trade mark attorneys) are unanimous in their assessment that the ability of SMEs/individuals to gain access to justice has been greatly improved by the reforms. This is confirmed by our quantitative data analysis. We observe a strong increase in case filings by SME claimants at the IPEC following the introduction of the costs cap and the ACM in October 2010. This finding is also in line with our qualitative data which show that the costs cap and ACM are by far the most important and influential reforms with respect to litigant behaviour.

Regarding the costs cap, the benefit of it is that litigants know their potential exposure before initiating a claim; and although the cap is set at a limit of £50,000, in practice a costs award of less than £40,000 is commonly awarded to the winning party. Meanwhile, ACM clarifies and limits claims – greatly speeding up the process of litigation. Both the quantitative data and the qualitative data show that these initial reforms, undertaken in October 2010, have proven to be the most significant and enduring changes that have occurred. By contrast, the damages cap, which came into effect in May and October 2011, is perceived

by those in the legal field as having had a minimal impact on litigant behaviour – though we note in reference to the quantitative data and the economic modelling that the damages cap may have had an impact on litigant settlement rates.

The SCT is perceived within the legal community as a useful option, and in our quantitative data analysis we demonstrate that the SCT attracts a different type of claim than the IPEC MT, something which demonstrates that the SCT and MT are not in competition – indeed, the two courts serve complementary purposes, and are attractive venues for SMEs and individuals, as well as larger litigants. Reconstituting the PCC as the IPEC within the Chancery Division (HC) has undoubtedly increased the clarity of the court’s underlying purpose, but we are unable to observe whether this has had an impact on the types of cases taken as this change happened too late (in October 2013) in our period of study for us to observe reliable results.

We further construct a theoretical model in order to predict the unobservable behaviour of parties in IP disputes that do not lead to a court filing. We infer from our model that if the cost of filing a claim is relatively small, the presence of the cost cap post-October 2010 should induce an increase in the share of disputes settled before any claim is filed. In practice, given the relatively low cost of filing a claim at the IPEC or PHC/HC during the period of our study<sup>24</sup> we suggest that the introduction of the costs cap has had an effect on the amount of cases settled before any case filing occurs i.e. that it has led to more pre-filing settlements, not less. Given the overall increase in filings at the IPEC, this would suggest that there has been a substantial overall increase in the occurrence of IP disputes more generally, post-October 2010. In other words, the IPEC reforms may have encouraged parties to enter into disputes with, and to seek redress from, potential IP infringers, where previously they would have not done so. The existence of a larger universe of disputes overall would explain why there is both an increase in filings at the IPEC and at the same time there is a greater share of disputes that settle pre-filing. In other words, the IPEC reforms might have had a substantial effect beyond the courtroom: the reforms appear to have fundamentally altered the IP dispute landscape, and in doing so they have increased the likelihood that IP holders will attempt to uphold their rights against potential infringers.

Furthermore, we infer two things about the damages cap: (i) it induces an increase in the share of disputes settled before any case is filed and (ii) it induces an increase in the share of disputes settled after a case is filed. Finding (i) is in line with the above inference concerning the costs cap and pre-filing settlement rates. Although finding (ii) is in line with our quantitative data, we suggest that it is more likely that the damages cap has had no effect on litigation behaviour, a view also expressed by legal practitioners and companies.

The model also tells us that the existence of the SCT induces a decrease in the share of disputes that are settled before any case is filed. In other words, because the SCT makes it cheaper and easier to file and litigate a low value case, rather than settling a pre-case filing, a litigant is now emboldened to file at the SCT. Similarly, our model tells us that the

---

<sup>24</sup>Notably, the HMRC court fees for civil filings were changed in March 2015. The primary element of the changes is the provision of a value-based fees system for claims between £10,000-£200,000. In most cases, this means that at both the IPEC and the HC/PHC as of March 2015 the cost of filing a case has increased substantially. However, given that this change occurred long after our dataset had been gathered (for cases filed 2007-2013) it is not relevant to our specific data analysis; furthermore, given the fact that this change has occurred very recently, we are unable at this time to analyse the effect this change may have on current or future litigation behaviour. The full set of fees is available here: <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex050-eng.pdf>.

introduction of the SCT induces a decrease in the share of disputes settled after a claim is filed, because litigants can take the case to trial knowing that their cost burden is very low at the SCT. On the basis of the analysis carried out above, it is difficult to compare the effects of the costs and damages caps to the effect of the SCT on settlement behaviour in IP disputes that do not lead to a court filing. It appears reasonable, however, to assume that the effect of the caps might outweigh that of the SCT, and that there is a net increase in settlements for IP disputes that do not lead to a court filing.

Thus, as explored above, the cumulative effect of the IPEC reforms 2010-2013 has been highly significant – in addition to an increase in the numbers of filed cases at the IPEC, the creation of the streamlined IPEC MT and SCT for litigating disputes has led to an overall increase in the amount of IP disputes that occur more generally i.e. pre-filing. In other words, now that IP holders have the ability to utilize the IPEC – a litigation forum that caps costs and damages, and makes use of ACM (and includes the SCT option) – IP holders are more confident about entering into disputes with potential infringers, where previously they would have not felt confident enough to do so.

Finally, we note that the comprehensive assessment of the IPEC reforms outlined over the course of this report may be of interest to other jurisdictions – in particular the U.S. – where there have been recent discussions about the adoption of a lower-cost IP enforcement track within the courts system. Our analysis may also be of relevance for future assessments of the Unified Patent Court (UPC), as the UPC will share several procedural features with the IPEC, such as the information required in the statement of case and the limits imposed on disclosure, cross-examination and expert evidence.

## 8 Acknowledgements

We acknowledge financial support from the UK Intellectual Property Office. The authors thank Shane Burke, Francesco Dionisio, Leslie Lansman, Manuel Rey-Alvite Villar and Paula Westenberger for outstanding research assistance. Our data gathering was in part possible thanks to the assistance we received from the then IPEC clerk, Christy Irvine, as well as His Honour Judge Hacon and Mr Justice Birss, who helped us to compile lists of relevant cases from the IPEC Diary and other internal court sources.

## References

- [1] Bebchuk, L.A. (1984): 'Litigation and Settlement under Imperfect Information,' *RAND Journal of Economics*, Vol. 15 (3), pp. 404-415.
- [2] Fox Angela (2014): 'Intellectual Property Enterprise Court: Practice and Procedure,' Sweet and Maxwell, London.
- [3] Greenhalgh Christine, Philips Jeremy, Pitkethly Robert, Rogers Mark, Tomalin Joshua (2010): 'Intellectual Property Enforcement in Smaller UK Firms,' Report for the Strategy Advisory Board for Intellectual Property Policy (SABIP); <http://www.ipo.gov.uk/ipresearch-association-200710.pdf>
- [4] Helmers Christian and Luke McDonagh (2013a): 'Patent Litigation in England and Wales and the Issue-Based Approach to Costs,' *Civil Justice Quarterly*, Vol. 32(3), pp. 369-384.
- [5] Helmers Christian and Luke McDonagh (2013b): 'Patent Litigation in the UK - An Empirical Survey 2000-2008,' *Journal of Intellectual Property Law & Practice*, Vol. 8(11), pages 846-861.
- [6] Moss Gary, Matthew Jones, and Robert Lundie-Smith (2010): 'Just how 'anti-patent' are the UK courts?,' *Journal of Intellectual Property Law & Practice*, Vol. 5, No. 3, pp. 148-157.
- [7] Spier, K. (1992): 'The Dynamics of Pretrial Negotiation,' *The Review of Economic Studies*, Vol. 59 (1), pp. 93-108.
- [8] Weatherall Kimberlee, Elizabeth Webster and Lionel Bently (2009): 'IP Enforcement in the UK and Beyond: A literature Review,' SABIP Repost Number EC001.

# A Appendix: Model

## A.1 Setting

Consider a dispute between an IP right holder (it could be any IP right) and an alleged infringer. Let  $D$  be the value of the damages that the defendant (i.e. the alleged infringer) has to pay to the claimant (i.e. the IP holder) if the latter prevails in a trial. In this example, the defendant is assumed to have some private information concerning whether he does, in fact, infringe the claimant's IP. On the basis of his information, he estimates the likelihood of the IP holder prevailing in a trial to be  $p$ . This probability can be seen as the 'type' of the alleged infringer. The IP holder does not know the alleged infringer's type  $p$  but only that  $p$  is distributed over an interval  $[\underline{p}, \bar{p}]$  with a cumulative distribution  $F(\cdot)$ . We denote  $f(\cdot)$  the corresponding density function and make the (standard) assumption that the hazard rate  $\frac{f}{1-F}$  is increasing.

We assume that the two parties conduct settlement negotiations before any claim is filed. If this first round of negotiations fail then they also have an opportunity to settle after a claim is filed. More specifically, we consider the following three-period 'game':

- First period: The IP holder makes a take-it-or-leave-it pre-trial settlement offer  $S_1$  to the alleged infringer, which the latter chooses to accept or not. If the offer is accepted, the game ends; otherwise, it proceeds to the next period.
- Second period: The IP holder decides whether to file a claim, which costs  $c_p$ . If he does not file a claim, the game ends. If he does, he makes a settlement offer  $S_2$  to the alleged infringer. If the offer is accepted, the game ends; otherwise, it proceeds to the next period.
- Third period: The IP holder decides whether to drop the case or not. If he does, the game ends. Otherwise, he incurs additional litigation costs  $C_p$  while the alleged infringer incurs litigation costs  $C_d$  and a decision – a judgment – regarding the infringement is issued by the court.

For the sake of tractability we make the following two assumptions.

*Assumption 1:* The parameters of the model are such that the IP holder's threat to litigate if the offer of settlement fails is credible whatever the type  $p$  of the alleged infringer.

This assumption is standard in the screening models *à la* Bebchuk (1984) commonly used in the economics literature on settlements. Absent this assumption, the information on the type of the alleged infringer revealed by his decision to accept or not the settlement offer may affect the IP holder's decision to go for a trial, which would substantially complicate the analysis.

*Assumption 2:* The alleged infringer's strategies are such that if a type  $p'$  accepts settlement offer  $S_t$ , where  $t \in \{1, 2\}$ , with positive probability then all types  $p'' > p'$  accept this offer with probability 1.

This restriction of the alleged infringer's strategy space guarantees that the distribution of types that remain in the second period of the game is a truncation of the original (i.e. first-period's) distribution. Spier (1992) makes a similar assumption in the related context of sequential rounds of pre-trial settlement and argues that it is "very natural, for it is consistent with the intuition that a defendant who faces greater losses is more likely to settle early."

## A.2 Pre-reform equilibrium

Before the reforms were implemented, the losing party in a trial at the PCC had to bear both its own and the winning party's litigation costs (without any cap on the latter). This was a potentially significant cost burden.

We first solve for the perfect Bayesian equilibrium under this cost allocation rule. Given the class of defendant strategies we focus on, in equilibrium there must exist two critical thresholds  $p_1 \geq p_2$  such that the IP holder's pre-trial settlement offer  $S_1$  is accepted if and only if  $p \geq p_1$  and its post-filing settlement offer  $S_2$  is accepted if and only if  $p_2 \leq p < p_1$ .<sup>25</sup>

To derive the pre-reform equilibrium, we proceed by backward induction. Consider first the third period of the game. Assumption 1 ensures that the IP holder does not drop the case if the settlement offer in the second period is turned down by the alleged infringer. Therefore, we know that a trial will occur in the third period if the second-period settlement attempt fails.

We can now analyze the second period of the game. The alleged infringer knows that if he rejects the IP holder's settlement offer, there will be a trial that will cost him  $p(D + C_p + C_d)$  in expectation. Thus, he will accept to pay the amount  $S_2$  to the IP holder to settle the dispute if and only if

$$S_2 \leq p(D + C_p + C_d)$$

or, equivalently, if and only if

$$p \geq \frac{S_2}{D + C_p + C_d} \equiv \tilde{p}(S_2).$$

Consider the IP holder's optimal choice of the amount  $S_2$  requested from the alleged infringer. The IP holder knows that if he makes a demand  $S_2$ , there is a probability  $1 - F_1(\tilde{p}(S_2))$  that it will be accepted and a probability  $F_1(\tilde{p}(S_2))$  that it will not, where  $F_1(\cdot)$  is the cdf of the truncated distribution over  $[\underline{p}, p_1]$ . If the IP holder's demand is accepted then he gets a payoff equal to  $S_2$ . Otherwise, there will be a trial (in the third period of the game) and the IP holder's expected payoff will be

$$\tilde{\mu}(S_2)D - (1 - \tilde{\mu}(S_2))(C_p + C_d)$$

where

$$\tilde{\mu}(S_2) = \frac{1}{F_1(\tilde{p}(S_2))} \int_{\underline{p}}^{\tilde{p}(S_2)} pf(p)dp$$

---

<sup>25</sup>When  $p$  is equal to one of the two critical thresholds, the offer can be accepted only with some positive probability. This does not affect our results.

is the average probability of winning the case conditionally on the settlement offer  $S_2$  being turned down. Therefore, the IP holder's expected payoff in the second period of the game is given by

$$\begin{aligned}\tilde{G}(S_2) &= (1 - F_1(\tilde{p}(S_2)))S_2 + F_1(\tilde{p}(S_2))[\tilde{\mu}(S_2)D - (1 - \tilde{\mu}(S_2))(C_p + C_d)] \\ &= (1 - F_1(\tilde{p}(S_2)))S_2 + \frac{D + C_p + C_d}{F_1(\tilde{p}(S_2))} \int_{\underline{p}}^{\tilde{p}(S_2)} pf(p)dp - F_1(\tilde{p}(S_2))(C_p + C_d).\end{aligned}$$

Differentiating  $\tilde{G}(S_2)$  and rearranging terms, we get that

$$\tilde{G}'(S_2) = (1 - F_1(\tilde{p}(S_2))) - f(\tilde{p}(S_2)) \frac{C_p + C_d}{D + C_p + C_d}.$$

Hence, for a given first-period's critical threshold  $p_1$ , the second-period equilibrium amount of settlement  $S_2$  and the corresponding probability threshold  $p_2 = \tilde{p}(S_2)$  are given by:

$$\frac{f(p_2)}{1 - F_1(p_2)} = \frac{D + C_p + C_d}{C_p + C_d} \quad (1)$$

$$S_2 = p_2(D + C_p + C_d). \quad (2)$$

For the sake of tractability we make an additional assumption regarding the distribution of defendants' types: we suppose that  $p$  is uniformly distributed over  $[\underline{p}, \bar{p}]$ . Under this assumption, Condition (2) becomes

$$p_2 = p_1 - \frac{C_p + C_d}{D + C_p + C_d}. \quad (3)$$

Moreover, in equilibrium, the alleged infringer must be indifferent between accepting  $S_1$  or  $S_2$ , which yields the following equilibrium condition:

$$S_2 = S_1. \quad (4)$$

From (2), (3) and (4) it then follows that  $p_1$  and  $p_2$  can be expressed as functions of  $S_1$ :

$$p_1 = \frac{S_1 + C_p + C_d}{D + C_p + C_d} \quad (5)$$

$$p_2 = \frac{S_1}{D + C_p + C_d}. \quad (6)$$

Consider now the first period of the game. The equilibrium first-period settlement offer  $S_1^{pre}$  must maximize the IP holder's expected payoff

$$\frac{\bar{p} - p_1}{\bar{p} - \underline{p}} S_1 + \frac{p_1 - p_2}{\bar{p} - \underline{p}} S_2 - c_p \frac{p_1 - \underline{p}}{\bar{p} - \underline{p}} + \frac{1}{\bar{p} - \underline{p}} \int_{\underline{p}}^{p_2} [p(D + c_p) - (1 - p)(C_p + C_d)] dp.$$

Replacing  $S_2$ ,  $p_1$  and  $p_2$  with their expressions as functions of  $S_1$ , we find that  $S_1^{pre}$  must maximize

$$\frac{c_p - D - C_p - C_d}{2(D + C_p + C_d)^2} S_1^2 + \left( \bar{p} - \frac{c_p + C_p + C_d}{D + C_p + C_d} \right) S_1$$

which yields

$$S_1^{pre} = \frac{\bar{p}(D + C_p + C_d)^2 - (c_p + C_p + C_d)(D + C_p + C_d)}{D + C_p + C_d - c_p}.$$

From (3) and (4) it then follows that the equilibrium thresholds  $p_1^{pre}$  and  $p_2^{pre}$  are given by

$$p_1^{pre} = \frac{\bar{p}(D + C_p + C_d) - (c_p + C_p + C_d)}{D + C_p + C_d - c_p} + \frac{C_p + C_d}{D + C_p + C_d}$$

$$p_2^{pre} = \frac{\bar{p}(D + C_p + C_d) - (c_p + C_p + C_d)}{D + C_p + C_d - c_p}$$

Hence, we obtain the share of disputes settled before any claim is filed as

$$\bar{p} - p_1^{pre} = \frac{(c_p + C_p + C_d) - \bar{p}c_p}{D + C_p + C_d - c_p} - \frac{C_p + C_d}{D + C_p + C_d},$$

while the share of disputes settled after a claim is filed is

$$p_1^{pre} - p_2^{pre} = \frac{C_p + C_d}{D + C_p + C_d}.$$

We now use our model to examine the effect of the reforms implemented between 2010 and 2012 on each of these two subclasses of settled disputes.

### A.3 Effect of the costs cap

Assume that a costs cap  $\bar{C} < \min(c_p + C_p, C_d)$  is implemented. To determine the effect of this cap, we need to solve for the new equilibrium of our three-period game under the following cost allocation rule: both parties incur their litigation costs but the winning party recovers  $\bar{C}$  from the losing party.

Again, in equilibrium, there must exist two critical thresholds  $p_1 \geq p_2$  such that the pre-trial settlement offer  $S_1$  is accepted if and only if  $p \geq p_1$  and the post-filing settlement offer  $S_2$  is accepted if and only if  $p_2 \leq p < p_1$ .

In the second period of the game, the alleged infringer knows that if he rejects the settlement offer, there will be a trial that will cost him  $p(D + C_d + \bar{C}) + (1 - p)(C_d - \bar{C})$  in expectation. Thus, he accepts to pay the amount  $S_2$  to the IP holder if and only if

$$S_2 \leq p(D + C_d + \bar{C}) + (1 - p)(C_d - \bar{C})$$

or, equivalently, if

$$p \geq \frac{S_2 + C_d - \bar{C}}{D + 2\bar{C}} \equiv \hat{p}(S_2).$$

Consider now the IP holder's optimal choice of the amount  $S_2$  requested from the alleged infringer. The IP holder knows that if he makes a demand  $S_2$ , there is a probability  $1 - F_1(\hat{p}(S_2))$  that it will be accepted and a probability  $F_1(\hat{p}(S_2))$  that it will not. If the demand is accepted then the IP holder gets a payoff of  $S_2$ . If the demand is not accepted then there will be a trial and the IP holder's expected payoff will be  $\hat{\mu}(S_2)(D - C_p + \bar{C}) - (1 - \hat{\mu}(S_2))(\bar{C} + C_p)$  where

$$\hat{\mu}(S_2) = \frac{1}{F(\hat{p}(S_2))} \int_{\underline{p}}^{\hat{p}(S_2)} pf(p)dp$$

is the average probability of prevailing in court conditionally on the settlement offer being turned down by the alleged infringer.

Therefore, the IP holder's expected payoff in period 2 is given by

$$\begin{aligned} \hat{G}(S_2) &= (1 - F_1(\hat{p}(S_2)))S_2 + F_1(\hat{p}(S_2)) [\hat{\mu}(S_2)(D - C_p + \bar{C}) - (1 - \hat{\mu}(S_2))(\bar{C} + C_p)] \\ &= (1 - F_1(\hat{p}(S_2)))S_2 + \frac{D + 2\bar{C}}{F_1(\hat{p}(S_2))} \int_{\underline{p}}^{\hat{p}(S_2)} pf(p)dp - F_1(\hat{p}(S_2))(\bar{C} + C_p). \end{aligned}$$

Differentiating  $\hat{G}(S_2)$  and rearranging terms, we get that

$$\hat{G}'(S_2) = (1 - F_1(\hat{p}(S_2))) - f(\hat{p}(S_2)) \frac{\bar{C} + C_p}{D + 2\bar{C}}.$$

Therefore, for a given  $p_1$ , the second-period amount of settlement  $S_2$  and the corresponding critical probability  $p_2 = \hat{p}(S_2)$  are given by:

$$\frac{f(p_2)}{1 - F_1(p_2)} = \frac{D + 2\bar{C}}{\bar{C} + C_p} \quad (7)$$

$$S_2 = p_2(D + \bar{C} + C_d) + (1 - p_2)(C_d - \bar{C}). \quad (8)$$

Since  $p$  is assumed to be uniformly distributed, equation (7) becomes

$$p_2 = p_1 - \frac{\bar{C} + C_d}{D + 2\bar{C}}. \quad (9)$$

Again, in equilibrium the alleged infringer is indifferent between accepting  $S_1$  or  $S_2$ . So it must hold that

$$S_2 = S_1. \quad (10)$$

From (8), (9) and (10) it follows that  $p_1$  and  $p_2$  can be expressed as functions of  $S_1$ :

$$p_1 = \frac{S_1 + 2\bar{C} + C_p - C_d}{D + 2\bar{C}} \quad (11)$$

$$p_2 = \frac{S_1 + \bar{C} - C_d}{D + 2\bar{C}}. \quad (12)$$

Consider now the first period of the game. The equilibrium first-period settlement offer  $S_1^{cap}$  must maximize the IP holder's expected payoff

$$\frac{\bar{p} - p_1}{\bar{p} - \underline{p}} S_1 + \frac{p_1 - p_2}{\bar{p} - \underline{p}} S_2 - c_p \frac{p_1 - \underline{p}}{\bar{p} - \underline{p}} + \frac{1}{\bar{p} - \underline{p}} \int_{\underline{p}}^{p_2} p (D + \bar{C} - C_p) - (1 - p)(C_p + \bar{C})] dp.$$

Replacing  $S_2$ ,  $p_1$  and  $p_2$  must be replaced with their expressions as functions of  $S_1$ , we find that  $S_1^{cap}$  must maximize

$$-\frac{1}{2(D + 2\bar{C})} S_1^2 + \bar{p} - \frac{c_p + C_p + \bar{C}}{D + 2\bar{C}} S_1$$

which yields

$$S_1^{cap} = \bar{p} (D + 2\bar{C}) - (c_p + C_p + \bar{C}).$$

From (9) and (10) it then follows that the equilibrium thresholds  $p_1^{cap}$  and  $p_2^{cap}$  are given by

$$p_1^{cap} = \bar{p} - \frac{c_p + C_d - \bar{C}}{D + 2\bar{C}}$$

$$p_2^{cap} = \bar{p} - \frac{c_p + C_p + C_d}{D + 2\bar{C}}.$$

Hence, the equilibrium share of disputes settled before any claim is filed:

$$\bar{p} - p_1^{cap} = \frac{c_p + C_d - \bar{C}}{D + 2\bar{C}},$$

The share of disputes settled after a claim is filed is

$$p_1^{cap} - p_2^{cap} = \frac{C_p + \bar{C}}{D + 2\bar{C}}.$$

Let us first examine the effect of the costs cap on the share of disputes settled before any claim is filed. To determine this effect, we need to compare  $\bar{p} - p_1^{cap}$  and  $\bar{p} - p_1^{pre}$ . It turns out that the comparison between these two shares is generally ambiguous. However, one can check that

$$\bar{p} - p_1^{cap} > \bar{p} - p_1^{pre}$$

if the cost of filing a claim  $c_p$  is relatively small. This stems from the fact that  $\bar{p} - p_1^{pre} \rightarrow 0$  when  $c_p \rightarrow 0$  while  $\bar{p} - p_1^{cap} \rightarrow \frac{C_d - \bar{C}}{D + 2\bar{C}} > 0$  when  $c_p \rightarrow 0$ . In the absence of a costs cap, the claimant's incentive to settle pre-trial disappears completely in the limiting case where the cost of filing a claim is zero. Crucially, however, with a costs cap, this incentive still exists in that limiting case because the claimant anticipates that he will not be able to recover all his litigation costs in case he prevails in the trial.

**Result 1:** *If the cost of filing a claim is relatively small, the costs cap induces an increase in the share of disputes settled before any claim is filed.*

Let us now compare  $p_1^{cap} - p_2^{cap}$  and  $p_1^{pre} - p_2^{pre}$ . Straightforward calculations show that

$$p_1^{cap} - p_2^{cap} < p_1^{pre} - p_2^{pre}$$

for relatively low values of damages  $D$  while the reverse holds for relatively large values of damages  $D$ . Since most of the claims at the IPEC are of relatively low value, we will focus on these in the following statement:

**Result 2:** *For disputes involving a relatively low level of damages, the costs cap induces a decrease in the share of disputes settled after a claim is filed.*

#### A.4 Effect of the damages cap

Let us now use our model to examine the effect of the damages cap, which we denote by  $\bar{D}$ . Since this cap was implemented after the costs cap, we need to see how the equilibrium thresholds  $p_1^{cap}$  and  $p_2^{cap}$  under the cost cap are affected by the implementation of a damages cap.

Note that the damages cap has no effect on the claims for which the damages are below or equal to the cap, i.e.  $D \leq \bar{D}$ . Therefore we will focus on the claims for which the damages cap is binding, i.e. those such that  $D > \bar{D}$ . For these claims the equilibrium thresholds become

$$\check{p}_1^{cap} = \bar{p} - \frac{c_p + C_d - \bar{C}}{\bar{D} + 2\bar{C}}$$

$$\check{p}_2^{cap} = \bar{p} - \frac{c_p + C_p + C_d}{\bar{D} + 2\bar{C}}$$

while they were equal to

$$p_1^{cap} = \bar{p} - \frac{c_p + C_d - \bar{C}}{D + 2\bar{C}}$$

$$p_2^{cap} = \bar{p} - \frac{c_p + C_p + C_d}{D + 2\bar{C}}$$

in the absence of a damages cap.

From  $D > \bar{D}$  it follows that

$$\bar{p} - \check{p}_1^{cap} > \bar{p} - p_1^{cap},$$

$$\check{p}_1^{cap} - \check{p}_2^{cap} > p_1^{cap} - p_2^{cap}.$$

Thus, we have the following results for the disputes involving claims for which the damage cap is binding:

**Result 3:** *The damages cap induces an increase in the share of disputes settled before any claim is filed.*

**Result 4:** *The damages cap induces an increase in the share of disputes settled after a claim is filed.*

## A.5 Effect of the Small Claims Track

The analysis of the implementation of the IPEC SCT is straightforward. We assume that the SCT induced a decrease in the litigation costs  $C_p$  and  $C_d$  (for small claims) since the SCT consists of informal hearings heard by a District Court judge *without the need for legal representation*. It follows from the expressions of  $p_1^{cap}$  and  $p_2^{cap}$  that a decrease in  $C_p$  and  $C_d$  induces an decrease in both  $\bar{p} - p_1^{cap}$  and  $p_1^{cap} - p_2^{cap}$ . We therefore get the following results for the cases that can be heard at the SCT:

***Result 5: The SCT induces a decrease in the share of disputes settled before any claim is filed.***

***Result 6: The SCT induces a decrease in the share of disputes settled after a claim is filed.***

## B Appendix: Figures

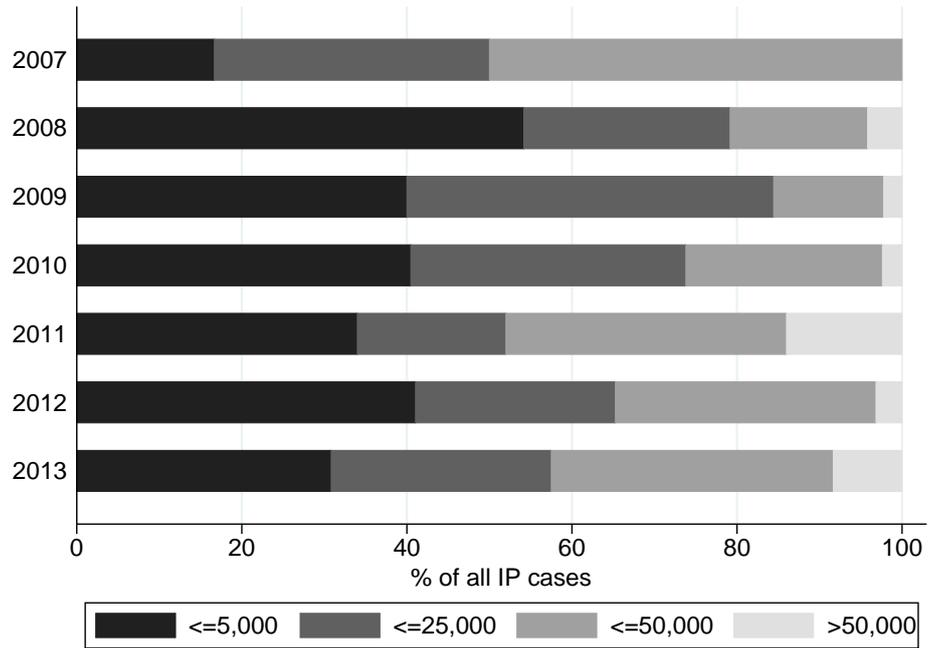


Figure A-1: IPEC: case values

Note: Case counts exclude cases brought by Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS). Data on value of claim available for 378 cases. Claim values shown in £.

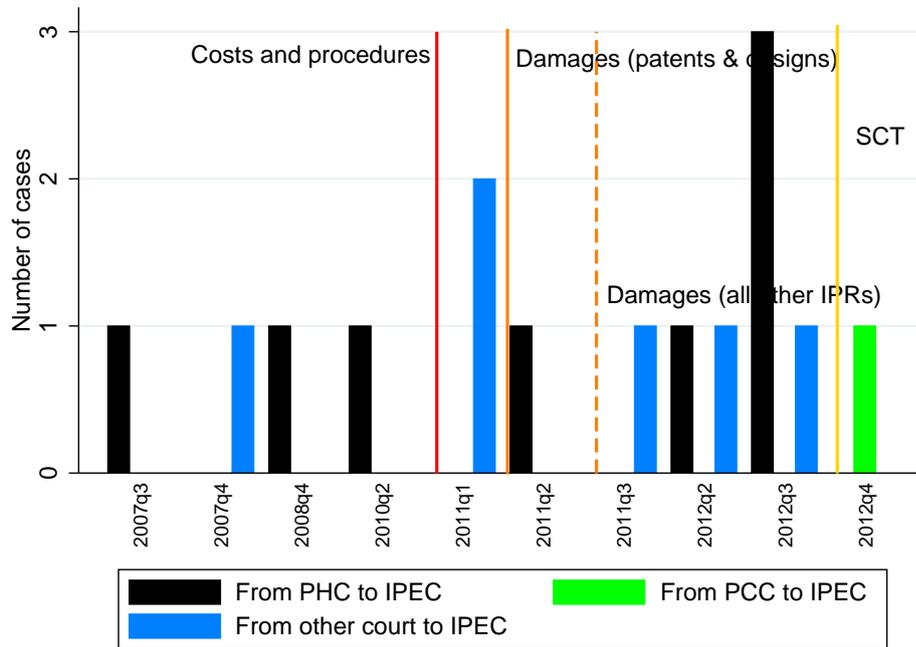


Figure A-2: Case transfers

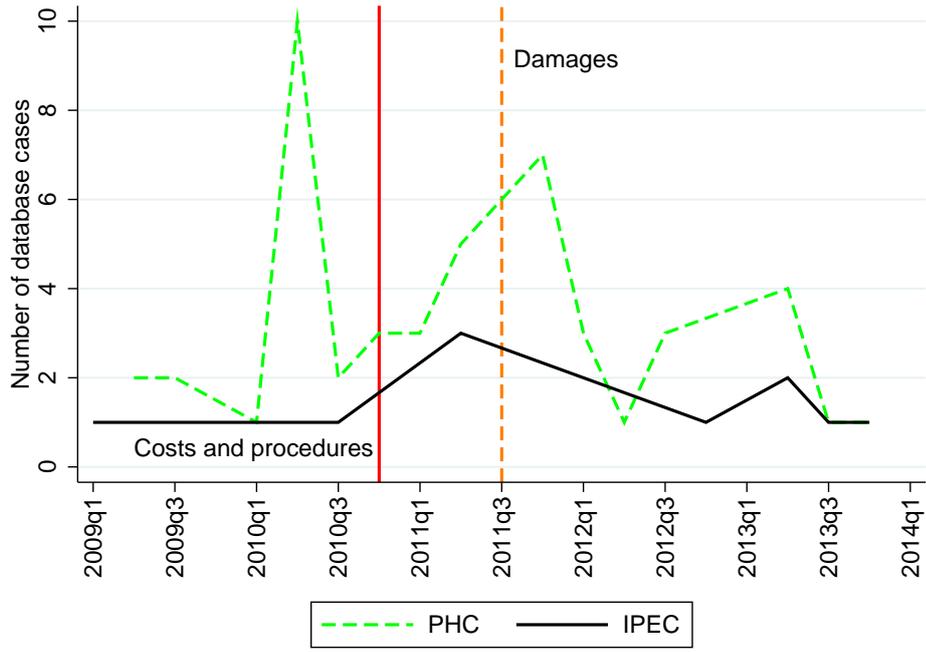


Figure A-3: Comparison IPEC/PHC: database cases

## C Appendix: Tables

Table A-1: PHC/HC: Case counts by plaintiff type, 2007-2013

Year	Individuals				SMEs			
	IPEC		PHC		IPEC		PHC	
	# Cases	Share	# Cases	Share	# Cases	Share	# Cases	Share
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
2007	5	28%			8	44%		
2008	9	24%			19	50%		
2009	9	9%	18	10%	26	27%	65	37%
2010	16	18%	18	8%	46	52%	65	28%
2011	31	23%	25	9%	72	53%	70	25%
2012	34	21%	29	12%	79	49%	50	21%
2013	49	22%	12	6%	102	45%	36	18%

**Notes:** No data are available for trademarks, design, copyright and database rights at the PHC/HC prior to 2009; trademark case count includes passing-off claims; design cases includes registered and unregistered design rights. Case counts exclude cases brought by Phonographic Performance Ltd. (PPL) and the Performing Rights Society (PRS).

## D Appendix: Summary of legal changes

- 1 Jan 2007-30 September 2013 - PCC Jurisdiction (County Court with split jurisdiction)
  - Patents (special jurisdiction)
  - Registered designs (UK and Community) (special jurisdiction)
  - Copyright (ordinary jurisdiction)
  - Trade marks and Passing Off (UK and Community) (ordinary jurisdiction- though there are restrictions on invalidity actions with respect to CTMs)
  - Unregistered designs (UK and Community) (ordinary jurisdiction)
  - Databases (sui generis and Copyright)
  - Ancillary matters such as Breach of Confidence - only where linked to claim within special or ordinary jurisdiction)
- 1 Oct 2013-31 December 2013 - IPEC Jurisdiction (Specialist Court within Chancery Division)
  - Patents
  - Registered designs (UK and Community)
  - Plant Variety rights and Semiconductor Topography rights
  - Copyright
  - Trade marks and Passing Off (UK and Community - though there are restrictions on invalidity actions with respect to CTMs)
  - Unregistered designs (UK and Community)
  - Databases (sui generis and Copyright)
  - Breach of Confidence
  - Ancillary matters (including breach of contract, breach of fiduciary duty, and malicious falsehood)
- 1 January 2007-31 December 2013 - HC Jurisdiction (Chancery Division)
  - Copyright
  - Trade marks and Passing Off (including Appeals from the Comptroller of Trade Marks) (UK and Community - though restrictions on invalidity actions with respect to CTMs)
  - Unregistered Designs (UK and Community)
  - Databases (sui generis and Copyright)
  - Breach of Confidence
  - Ancillary matters (including breach of contract, breach of fiduciary duty, and malicious falsehood)

- 1 January 2007-31 December 2013 - PHC Jurisdiction (Specialist Court within Chancery Division)
  - Patents (including Appeals from the Comptroller of Patents)
  - Registered Designs (UK and Community) (except for Appeals from the Comptroller within jurisdiction of Registered Designs Appeal Tribunal)
  - Plant Variety Rights and Semiconductor Topography rights
  - Ancillary matters (including breach of contract, breach of fiduciary duty, and malicious falsehood)

## **E Appendix: Quantitative Data Collection Challenges**

### **E.0.1 Challenges of Data Collection of IP Cases at the IPEC 2007-2013**

The physical IPEC records from 2007-13 are held in relatively good order in a localised area on the 4th floor of the Rolls Building. Nevertheless, a small proportion of these case files are missing from the 4th floor at any given time due to the fact that case files are regularly needed at IPEC trials. For this reason, the research assistants frequently did a sweep to see if missing files had been returned. Over the period September 2013-July 2014 this tactic helped us to locate many cases which were not initially available to us at the Rolls Building. Meanwhile, with the assistance of the IPEC clerk, as well as the relevant RCJ clerk, our research assistants collected SCT data for all cases filed up to the end of 2013 from the physical SCT files held at the RCJ.

Nonetheless, the record keeping at the IPEC remains largely paper-based – rather than digital – and as such, it is not uncommon for case files to be misfiled, or to go missing altogether. For this reason there are a very small number of cases for which we were unable to obtain any information except for the case number. Nonetheless, we are confident that given the methodical approach we took to case-counting outlined above, we have examined every possible physical IPEC case file for 2007-13. As noted above, in September 2014 we examined the available IPEC judgments for 2007-13 online (via BAILII); importantly, we did not find any cases that we did not already have a record of from our search of the physical files. Thus, our IPEC case dataset includes data drawn from all physical files found at the Rolls Building and all available digital court records.

### **E.0.2 Challenges of Data Collection of IP Cases at the HC/PHC 2007-2013**

Regarding the HC/PHC level, in line with the IPEC data collection outlined above, our initial plan was to obtain direct access to all HC/PHC records to enable us to extract full case data for all IP cases filed 2007-2013. However, in collecting the data we had to deal with a number of significant challenges. Significantly, in contrast with the IPEC records from 2007-13, the HC/PHC IP case files are not held in a unique location, but are shuffled within the general Chancery section in the Rolls Building; moreover, there is not even a list of IP-specific case numbers which are attributable to the various IP Chancery cases.<sup>26</sup> As a

---

<sup>26</sup>Note that at the request of Birss J. from 2013 HMCTS has begun to separate PHC filings from IPEC filings, something that has increased the accuracy of the stats viz. our own records (though the HMCTS stats are still

result, the only way to count and examine HC/PHC IP files is to physically go through each of the estimated 5,000 Chancery Division case files for each year, one-by-one, opening each file to see if it is an IP-related claim or another Chancery matter (e.g. a property dispute, an insolvency claim etc.). Due to the fact that a certain proportion of cases are always in circulation at the PHC/HC, we also needed to conduct frequent sweeps of the storage area to locate any missing cases.

Having encountered these initial challenges, the authors agreed with the IPO that a new, more streamlined data collection strategy was necessary. We agreed on a two-pronged approach - focusing on case counts and case-level data - that would allow us to maximise our resources, while still providing us with accurate case counts and case-level data. With respect to case counts, for HC/PHC IP cases we agreed that our research assistants would manually search through the 5,000 Chancery cases filed per year in order to locate the relevant case files, so that we would be able to provide accurate stats on the number of IP cases filed per year, per IP right. Regarding case-level data, because we lacked the resources to extract detailed data from all IP case files we agreed that we would divide our data gathering into two phases (i) Patent cases at the PHC and (ii) other IP cases at the HC/PHC, as explained above.

Having re-designed the methodology, the research assistants began tasks (i) and (ii). However, five months into our data collection we discovered that due to spatial constraints HMCTS had moved the 2007 and 2008 Chancery files off-site. By this stage, we had already collected the relevant patent data for 2007 and 2008. However, the effect of this was that we were unable to undertake counts or collect case-level data on 2007 and 2008 copyright, trade mark, database and designs cases. Thus, although our PHC patent case dataset does include 2007 and 2008 cases, the streamlined dataset for HC/PHC copyright, trade mark, database and designs cases does not – it is limited to cases filed 2009-2013.

## **F Appendix: Questions for qualitative interviews**

1. Do you think the access of small and medium-size enterprises (SMEs) and entrepreneurs to IP litigation has increased with the recent reforms to the Patents County Court (PCC)/Intellectual Property and Enterprise Court (IPEC)?
2. Are there any reforms in particular e.g. costs cap, damages cap, active case management, small-claims track (SCT), that have been particularly influential in this regard?
3. Could the IPO do more to improve the IPEC e.g. raise or lower the cost or damages cap at the multi-track or SCT level?
4. Is there anything about litigation that makes it more attractive to SMEs than other forms of achieving a resolution such as mediation or alternate dispute resolution?
5. In your experience, is it common for SMEs to settle during disputes at the PCC/IPEC? What do you think most affects a party's decision to settle?
6. Why do you think that so many parties settle late in the process e.g. after the CMC or after the trial has commenced, rather than pre-trial?

---

not entirely reliable, and still not linked to actual claim file numbers).

7. Could more be done, pre-trial, to encourage parties to settle? Could the IPO do anything more to encourage parties to engage in mediation, for example? Does the allocation questionnaire play its role appropriately in this regard?

## **G Appendix: Questions for qualitative survey**

1. Do you agree to give your consent to taking part in this survey?
2. Preliminary Question: How would you describe your current status? Do you have a position in a company, and if so, what is your position? Alternatively are you an individual inventor or entrepreneur?
3. What types of IP rights do you have?
4. How important is IP for you?
5. Are you aware of the Patents County Court(PCC)/Intellectual Property Enterprise Court (IPEC) reforms? (Cost cap, damages cap, active case management, small-claims track).
6. Are you actively monitoring the market and your competitors for potential infringement of your IP rights?
7. Have you identified possible infringements of any of your IP rights for the period 2007-2010?
8. Have you identified possible infringements of your IP rights for the period 2011-2013?
  - (a) Has your monitoring of IP infringement changed since the PCC/IPEC reforms came in during 2011?
9. Which, if any, of your IP rights do you think have been infringed?
10. If you have identified possible infringements, how would you describe the alleged infringer(s)
11. Did you contact the alleged infringer(s)?
12. Regarding the infringement dispute(s), what was the resolution?
13. Prior to resolution, did you file a court claim against the alleged infringer(s)? If so, please specify which court
14. If you didn't file a court claim, why did you choose to not take the dispute to court?
15. Regarding IP disputes where a settlement was reached, would you have gone to court if attempts to settle failed?
16. Is there anything else you would like to say on the subject of the PCC/IPEC reforms or IP litigation?