KNOW YOUR RIGHTS: WHAT CAN YOU DO WHEN YOUR COPYRIGHT IS INFRINGED?

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Know Your Rights:
What can you do when your copyright is infringed?

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The importance of copyright to photographers – e.g. income from licence fees - is well known to our readers. But, what happens when your copyright is infringed and the infringer won't pay up and/or stop infringing? As many of our readers will know, barriers to court enforcement long existed particularly for low value claims: the relatively small amount of money at stake often didn't justify the cost and trouble of bringing court action.

That position changed with the establishment, in 2012, of a new Court – the Intellectual Property Enterprise Court (IPEC) – which includes a Small Claims Track (SCT) for intellectual property claims (including copyright) worth under £10,000. The Court is part of the High Court of England and Wales, and hears any dispute with a relevant link to England and Wales (e.g. where England and Wales is the place of the defendant's domicile). There is a court fee to pay on the issue of a claim (for monetary remedies, on a sliding scale depending on the claim's value) but if the action is successful the fee may be recovered from the infringer. A pro-bono scheme offering free legal advice for the conduct of such claims has also recently been established: see www.ipprobono.org.uk.

Yet, while many photographers may have heard about the IPEC, there is a knowledge-gap about its actual workings, particularly Small Claims Track cases. Unlike the position with other courts, very few IPEC SCT judgments are publicly available. Key questions like how it decides cases, what types of figure it awards and who brings claims, are surrounded by mystery.

Researchers at CREATe, the Research Council funded centre for copyright law at the University of Glasgow, have sought to change that position. CREATe negotiated exclusive access to all IPEC SCT Court files for its first three years since the Court's creation (1 October 2012 to 31 December 2015). CREATe found that the vast majority of these claims – 46% (122 claims of a total of 266 over the three-year period) - were claims for photographic copyright

infringement brought by freelance professional photographers or their agents. CREATe then obtained special consent to transcribe all the judgments delivered by the Court in these freelance professional photographer cases. As most cases settle, there were 21 judgments in total.

What can photographers contemplating court-action learn from these judgments? The decisions reveal the Court to be highly sympathetic to the difficulties faced by claimant freelance professional photographers – the importance of income from copyright for photographers to make a living – and highly unsympathetic to arguments commonly advanced by infringers, such as the assumption that everything on the internet is free to be used or that, because cheap or stock images are widely available, only a nominal amount should be paid for a high-quality image.

In all cases, apart from one, the claimant was successful. Further, in the overwhelming majority of judgments, the infringement itself was considered to be clear-cut. The only question for the Court was the amount of money to be awarded. Copyright law – the Copyright Designs and Patents Act 1988 (the CDPA) – enables a claimant to claim financial remedies on a number of grounds. What light does CREATe's research shine on questions that freelance professional photographers want answers to: what types of remedies are commonly granted by the IPEC SCT, what kinds of figure are awarded, and what arguments are relevant when putting a case together?

Damages

Damages compensate the claimant for his or her losses. In all cases, save for one (*Gamby v Harrison* (2014) where the photographer's daily rate of £575 was awarded as the photographer worked on commission) the claimant was awarded damages calculated as the hypothetical licence fee which would have been agreed between claimant and defendant, had the use been licensed.

Where a claimant has a non-negotiable standard licence fee which s/he regularly charges, the Court has held the hypothetical licence fee to be the claimant's fee, e.g. the cases brought by the aerial photographer Jonathan Webb for unauthorised website use of aerial views of Shrewsbury, Manchester and Stoke on Trent: £300 in *Webb v Central Media* (2014) and *Webb v VA Events* (2015)*;* £360 in *Webb v Hope Lettings* (2014).

In other cases, the claimant's usual licence fee was the starting point for the calculation, but was reduced. In *Herringshaw v Everton Collection* (2014), the claimant's usual licence fee of £55 per image for photographs of professional footballers, was reduced to £10 per image in view of the large volume of images (236 photographs) included on the defendant's website and the defendant's charitable status. In *Walmsley v Daily Telegraph* (2014), the Court awarded £200 for the unauthorised use of the claimant's 'striking' photograph of the composer Cornelius Carew on *The Telegraph*'s blog, in view of the claimant's skill; licence fees which the claimant had charged *The Times* and *The Sunday Times* magazine were reduced to reflect the fact that the defendant had only reproduced on a blog. It was irrelevant that the defendant usually paid £25 for blog photographs.

The Court also frequently refers to picture library rates (regardless of whether the claimant in fact licenses through a picture library). In *Bancroft v Harries* (2014), regarding unauthorised website use of the claimant's glamour photographs of models, the claimant was successful in obtaining the full amount she claimed - £9,273.60 – by referring to rates charged by Photo Quote, Getty Images and NUJ standard rates that related to the relevant type of image and number of pixels. The Court was also persuaded by evidence of the claimant's reputation, skill and popularity as a photographer.

Picture-library rates were also referred to in *Seaward v Foxtons* (2015), regarding the unauthorised use by estate agents of the claimant's photographs of his former home for marketing purposes. The fee sought by the claimant (£350 per use, in respect of 10 uses: total £3,500) was 'more than reasonable' in view of rates set by Corbis; the Court observed that had the claimant asked for £500 per use, that would have been granted. In another case, concerning the unauthorised use of a photograph of singer Florence Welch of Florence and the Machine on an entertainment website, Getty Images rates were applied (£13 per month, producing an overall damages figure of £780), rather than the claimant's own licence fee: *Sheldon v Johnson* (2016).

In other cases, picture library rates formed the starting point for the calculation, but were reduced. In *Doré v Hendrich* (2014), concerning the unauthorised use of a photograph of Stonehenge on a local tour-guide website, the Court held that Getty Image rates should be discounted by 50% to account for the small nature of the defendant's business, producing

damages of £750. In *Brown v Mayoh* (2014), about a newsworthy photograph – a Dornier aeroplane underwater at Goodwin Sands - which was published without consent on the defendant's hobby website, damages calculated on the basis of National Union Journalists rate card (£450) were reduced to £350, to account for the fact that the defendant website was a 'specialist website of limited interest to the general public'; £450 was the sort of fee that the Claimant would have charged a national newspaper. The Court also awarded a further £350 – a 100% uplift on the basic licence fee - as a premium paid for first publication of a newsworthy photograph; the claimant's claimed standard practice was to calculate a 'first publication premium' as an uplift of between 0.5 and two times the basic licence fee.

Finally, where the claimant itself is a picture library (acting as the photographer's exclusive licensee) the Court usually awards standard rates charged by that library: £204 in *Stockfood v Red Pub,* £270 in *Stockfood v Wine Direct,* £155 in *Stockfood v Quality Garden.* In *Stockfood v Propaganda,* the standard licence fee of £225 was reduced to £200, due to the defendant's limited use of the image.

Additional Damages

The Court can award additional damages, 'as the justice of the case may require', in view of all the circumstances, particularly the flagrancy of the infringement and the benefit accruing to the defendant from the infringement (section 97(2) CDPA). In the IPEC SCT, factors justifying additional damages include recklessness as to the removal of the infringing photographs, after being notified of infringement (*Croxford v Cotswolds* (2015)), the benefit to the defendant of the professional quality of the claimant's image and failure constructively to agree a licence fee (*Sheldon v Johnson* (2016)), the repeated use of the claimant's photograph over a long period of time with a view to bringing in business (*Webb v Central Media* (2014)) and the unauthorised publication of an image bearing a large water-mark and copyright notice (*Brown v Mayoh* (2014)). In all these cases, a 100% uplift on the basic licence fee was awarded. In a further case - *Webb v Hope Lettings* (2014) - the additional damages award exceeded an 100% uplift: £1000 was awarded (in addition to the basic award of £360), where the defendant had used the claimant's aerial photograph as a central plank of their internet marketing strategy

Attribution

Damages may also be awarded for failure to attribute the photographer (section 77 CDPA) and this is often calculated as a 100% uplift on damages: *Walmsley v Education* (2014), *Stockfood*

v Quality Garden (2015) and *Stockfood v Wine Direct* (2015). However, in *Doré v Hendrich* (2014), where the defendant had removed the watermark from the claimant's photographs, the same judge (District Judge Clarke) considered such a measure to be too 'crude', awarding £300 for lack of attribution and additional damages together (the basic award being £750), without specifying how the figure was calculated.

Derogatory Treatment

Damages can also be awarded for 'derogatory treatment': the addition, deletion, alteration or adaption of a work which distorts or mutilates the work or is otherwise prejudicial to the honour or reputation of the author (section 80 CDPA). In *Webb v VA Events* (2015), where the image was orphaned through the removal of the claimant's metadata and the addition of the defendant's own copyright notice, £1,500 was awarded as a 500% uplift on the basic award of £300 - as a combined figure for derogatory treatment, lack of attribution and additional damages (the defendant having a used the image excessively with a deliberate intention to infringe).

Interest and Costs

Interest on damages (up to 8%), from the date of infringement to judgment, can also be awarded, the norm being between 3-4%. Limited costs can also be claimed, e.g. court fees, travel to/from a court hearing. The commission on damages charged by infringement detection agencies (e.g. Picscout, Gazo and Corrigan, charging between 20% to 25% commission) was also recoverable where the defendant did not respond (*Stockfood v Quality Garden* (2015)) or was unreasonable in conducting its defence (*Stockfood v Red Pub* (2014)), though the Court made clear that this would not always be awarded.

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QUOTATIONS FROM CASES:

'There is a difference between … amateurs who take photographs and make them available and fees which professional photographers believe that they should be paid for use of their work. This is Mr Doré's work. What he does is take photographs. If he was not paid for his photographs he would not be eating and I do have some sympathy for him and that is what this court is here for.' District Judge Clarke, *Doré v Hendrich*, (2014).

‘It is naive for anyone to believe that just because an image is available on Google copyright does not subsist in that image.’ *Webb v Hope Lettings,* District Judge Hart (2014).

It would be ‘a wrong signal from this court to say that anyone who publishes an infringing photograph which has got such an enormous watermark and copyright notice on it, without checking with the rights holder that it may do so, is not guilty of a flagrant breach of copyright.’ *Brown v Mayoh,* District Judge Clarke (2014).

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