EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT No. 2) RULES 2012

2012 No. 2208 (L.8)

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) ("the CPR"). The CPR are rules of court, which govern practice and procedure in the Civil Division of the Court of Appeal, the High Court and county courts

2.2 The amendments to the CPR covered by this instrument relate to Government initiatives.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 In the light of comments on the use in rules of court of the expression "will", in the Committee's 31st and 41st reports of the 2010-2012 session of Parliament, the Committee's attention is drawn to rules 3, 8(c), 9(b) & (c), 10(c) in this instrument, and the Schedule to it which inserts in the CPR new rules 81.7, 81.14, 81.23, 81.28, 81.34, 81.35 and 81.37, where the expression "will" is used.

3.2 In some instances in these rules, the use of the word "will" denotes an automatic outcome - see, for example, rule 10(c) which inserts new Rule 63.27 which, in turn, provides for the circumstances in which a claim in a patents county court will be allocated to the small claims track. In other instances, the use of the word "will" denotes a non-discretionary function - see, for example, the Schedule to the rules which inserts new Rule 81.28(5) which provides that a court which hears a committal application in private and decides to make such an order will state certain facts about that order in public. In one instance, new Rule 81.14(4) provides that the court will consider an application for permission to make a committal application at an oral hearing "unless it considers that such an application is not appropriate".

3.3 As the Committee will be aware, it is the Civil Procedure Rule Committee ("the CPR Committee") which makes the CPR (subject to approval by the Lord Chancellor). The CPR Committee's continuing view is that, in relation to the functions of the court, it is appropriate to refer to what the court "will" do, not what it "must" do. Consequently, the CPR do not in general operate to compel the court to perform its non-discretionary functions by imposing a duty in relation to each one and there is no sanction which applies to the court should it fail to do so. Imposing a further notional duty on the court to perform its individual functions by use of the

word "must" is considered by the CPR Committee to be, in general, unnecessary and, arguably, misleading.

3.4 In each context that it is used, both the CPR Committee and the Ministry of Justice consider the expression "will" to be accurate and its meaning in the particular context to be clear. As noted in the Ministry of Justice's memorandum of 7th February, neither the Ministry of Justice nor the CPR Committee is aware of any instance where the use of the expression "will" when referring to such functions of the court has given rise to any complaint among practitioners or court users (including litigants in person) that the meaning or outcome is unclear.

4. Legislative Context

4.1 The Civil Procedure Act 1997 established the CPR Committee and gave it power to make civil procedure rules. The first CPR were made in 1998. The intention behind the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and county courts, replacing the old County Court Rules (CCR) and Rules of the Supreme Court (RSC).[1] The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedures and reduce, or at least control, the cost of civil litigation in England and Wales. The changes were made, and continue to be made, in response to the report 'Access to Justice' (1996) by Lord Woolf.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 This instrument amends the CPR as follows.

(a) Amendments are made to allow the court to make an order upon a party failing to file an Allocation Questionnaire ("AQ") within a specified time. Upon a defence to a claim being filed, parties are required to file an AQ which provides information on: pre-issue steps taken; steps taken to mediate; witness of fact and experts to be called if there is a hearing; costs incurred; and venue for hearing and any other information the parties' think relevant. If an AQ is not provided within the time allowed (21 days from the date the notice is sent to the parties), the court may make an order for directions on next steps, an order striking out the claim or defence, an order for entry of judgment or an order listing of the case for directions. Where the case is being handled by the County Court Money Claims Centre based in Salford the case will be transferred to a local county court, where upon the relevant order may be

[1] This work is ongoing: the few remaining CCR and RSC are contained in two schedules to the CPR.

made. The amendments also preclude the party in default from obtaining payment of costs on any application to set aside or vary the order, or for attendance at a case management conference, unless the court thinks it unjust to do so. These amendments are the result of information gathered from a pilot scheme which ran from 2009 to 2012 during which a court officer could make an order, indicating the claim, counterclaim or defence would be automatically struck out if the parties did not comply with the direction from the court requiring the return of the completed AQ. The provision tested during the pilot scheme has not been carried through as the CPR Committee felt that the penalty for non-compliance was disproportionate and did not provide for circumstances in individual cases, nor give the freedom for the making of an alternative order.

(b) Amendments are made to allow for the recovery of costs incurred in obtaining a transcript of a judgment made in a case allocated to the small claims where a party is seeking to appeal that judgment. Cases are allocated by the court to the small claims track where the value of the claim is less than £5,000 (or £1,000 in personal injury cases and certain other housing disrepair matters) and the claim is straight forward. Cases allocated to the small claim track, often conducted by litigants in person, benefit from a simplified procedure and less formal hearing. A particular feature of the small claims track is that each party must bear their own costs, with a few exceptions such as the costs of experts' fees and travelling expenses and loss of earnings. The recovery of the costs of obtaining a transcript required for an appeal is added to the list of exceptions to ensure that a party is not discouraged from bringing a meritorious appeal because of the expense of obtaining a transcript.

(c) The CPR comprise rules made since its inception together with remaining extant Rules of the Supreme Court and the County Court Rules which were not incorporated and appear as Schedules 1 and 2 to the CPR. In this instrument, amendments are made for the inclusion of rules on the procedures pertaining to contempt and committal in a new part of the CPR and the revocation or omission of the relevant RSC and CCR. The new provisions do not fundamentally change the existing rules, but do correct an error in relation to false evidence; reflect changes in procedure that have evolved; and provide a standard form of wording to be endorsed on orders of the court where non-compliance with the order may result in committal.

(d) Amendments are made to provide that where permission to appeal is considered without an oral hearing and refused, the judge may make an order that the person seeking permission may not request the decision to be reconsidered at an oral hearing, where the application is totally without merit. These powers, already available to the Court of Appeal, are extended to included decisions by judges of the High Court, a Designated Civil Judge or Specialist Circuit Judge.

(e) Rules are introduced to allow particular court officers assigned to the Administrative Court to exercise the jurisdiction of the High Court, in a number of proceedings. Routine judicial decisions, case management directions, granting interim orders in criminal proceedings, directions etc are devolved to such officers. This change aims to make the best use of judicial and staff resources.

(f) Amendments are made to allow for a discrete process for judicial review following refusal by the Upper Tribunal of applications for permission in asylum and immigration cases. The process allows parties the opportunity to challenge the decision but does not require the court to reconsider issues already considered by the Upper Tribunal.

(g) The small claims track is extended to include lower value intellectual property claims proceeding in the Patents county court. Currently all claims issued in the Patents county court or the High Court are allocated to the multi-track with the associated costs regime. It has been recognised that there was a gap in the provision of litigation for the lowest value cases, and the general procedures governing low value claims that is already existent within other courts should be applied. The new small claims procedure for intellectual property claims is streamlined; there is no need to fill an allocation questionnaire. The small claims track is expected to benefit those claimants currently deterred by the cost of bringing such a claim within the court system. It will deal with the lowest value copyright, unregistered design and trade mark claims and will be quicker and cheaper than the current options for resolving disputes through the court. It is expected to be of greatest benefit to small and medium enterprises/entrepreneurs with straightforward claims, for example, the use of photographic material without consent.

8. Consultation outcome

8.1 The Civil Procedure Rule Committee must, before making Civil Procedure Rules, consult such persons as they consider appropriate (section 2(6)(a) of the Civil Procedure Act 1997). Where the Committee initiates amendments then consultation is undertaken where deemed necessary.

8.2 Recommendations in respect of the Patents county court, made in *Lord Justice Jackson's Review of Civil Litigation Costs* (Chapter 24) and in the *Hargreaves Review of Intellectual Property and Growth*, have been taken forward by the Intellectual Property Office. The reforms have judicial endorsement and have also been the subject of support in the responses to a call for evidence conducted in February 2012. Of the 26 respondents to the call for evidence 21 supported the introduction of a small claim procedure for the Patents county court along the lines of the existing system. Although introduction of a small claims track is outside the scope of the deregulatory process an impact assessment has been prepared.

8.3 The relevant documents can be found at:

Lord Justice Jackson's Review of Civil Litigation:

http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs.htm.
Chapter 24 deals with Intellectual Property Litigation.

The Ministry of Justice consultation and response paper Proposals for Reform of Civil Litigation Funding and Costs in England and Wales:
http://www.justice.gov.uk/consultations/jackson-review.htm

Hargreaves Review of Intellectual Property and Growth:
http://www.ipo.gov.uk/ipreview.htm

Intellectual Property Office Call for evidence - Government Response:
http://www.ipo.gov.uk/ -enforce-c4e-pcc-response.pdf

Impact Assessment:
A copy of the impact assessment on the introduction of a small claims track in the Patents county court produced by Department for Business Innovation and Skills (Intellectual Property Office) is attached.

9. Guidance

9.1 A preview summarising the forthcoming changes will be published on the Ministry of Justice website in August 2012 at http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/index.htm. The Ministry of Justice will also write to key stakeholders detailing the changes in August 2012.

9.2 The rules will be published by the Stationery Office and will be available on the Ministry of Justice website when the majority come into force in October 2012.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment has not been prepared for this instrument which gives effect to a variety of changes from different sources.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to provide a summary of the changes up to three months in advance by writing to key stakeholders and through the CPR website.

12. Monitoring & review

12.1 These rules will form part of the Civil Procedure Rules 1998 that are kept under review by the Civil Procedure Rule Committee. The Civil Procedure Rule Committee will make any subsequent amendments to these rules.

13. Contact

Jane Wright at the Ministry of Justice (tel: 020 3334 3184 or email: jane.wright@justice.gsi.gov.uk) can answer any queries regarding the instrument.

Title:	Impact Assessment (IA)
Introducing a small claims track to the Patents County Court (PCC)	**IA No:**
Lead department or agency: BIS (IPO)	**Date: 19/01/2012**
Other departments or agencies: MoJ including HMCTS	**Stage:** Development/Options
	Source of intervention: Domestic
	Type of measure: Other
	Contact for enquiries: Paul Storer - 01633 814344

Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

Some businesses, predominantly those with lower-value claims for intellectual property (IP) infringement i.e. less than £5,000, state that they are priced out of access to justice through the courts. In particular, micro businesses and entrepreneurs identify that, as a result of potentially disproportionate costs, they can not bring such claims before the courts and they are therefore unable to protect their innovation and creativity. The Jackson Review (2010) identified this as an unmet need. The Government (IPO) offers affordable alternatives to court action, for instance mediation services or advice on licensing solutions, but where such means prove unsuccessful then the right holder is effectively unable to enforce or defend their rights without exposure to significant legal costs.

What are the policy objectives and the intended effects?

The Jackson Review (2010) and Hargreaves Review (2011) both recommend the introduction of a small claims track in the specialist IP county court (the Patents County Court). This proposal envisages its introduction at a relatively low level of initial resource for specific types of IP dispute, to test demand and effectiveness. Like the new procedures in the PCC, a 'small claims track' will further improve access to justice since costs will be proportionate to what is at stake. It will ensure that the innovation and creativity of the micro-business and entrepreneur, in particular, are better protected for the benefit of the right holder and the UK economy.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The options considered were
Option 0: do nothing
Option 1: introduce a small claims track to the Patents County Court (PCC)
Claims under £500,000 can be heard under the streamlined procedures in the Patents County Court. However the costs incurred would still be disproportionate to small claims less than £5,000. There are numerous low cost alternatives to court action, e.g. mediation, available to micro business and SMEs, including at the IPO. Where such means of resolving the lowest value disputes are unsuccessful then the right holder is effectively unable to enforce or defend their rights as there is no small claims track in the Patents County Court. Right holders are currently unable to affordably enforce their rights and this issue may only be resolved by amending court procedures to introduce a small claims track.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 11/2015	
What is the basis for this review? Please select. **If applicable, set sunset clause date:** Month/Year	
Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	Yes

SELECT SIGNATORY Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: ..... Date: .....

Summary: Analysis and Evidence

Policy Option 1

Description:

Price Base Year 2009	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 1.41	**High:** 3.47	**Best Estimate: 2.27**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0		0.1	**0.8**
High	0		0.1	**0.8**
Best Estimate	0		0.1	**0.8**

Description and scale of key monetised costs by 'main affected groups'

Businesses/individuals are expected to pay court fees.Taking the most expensive scenario, the fees for 150 central cases (see below) where ALL cases go to a court hearing and 50% have injunctions would be £62,140 with a cost to Government of £29,131. See page 8 for further details.

Other key non-monetised costs by 'main affected groups'

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BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0		0.3	**2.2**
High	0		0.5	**4.3**
Best Estimate	0		0.4	**3.1**

Description and scale of key monetised benefits by 'main affected groups'

Best estimate 150 cases with a central (mid-value) scenario -
30 cases receiving £500
70 cases receiving £2,000
50 cases receiving £4,000
Total benefit per year = £355,000

Other key non-monetised benefits by 'main affected groups'

Introduces access to justice at proportionate cost for small IP claims. Increased deterrent to prevent infringements of IP rights. The innovation and creativity of UK business/individuals is better protected. There is the potential benefit of encouraging further growth as individuals feel that there is an improved possibility of reaping the rewards which flow from their activities.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

a) Low, high and best (central) estimate values are based on the value of the claim. For example, the low estimate, suggests that the majority of cases will be of low value.
b) 100% of all claims go to court with 50% with injunctions. This is the most expensive scenario, it is being presented for prudence, as there is currently no indication how many claims will go to court.
c) A cost to business has been assumed, again for prudence. In reality the cost of court fees would be expected to be paid by the losing party, either an infringer or an illegitimate claimant giving a zero actual cost to the successful litigant.

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0.1	**Benefits:** 0.4	**Net:** 0.3	Yes	OUT

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			England and Wales		
From what date will the policy be implemented?			01/04/2012		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			-		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			No		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:**		**Non-traded:**
Does the proposal have an impact on competition?			Yes		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:**		**Benefits:**
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	Yes	Yes	Yes	Yes	Yes

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	
Small firms Small Firms Impact Test guidance	Yes	
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	
Human rights Human Rights Impact Test guidance	Yes	
Justice system Justice Impact Test guidance	Yes	
Rural proofing Rural Proofing Impact Test guidance	No	
Sustainable development Sustainable Development Impact Test guidance	No	

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	Lord Justice Jackson (2010), Review of Civil Litigation Costs
2	Ian Hargreaves (2011), Digital Opportunity: A Review of Intellectual Property and Growth
3	
4	

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	Y_7	Y_8	Y_9
Transition costs										
Annual recurring cost										
Total annual costs										
Transition benefits										
Annual recurring benefits										
Total annual benefits										

* For non-monetised benefits please see summary pages and main evidence base section

Microsoft Office
Excel Worksheet

Evidence Base (for summary sheets)

Problem under consideration:

Some businesses, predominantly those with lower-value claims for intellectual property (IP) infringement i.e. no more than £5,000, have reported that they are priced out of access to justice through the courts. In particular, some micro businesses and entrepreneurs identify that, as a result of potentially disproportionate costs, they cannot bring such claims before the courts and they are therefore unable to protect their innovation and creativity. The Jackson Review (2010) identified this as an unmet need. The Government (IPO) offers affordable alternatives to court action, for instance mediation services or advice on licensing solutions, but where such means prove unsuccessful then the right holder is effectively unable to enforce or defend their rights without exposure to a significant costs award.

Comments of the Federation of Small Businesses in its Phase 2 submission to Jackson LJs 'Review of Civil Litigation Costs':

"Businesses have also suggested to us that reform of intellectual property litigation should embrace wider difficulties that they are experiencing in resolving relatively straightforward copyright issues (especially in relation to the music business) at a reasonable cost and within a sensible timescale. For example, many small music businesses such as independent record companies, publishers, composers and performers are vulnerable to their intellectual property rights being infringed, but at present only have the option and risk of getting involved in expensive lengthy and complex chancery litigation procedures. It is suggested that what is required (which is understood to exist in other European jurisdictions) is a simply and cost effective procedure for resolving conflicts or establishing rights, especially in cases where the issues are clear but the value of the outcome of the dispute is not large. This type of IP right is the bread and butter of many of those types of business (and generates a considerable amount of foreign earnings for UK PLC) and yet those businesses are effectively barred from access to justice by the factors mentioned above..."

Rationale for intervention;

Until recently IP disputes in the courts were automatically assigned to the 'multi-track'. There has been a shift away from this policy with the introduction (October 2010) of more streamlined procedures for claims under £500,000 as part of the reform of the Patents County Court (PCC). However, there is evidence to suggest that there are many IP claims which are at the lowest end of this value (well under £25k) and are of the least complexity, that are still not suitable to be heard under such procedures, since the cost of bringing such a claim would be disproportionate to the value of the claim.

Following publication of Lord Justice Jackson's Final Report of his 'Review of Civil Litigation Costs 2010'[1], the Ministry of Justice are implementing many of the key recommendations in order to address the need to improve access to justice at proportionate cost.

Jackson LJ also recognised the need to introduce a 'small claims track', in particular for the lowest value copyright disputes for claims with a monetary value of no more than £5,000. He recommended that one or more district judges, deputy district judges or recorders with specialist experience be available to sit in the PCC in order to deal with small claims.

His recommendation for the 'small claims track' was recently endorsed in the Independent Review of IP and Growth[2], chaired by Professor Ian Hargreaves ('the Hargreaves Review'), which considered that the track may also be appropriate for other IP disputes.

Innovation and growth

The Coalition Programme highlighted the importance of business as an economic driver of growth and innovation. It is recognised that SMEs/micro businesses/entrepreneurs play a big part in this and government support is a key element to their success and future innovation.

[1] http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/index

[2] http://www.ipo.gov.uk/ipreview.htm

Intellectual property rights are at the heart of protecting that innovation. In relation to reform of the PCC, Baroness Wilcox stated: "Maintaining an effective and efficient intellectual property framework for businesses is not enough to drive innovation. We must offer businesses a more accessible justice system for them to enforce their rights. By making it easier for small firms and entrepreneurs to use the legal processes it will give them more time to concentrate on business activities....".

Similar to the cheaper streamlined procedures in the PCC, a 'small claims track' will further improve access to justice and ensure that the innovation and creativity of the micro-business and entrepreneur in particular are protected appropriately and for the benefit of the UK economy.

On the basis of such evidence submitted to his review, Jackson LJ concludes:

"In my view there is an unmet need for justice in this regard. One can cite many other examples beyond those mentioned by the FSB. For example, a journalist whose articles have been reprinted without permission might have a claim for a few hundred pounds. A photographer whose photographs have been downloaded from the internet and reproduced without permission might have a claim for a few hundred pounds. It may be difficult for such claims be pursued at the moment. There is no small claims track in the PCC and there is little IP expertise in most other county courts".

Jackson LJ (ibid):

".....there ought to be a small claims track in the PCC for IP claims with a monetary value of less than £5,000..... I accept that when declarations or other non-monetary remedies are claimed, there is room for argument about how a claim should be valued, but this problem is not insuperable, as demonstrated by the IPCUC Working Group's final report and by the experience of the German courts. If a small claims track is created for IP claims below £5,000, there will effectively be no costs shifting for such claims and small businesses will be able to represent themselves: see chapter 49 of the Preliminary Report".

In relation to evidence submitted to the Jackson Review, there is little available beyond what was published and what is outlined above. However, it should be noted that the IP Judges also support the track and these views were expressed through the IPCUC and were also fully endorsed in the Chancery Judges Survey[3] .

In addition we highlight the additional research undertaken by the former Strategic Advisory Board for Intellectual Property Policy (SABIP) at the request of Lord Justice Jackson (Final Report entry paraphrased[4]):

'1.7 The surveys by SABIP.
SABIP kindly commissioned three internet surveys between August and October 2009, namely (i) copyright and design rights survey, (ii) patent survey and (iii) trade marks survey. In the first survey over 7,000 freelancers and small and medium enterprises ("SMEs") were sampled ...The response was sufficient in the first survey to allow inferences to be drawn, but very poor in the second and third surveys. In the first survey [i.e. in relation to copyright and designs] over 600 businesses and freelancers accessed the survey and over 300 completed all relevant questions'.

'The survey addressed two issues: first, whether there was an unmet need for a small claims track and a fast track for IP cases; secondly, whether the proposed caps upon damages of £500,000 and recoverable costs of £25,000 and £50,000 would make the PCC more attractive to SMEs ...'

'For present purposes, I shall concentrate on the first survey, which was the only one to yield a suitable number of responses. SABIP advises me that the second and third surveys did not generate robust statistical datasets.

'1.8 Conclusions from the first survey.
SABIP sets out its preliminary conclusions from the first survey as follows: ...
There was overwhelming support for both a fast track (72.2%) and a small claims forum (78.7%). Furthermore, the survey indicates high levels of potential usage for both these options: respondents

[3] http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/Chancery%20Division%20judicial%20response.pdf
[4] http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf doc page 249

indicated their assessment that they would be likely to bring ... 197 cases in the next year and 883 cases over the next five years to a small claims venue (cases of under £5,000)'.

'Given these results, it seems highly likely that high levels of demand exist for both a fast track and a small claims court for copyright and design rights cases. Although it is likely that the survey respondents may have overstated their potential usage of these mechanisms, any proposal to implement these tracks should take into consideration the need to quickly build capacity. Indeed, if the demand implied by our survey were to materialise, there is a risk of the procedures being swamped.'

In the course of the consultation on setting the limit on the value of claims heard in the PCC, the IPO received a comprehensive response from Consumer Focus (CF). It urged that *'the PCC, which is to be the designated court for lower-value copyright disputes, is reformed with the needs of consumers in mind'* adding '*that the PCC should recognise that consumers, along with entrepreneurs and SMEs, are key stakeholders, and that the PCC process must meet consumer needs'*.

As part of that response it also commented on the issue of a small claims track, particularly in relation to consumers and copyright issues, recommending*. 'that the PCC should plan for the likely increase in copyright infringement cases involving consumers in 2011'.* It believes *'that the implementation of the Digital Economy Act will lead to an increasing number of lower-value copyright infringement disputes'* and proposed *'the introduction of a modified small claims track for the PCC, designed so that consumers can defend themselves in lower-value copyright infringement disputes ... by the end of 2011.'*

Consumer Focus repeated their call for a Small Claims Track to be introduced in their response to the Independent Review of IP and Growth.

Further, the evidence submitted by the British Photographic Council to the Hargreaves Review[5] stresses the non-viability of the current system for claims under £5000 on cost grounds. It cites a survey of 1700 photographers in which a quarter of infringed photographers took no action and 45% of those who pursued only some infringements said the UK legal system was insufficient to their needs. The final report states that:

"8.64 However, one issue not currently addressed by these [PCC] reforms, but which both the Jackson Review and submissions to this review have advocated is a "small claims" track for low value IP claims. These are cases where the claimant is sometimes more concerned with discouraging future infringement than with the monetary value of the present claim".

Policy objective and description of options considered:

There are numerous low cost alternatives to court action, e.g. mediation or licensing solutions, available to micro business and SMEs, including at the IPO. Where such means of resolving the lowest value disputes are unsuccessful then the right holder is effectively unable to enforce or defend their rights. At present, IP disputes are automatically assigned to the multi-track except where claims are below £500,000 in the Patents County Court (when they are subject to new streamlined procedures). However, the costs incurred under these procedures would still be disproportionate to claims of less than £5,000. In contrast, non-IP claims within the small claims track are subject to stringent cost restrictions. The less formal truncated procedures would also be well suited to certain IP disputes, for instance some copyright claims, as well as enforcement and uncontested IP actions. The 'do nothing' option is not viable since currently right holders are unable to affordably enforce their rights and so protect their innovation. The solution to rectify this situation would seem to be to amend court procedures to broaden the options available.

Options considered:
0. Do nothing
1. Introduce small claims track to the PCC

[5] http://www.ipo.gov.uk/ipreview/ipreview-c4e.htm

Benefits and costs of each option:

Option 0 – Do nothing

The 'do nothing' option is not viable since right holders are currently unable to affordably enforce their rights and so protect their innovation. The most effective solution would seem to be to amend court procedures to provide access to justice.

Option 1 - Introduce a small claims track to the PCC

IPO and the Ministry of Justice have agreed, based on the SABIP study, that 150 cases could be expected to be brought to court in the first year.

The value of the cases is currently unknown, so the low, central and high estimates take into account these different scenarios. The table below sets out the number of cases in each scenario and the value of the claims they represent.

Value of claim	**Number of claims by value**		
	Low value scenario	**Central scenario**	High value scenario
£0-1500 (Av £500)	70	**30**	20
£1500-3000 (Av £2000)	50	**70**	30
£3000-5000 (Av £4000)	30	**50**	100
Total claims	150	**150**	150

These break-downs are used to calculate the following costs and benefits for the low, high and central scenarios in relation to both SMEs/Consumers and Government.

A. SMEs/consumers

Key monetised costs:
Businesses/individuals would be expected to pay court fees including an issue fee, allocation fee and pre-trial/hearing fee. The court fees and costs have been supplied by Her Majesty's Court and Tribunal Services. The fees for 150 central scenario cases with a spread of claims as below and where ALL cases go to a court hearing and 50% have injunctions (very worst case scenario), would be £62,140. This is the figure used on page 2 for the purposes of prudence.

However, if the 100% to trial scenario does not include injunctions then this gives costs considerably lower at £49,015. Continuing to move towards increasingly more likely situations, where only 50% go to trial and no injunctions then costs to business reduce to £34,114.

The benefits below reflect a 100% success rate for claimants. Making the same assumption for costs then **actual cost to business could be zero** since successful claimants would expect to recover these costs from the unsuccessful litigant.

Key non-monetised cost:
-

Key monetised benefits:
The monetised benefits are attained from multiplying the average value of the claim by the estimated number of cases, for each given scenario. The average value per claim has been determined as follows:

Value of claim	Average value per claim
£0-1500	£500
£1500-3000	£2,000
£3000-5000	£4,000

Best estimate 150 cases mid value scenario -
30 cases receiving £500
70 cases receiving £2,000
50 cases receiving £4,000
Total benefit per year = £355,000

Key non-monetised benefits:
The small claims track will introduce access to justice at proportionate cost for IP claims of no more than £5000. Whilst there may be an initial surge in the number of cases, the introduction of proportionate and accessible sanctions is expected to result in an increased deterrent to infringement of IP rights. This should therefore encourage the use of Alternative Dispute Resolution (ADR) and licensing solutions as the means to resolve disputes. Innovation and creativity of UK business/individuals is better protected for the benefit of the UK economy. There is also the potential benefit of encouraging further growth as individuals feel that there is an improved possibility of reaping the rewards which flow from their activities.

B. Government

Key monetised costs:

The court fees and costs have been supplied by Her Majesty's Court Services. There were two cost options supplied for fees, i.e. the cost to business and four cost options for the cost to the Ministry of Justice.

The chosen option represents 100% of cases going to court with 50% with injunctions. This model was chosen as it was the most pessimistic in terms of cost. The reason this was chosen is for prudence, showing that the costs are fully considered. Taking into account administrative and judicial costs then the estimated total cost to Governments of 150 cases in the central scenario above, where ALL cases go to court and 50% have injunctions is £91,271. This would be offset by £62,140 in fee income giving a cost to Government of £29,131 (again used on page 2 above).

Removing the 50% with injunctions but 100% to court then the running cost is £81,364 offset by £49,015 fees giving net cost to Government of £32,349. Again, as above, moving to an increasingly more likely scenario with 50% of cases going to court with no injunctions then the running costs are £49,847, fee income £34,114 leaving net cost to Government of £15,764.

Another cost is the set-up cost as the small claims track should largely be self-funding (see non-monetised costs below).

Key non-monetised costs:
The following costs will involve some sort of financial loss, however this is expected to be minimal.

a) Drafting the required changes to the Civil Procedure Rules (CPR) (likely to take about 1-2 days of judicial time plus staff time)
The proposed changes to the CPR will need to be agreed and signed off by the Civil Procedure Rules Committee, the Master of the Rolls, Lord Chief Justice and the Lord Chancellor.
b) Possible consultation on the CPR changes (staff costs to support consultation and printing of documents)
c) Drafting of the Statutory Instrument to allow CPR changes to take effect (likely to take about 1-2 days of judicial time plus staff time)
The SI will need to be approved by the Master of the Rolls, Lord Chief Justice, the Lord Chancellor and Parliamentary Council.
d) Changes to the HMCTS website.

e) Making adjustments to the administrative procedure of the PCC (including ensuring adequate administrative support) and producing and printing of leaflet and new forms.

A Deputy District Judge with IP experience is currently available to hear cases in the small claims track. Further investigation into these costs may take place to determine whether they are incidental.

Monetised benefits:
-

Key non-monetised benefits:
The innovation and creativity of UK business/individuals will be better protected for the benefit of the UK economy. The approach also has the potential benefit of encouraging further growth as individuals will feel that there is an improved possibility of reaping the rewards which could flow from continuing their activities.

Conclusions

- This case assumes that 150 claims go to hearing, with 50% of these cases requiring injunction.
- This is a worst case scenario in terms of costs, as all claims are unlikely to go to court and 50% of cases requiring injunction is considered a very high estimate. The adoption of the worst case scenario has been done for prudence.

Given this scenario:
- There is a potential benefit to business of £355,000 per year where it is assumed that all 150 claims are successful.
- The cost to business of court proceedings would be £62,140. This costing is again for prudence. In reality the cost of court fees would be expected to be paid by the losing party, either an infringer or an illegitimate claimant giving a zero actual cost to the successful litigant.
- The cost to Government of this volume of cases would be of £29,131.

Background to the small claims track

Although the new PCC procedures are linked to a scale of capped costs, the level of the cap is £50,000. This level is still likely to be disproportionate in cases which would be suitable for a small claims track. An example of a case which would be suitable for the small claims track would be copyright claim with a value under £5,000.

There are severe costs restrictions for claims allocated to the small claims track including in relation to:
1. Solicitors' costs relating to issuing the claim (fixed);
2. Court fees (on a sliding scale);
3. Certain travel and accommodation expenses incurred attending hearings (£50.00 per person per day);
4. Loss of earnings/holiday entitlement as a consequence of attending hearings (fixed sums); and
5. Expert's fees (fixed sum of £200 per expert).
et al.

Under the law of costs in England and Wales the rule is that in general "costs follow the event" so that the successful party to litigation is entitled to seek an order that the unsuccessful party pay his or her costs. In addition, if the court finds that one party has behaved unreasonably, it may award further costs as it thinks fair.

Many of the up-front costs to bring a case in the small claims track could be avoided or minimised. A key saving would be in relation to solicitor's costs (1. above). An individual/SME could avoid the costs of issuing the claim by doing it themselves and may also represent themselves should the court decide a hearing is necessary. The court has the authority to decide that a case could be decided on the papers as submitted, further ensuring recoverable costs under 3, 4, and 5. above are avoided.

Aside from the major cost of legal representation there is a substantial saving to be made in relation to disbursements or court fees (see 2. above) by bringing the claim in the small claims track thereby ensuring costs remain proportionate to the claim.

The table below compares court fees for the mid range value of claims in the small claims track with those in relation to the lowest value claims in the other two tracks and illustrates the considerable cost differential:

Cost of Action	**Small claims track (£) (a claim of £2000)**	**Fast track (£) (>£5,000 to £15,000)**	**Multi-track (£) (>£15,000 to unlimited)**
Filing and issuing claim form	95	245	340
Filing allocation Questionnaire	40	220	220
Pre-trial check list and hearing cost	165	655 (110+545)	1200 (110+1090)
TOTAL	**300**	**1120**	**1760**

HM Courts and Tribunal Service also run a 'Small Claims Mediation Service' to help to further minimise the need for a hearing to resolve the dispute. This service deals with monetary claims under £5,000 that are already going through the courts. If both parties agree to using mediation, they will be contacted by the service. Whilst the service is not free (the cost of using the service is covered by the court fees which would be paid by the person making the claim) most mediation is dealt with by telephone and it saves the time and the expense of having to go to court.

Directgov:
'If you are involved in a money claim for £5,000 or less, you can use the service, called the small claims mediation service.....
It is worth trying mediation, instead of a court hearing, because it can be:
•quicker – a session can take about an hour and you won't have to wait for months for a court hearing
•easier to use – it can take place over the phone
•less formal – it doesn't involve a judge or a trial
It could also save you money – you can get some court fees paid back if the mediation is successful. You will need to give at least seven days' written notice to the court before the date of the hearing to get a full refund.

Who can use the mediation service?
The value of the claim has to be less than £5,000
You can use the small claims mediation service if:
• you are making a claim – for instance if you're trying to get money you're owed
• someone has taken legal action against you and is saying you owe them money
.....
The service can be used in defended cases – where someone decides to defend a case that has been made against them'.

Risks and assumptions:

It is assumed that the number of cases will remain constant over time. The number of cases may increase due to more businesses recognising that they can now claim, however there would be a likely contra to this, as the businesses being claimed against, would realise that they may have to go through legal procedures, so a greater number would be settled out of court.

Cases in the small claims track will range from £0 to £5,000. It is fair to assume that for the best estimate the average case value would be somewhere in the middle ground, £2,000. A high estimate would be £4,000 with a low estimate of £500. The furthest ends of the range (£5,000 and £0) are not used as it is highly unlikely that all cases within the year would be for one of these two values.

SABIP stated that the estimate for the number of cases could be as high as 200 or as low as 100, being overestimated by as much as 50% (http://www.ipo.gov.uk/ipresearch-submission1-200910.pdf). In the absence of other data, these were taken as the high and low estimates, with the middle ground, 150, as the best estimate for the number of cases.

The chosen option represents 100% of cases going to court, taking into account issue and judicial costs. This model was chosen as it was the most pessimistic in terms of cost. The reason this was chosen is for prudence, showing that the costs are fully (if not overly) accounted for.

Direct costs and benefits to business calculations (following OIOO methodology):
See above.

Wider impacts;
The innovation and creativity of UK business/individuals is better protected for the benefit of the UK economy.
There is the potential benefit of encouraging further growth as individuals feel that there is an improved possibility of reaping the rewards which flow from their activities.

Summary and preferred option with description of implementation plan
The first meeting of the Users Committee of the Patents County Court, following implementation of the new streamlined procedures, took place on 2nd November 2010. The Committee set up a sub-committee to look at the question of a small claims track and fast track in the PCC. The Sub-Committee (Mr Justice Arnold, Alan Johnson and Professor Alison Firth) reported on 9th December 2010. The report was approved by the full committee and submitted to the Judicial Steering Group on 21st December 2010. The report considers that *'patent claims are plainly unsuitable for the small claims track and are very rarely suitable for the fast track. The position is more debatable with regard to design claims, but again we consider that these are generally unsuitable for the small claims track and may not often be suitable for the fast track'*.

Their report continues:

'So far as the small claims track is concerned, this is an informal procedure designed for claims with a value of up to £5,000. We see no reason why this procedure cannot be used as it stands for IP claims in the ordinary jurisdiction and in particular copyright claims, up to that value, provided that a District Judge or Deputy District Judge with specialist IP expertise is available to hear them'.

The proposal is therefore to introduce a small claims track on a low resource basis for certain IP claims, mainly copyright and some trade mark/passing off cases but not for those falling within the special jurisdiction i.e. patents and designs. This will initially involve committing the annual time of one Deputy District Judge (DDJ) (15-20 days). There is already a DDJ with IP experience available. However, there will be a need to ensure sufficient administrative support for the Court.

Procedures will be those as set out under CPR Part 27 including determination without a hearing for non-contested and contested cases and an informal approach during any hearing including in relation to evidence.

Listing of cases in the Patents County Court is now overseen by Chancery Listing and claim forms in the Patents County Court are issued in the Chancery Registry. Along with the Chancery Division of the High Court, the Patents County Court moved to the Rolls Building in summer 2011.

The administrative procedures can be readily adjusted to accommodate a small claims track.

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review , or there could be a political commitment to review (PIR)];
Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?] To check that the policy is operating as intended.
Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach] The review approach will be to look at the quanitative information on the cases going through the courts and to supplement this with interviews with stakeholders, such as IP judges consumer groups and SME representatives to ensure that it continues to provide access to justice at a proportionate cost to these target groups.
Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured] The current baseline is zero as no small-claims have been introduced to the Patents County Court. However comparisons can be made based on the projections used in this impact assessment.
Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives] That SMEs and consumers are able to use the service and that they perceive it provides access to justice at a proportionate cost.
Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review] We will work with the Judiciary on collecting and assessing monitoring information and will put in place arrangements to schedule interviews closer to the time.
Reasons for not planning a review: [If there is no plan to do a PIR please provide reasons here]