

MR JUSTICE ARNOLD :

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Introduction

1. This is a claim by Golden Eye (International) Ltd (“Golden Eye”) and thirteen other claimants for a *Norwich Pharmacal* order against Telefonica UK Ltd trading as O2 (“O2”). O2 is one of the six largest retail internet service providers (“ISPs”) in the UK. The object of the claim is to obtain disclosure of the names and addresses of customers of O2 who are alleged to have committed infringements of copyright through peer-to-peer (“P2P”) filesharing using the BitTorrent protocol. (P2P filesharing using BitTorrent is described in my judgment in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [19-[20].) For reasons that I will explain, the claim raises fundamental questions as to the operation of the *Norwich Pharmacal* regime, the legitimacy of so-called “speculative invoicing” and how to balance the rights of copyright owners and consumers.

Procedural history

2. Golden Eye has previously obtained similar orders against two other large ISPs, the first against British Telecommunications plc (“BT”) granted by Proudman J in October 2009 and the second against British Sky Broadcasting Ltd granted by Vos J on 4 February 2010.
3. The present claim was made by a Part 8 Claim Form issued on 23 September 2011. The Claim Form was issued by Golden Eye itself, rather than by solicitors instructed on its behalf. The application was supported by a witness statement of Julian Becker, a director of Golden Eye, dated 12 September 2011. In his statement, Mr Becker said that O2 had been put on notice of the claim and had stated through its solicitors (Baker & McKenzie LLP) that it did not oppose the making of the order sought provided that the order was in the terms approved by Baker & McKenzie on O2’s behalf.
4. In a covering letter dated 20 September 2011 Golden Eye stated:

“We are the First Applicant and act for the Second – Fourteenth Applicants in this application.

...

It may be somewhat unusual for the Applicants to apply on their account. However, there has recently been a certain amount of publicity associated with this type of claim (ACS Law; Davenport Lyons). We therefore believe that we will be best served acting for ourselves.”

The letter went on to request that the claim be considered on paper, and enclosed a copy of the skeleton argument which had prepared by counsel instructed on its behalf on the application against BT.

5. On 7 October 2011 Baker & McKenzie filed an acknowledgement of service on behalf of O2 stating that O2 did not intend to contest the claim.
6. On 18 November 2011 the parties were given notice of a disposal hearing before Chief Master Winegarten on 6 December 2011. On 28 November 2011 Baker & McKenzie wrote to the Chief Master to confirm that O2 did not oppose the making of an order in the terms submitted by Golden Eye, and therefore did not intend to attend the hearing. At the hearing on 6 December 2011 Mr Becker attended on behalf of the Claimants. The Chief Master raised a number of questions about the proposed order, which he asked Mr Becker to relay to Baker & McKenzie. Mr Becker duly did so, and on 14 December 2011 Baker & McKenzie wrote to the Chief Master answering his questions. In the letter Baker & McKenzie stated that, prior to issuing the Claim Form, Golden Eye had provided O2 with a draft of the proposed order and that Baker & McKenzie had made amendments to the draft. A number of amendments were identified and explained. The letter reiterated that O2 did not oppose the making of an order in that form. Having considered the letter, the Chief Master decided to refer the claim to a judge.
7. On 16 January 2012 I directed that (1) the claim be listed for a hearing, (2) the Claimants file and serve upon O2 a copy of the tracking report upon which they relied (as to which, see below) and (3) that the Claimants serve a copy of the claim and supporting evidence upon Consumer Focus in order that Consumer Focus could consider whether to make representations on behalf of the persons who would be identified if the order is granted (“the Intended Defendants”). The reason why I made the third direction was that I was concerned that the persons with a real interest in opposing the making of an order, or at least in seeking alterations to the terms of the proposed order, were the Intended Defendants rather than O2, but that there was no practical way in which to enable any Intended Defendant to do so. I shall return to this point below.
8. Consumer Focus is a trading name for the National Consumer Council of England, Wales and Scotland. Consumer Focus is a statutory body created by the Consumers Estate Agents and Redress Act 2007. It represents the interests of consumers, particularly low income and vulnerable consumers. It has been recently been active in the field of copyright. For example, in January 2011 Consumer Focus published a consultation document entitled “Competition, copyright and collective rights management” inviting comments from the public to inform its intended submission to the Hargreaves Review of IP and Growth; on 1 March 2011 it duly made a submission to the Hargreaves Review; on 8 November 2011 it jointly organised with PICTFOR (the Parliamentary, Internet, Communications and Technology Forum) a panel discussion of some of the Hargreaves Review’s recommendations entitled “Copyright collecting societies: does the UK need minimum standards”; and on 21 February 2012 it jointly organised with the Creators’ Rights Alliance a one day seminar entitled “Consumers’ and creators’ common ground”.
9. Golden Eye duly sent the papers to Consumer Focus, and Consumer Focus applied to intervene in the proceedings. There being no rule in CPR applicable to intervention in proceedings before this Court, the application was made informally under the Court’s inherent jurisdiction. Although initially resistant to the application to intervene, the Claimants sensibly did not in the end resist the application provided that they were given permission to file supplementary evidence to deal with certain points raised by

Consumer Focus. Accordingly, I granted Consumer Focus permission to intervene on those terms. As counsel for Consumer Focus made clear, Consumer Focus undertook the task of presenting adversarial argument on behalf of the Intended Defendants, rather than merely assisting the Court with legal submissions as an *amicus curiae* (friend of the Court). I am grateful to it for doing so.

The Claimants

10. The Claimants divide into two groups. The first group consists of Golden Eye and Ben Dover Productions. Ben Dover Productions is a partnership between Lindsay Honey and Linzi Drew Honey. Lindsay Honey is also a director of Golden Eye. Under the pseudonym Ben Dover, he directed, produced and starred in a series of pornographic films between 1995 and 2008. Ben Dover Productions is the owner of the copyright in those films. Golden Eye is owned 50/50 by Mr Becker and Mr Honey.
11. By an agreement between Ben Dover Productions and Golden Eye dated 14 December 2009 (“the Ben Dover Agreement”), Ben Dover Productions granted Golden Eye a royalty free worldwide exclusive licence of all copyrights and rights in the nature of copyright in the works listed in Schedule 1 to the agreement for a period of five years. Schedule 1 lists 105 pornographic films which it appears have been released on DVD. About half of these are indicated to have been given R18 certificates (i.e. for sale in licensed sex shops only), while no indication of any British Board of Film Classification certificate is given for the remainder. Clause 3.3 of the agreement empowers Golden Eye to decide what, if any, action to take in respect of any suspected infringements of copyright and gives its sole control over and conduct of all proceedings on terms that it shall bear the costs and be entitled to retain all sums recovered.
12. In addition to exploiting Ben Dover Productions’ films pursuant to the Ben Dover Agreement, Golden Eye markets a range of associated merchandise under the Ben Dover trade mark.
13. The second group of claimants consists of the Third to Fourteenth Claimants (“the Other Claimants”). The Other Claimants are also owners of the copyrights in pornographic films. Each of the Other Claimants has entered into an agreement with Golden Eye. The agreements are dated between 30 June 2010 and 18 January 2011. The agreements are all in essentially the same form. The term of each of the agreements is two years and the territory is England and Wales. The key clause is clause 2, which provides:

“2. GRANT OF RIGHTS

- 2.1 Licensor is the owner of the Copyright and/or related ancillary rights in the Works under international copyright law.
- 2.2 Licensor grants Licensee the exclusive right to act for it in relation to any alleged breaches of copyright arising out of ‘peer to peer’ copying of material across the Internet. The parties agree that additional movies can be added to Schedule 1 with a written supplemental Agreement.

- 2.3 In case of any infringement of suspected or past infringement by any third party of copyright subsisting in the Works:
- (a) the Licensee shall, in its sole discretion, decide what action if any to take; and
 - (b) the Licensee shall have sole control over, and conduct of, all claims and proceedings;
 - (c) the Licensee may require the Licensor to lend its name to such proceedings and provide reasonable assistance, subject to the Licensee giving the Licensor an indemnity in respect of all costs damages and expenses that it may incur including an award of costs against it, directly resulting from Licensor's involvement in such proceedings.
- 2.4 During the Term, the Licensor shall not:
- (a) itself exercise; or
 - (b) grant any license permitting any third party to exercise, the rights granted to the Licensee under clause 2.2.
- 2.4 The Licensor warrants that it owns the Copyright free from any claims or encumbrances and is entitled to grant the rights granted under this agreement.
- 2.5 In consideration of the rights hereby granted under this Agreement, the Licensee agrees to pay to the Licensor 25% of any Revenue. These monies shall be payable by the Licensee in a manner and at intervals agreed between the parties.”
14. In the case of the agreements with Orchid MG Ltd, Kudeta BVBA and RP Films Ltd, the figure specified in clause 2.5 is 27.5%, 37.5% and 27.5% respectively, rather than 25%.

The evidence in support of the claim

15. Originally, the only evidence filed in support of the claim was Mr Becker's first witness statement. In paragraphs 1-3, headed "Introduction", he explained that the Claimants sought disclosure by O2 of the names and addresses of the subscribers associated with the IP addresses shown in the CD-ROM attached as Exhibit 1, that the Claimants believed that those IP addresses had been used by the subscribers to make available copyright material for P2P copying and that O2 did not oppose the making of an order in the terms set out in Exhibit 2.
16. In paragraphs 4-14, headed "Underlying cause of action", Mr Becker dealt with the Claimants' claims against the Intended Defendants. In paragraph 5 he stated:

“The works in question are certain films created by a number of entities, both natural and corporate. The copyright in these works is owned by the Second to Fourteenth Applicants. [Golden Eye] has entered into a number of agreements which have the effect, inter alia, of allowing [Golden Eye] to bring a claim for breach of copyright on behalf of the Second to Fourteenth Applicants. Copies of the licence agreements are attached hereto as Exhibit 3...”

17. In paragraphs 6-8 Mr Becker briefly explained P2P file sharing, and said that the Claimants were concerned that there was substantial amount of P2P file sharing of their films. In paragraph 9 he said that Golden Eye had subscribed to a tracking service which was able to identify IP addresses from which persons were making available the Second to Fourteenth Claimants’ films over P2P networks. In paragraphs 10-13 he explained that it was the Claimants’ case that the persons so identified were making the films available to the public contrary to section 20 of the Copyright, Designs and Patents Act 1988 (“CDPA 1988”) and authorising within the meaning of section 16 of the 1988 Act the downloading of films which involved the making of infringing copies, and/or acting as joint tortfeasors with the downloaders. In paragraph 14 he said:

“[Golden Eye] has a right to bring this application on behalf of the Second to Fourteenth Applicants in its own name pursuant to section 101 of the Copyright Designs and Patents Act 1988.”

18. In paragraphs 15-18, headed “The Respondent and the Information Sought”, Mr Becker explained in slightly more detail the basis for the Claimants’ application against O2. In paragraph 15 he said:

“As mentioned above, [Golden Eye] has subscribed to a service which can detect persons making its copyright films available for distribution. The persons responsible are identified by reference to the IP address assigned to them at the time that the film is being made available online.”

He went on to explain that the only way in which it was possible to find out the names and addresses of the subscribers to whom the IP addresses had been assigned at the relevant times was to obtain disclosure from the ISP.

19. In paragraph 18 he said:

“The Applicants are willing to undertake to the Court that they have a genuine intention to pursue infringement actions against any subscribers disclosed to them by the Respondent pursuant to the order sought, where there is a legitimate and appropriate basis to do so, unless a compromise can be reached with such subscriber.”

20. In paragraphs 19-25, headed “Correspondence and Procedural Points”, Mr Becker said that the Claimants believed that the films listed in Exhibit 1 were being made available for download on P2P filesharing networks on the dates and times listed via

the IP addresses listed and that he had written to O2 but O2 was unable to consent to provision of the information sought for data protection and privacy reasons. In paragraph 21 he stated:

“If the order is made as sought, [Golden Eye] intends (on behalf of the Second to Fourteenth Applicants and subject to sight of the exact information provided) to send pre-action correspondence to the persons so identified and, if appropriate in due course, to bring proceedings against those persons.”

He went to deal with certain points in the draft Order.

21. The CD-ROM in Exhibit 1 contains three electronic spreadsheets which list (i) the IP address, (ii) the date, time and time zone, (iii) the ISP and provider network, (iv) a reference number, (v) user and content hash numbers, (vi) the copyright holder and (vii) the work for each alleged infringement. The spreadsheets contain a total of 9,124 entries. It follows that the Claimants are seeking the disclosure of the names and addresses of up to 9,124 O2 subscribers. It has been estimated by Mr Becker that a print-out of the spreadsheets would occupy over a thousand pages.
22. Mr Becker’s witness statement neither exhibited, nor was accompanied by, any evidence from the provider of the tracking service referred to by Mr Becker who had been responsible for producing the information in Exhibit 1, as it plainly ought to have done. It was for this reason that I made the second direction set out in paragraph 7 above.
23. In response to that direction, Mr Becker wrote to the Court on 7 February 2012 saying:

“The service that has been subscribed to is run by a man called Alireza Torabi who is an IT Consultant. He has prepared a statement setting out the way in which his software detects downloading. His statement is included with this letter.

I also have a report from an expert, Mr Vogler which sets out how the system works.”
24. Enclosed with Mr Becker’s letter were an expert report by Clement Vogler dated 27 June 2020 and a witness statement of Alireza Torabi dated 3 February 2012.
25. In my view both Mr Vogler and Mr Torabi are “experts” as defined in CPR r. 35.2(1), that is to say, “a person who has been instructed to give or prepare expert evidence for the purpose of proceedings”. CPR Part 35 does not define “expert evidence”. It is generally accepted, however, that expert evidence is evidence the giving of which requires particular expertise in the field in question by virtue of study and/or experience. More specifically, Evans-Lombe J held in *Barings plc v Coopers & Lybrand* [2001] PNLR 22 at [45] that:

“Expert evidence is admissible under s.3 of the Civil Evidence Act 1972 in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and

rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues.”

Both Mr Vogler and Mr Torabi have qualifications in information technology, and both give evidence about the operation of software used to monitor P2P filesharing, which is clearly a field requiring technical expertise.

26. Mr Vogler’s report appears broadly to comply with the requirements of CPR r. 35.10, Practice Direction 35 – Experts and Assessors and the Protocol for the Instruction of Experts to Give Evidence in Civil Claims. It records that he was instructed to prepare the report by Golden Eye. In his report Mr Vogler describes tests he carried out to verify that a computer application produced by NG3 Systems Ltd (“NG3”) called XTrack version 3.0, which is able to identify the source of a file transmitted over the internet through certain P2P networks, namely transmissions involving the eDonkey network and the BitTorrent protocol, correctly identified the IP addresses and dates and times of uploading of a number of test files which he had uploaded. The tests were carried out in October and November 2009. Mr Vogler explains he did not have Xtrack installed on his computer, and did not concern himself with how it worked, but treated it as a “black box”. He simply presented it with inputs, namely his test files, and examined the outputs to see if they corresponded to his inputs. He was satisfied that they did correspond.
27. In section 6 of his report, Mr Vogler explains that an IP address identifies a device, which may be a computer or a router. Although ISPs often assign IP addresses dynamically, they retain records which enable the customer to whom the IP address had been assigned to be identified. He goes on to say that the actual user of the computer at the relevant time may or may not be the customer registered with the ISP. He also acknowledges two possible circumstances in which Xtrack might wrongly identify someone as the source of an upload, the more straightforward of which is where the victim’s computer has been taken over by a trojan which enables a third party to control the computer.
28. Mr Torabi’s statement does not begin to comply with the requirements of CPR r. 35.10, PD35 and the Protocol. In his statement Mr Torabi says that Golden Eye is a subscriber of his, that he uses “detection/logging software ... based on an Open Source software called Transmission” and that he prepared the spreadsheets exhibited to Mr Becker’s statement. He also explains briefly what Transmission does. He does not refer to Xtrack at all, and there is nothing on the face of his statement to link Transmission with Xtrack.
29. Following the hearing before me, Mr Becker filed a second witness statement in which he confirmed certain matters which counsel for the Claimants had stated on instructions during the hearing. In addition, Mr Becker set out certain matters of which he had been informed by Mr Torabi. In particular, Mr Becker confirmed: (i) the relationship between Golden Eye and Ben Dover Productions which I have described above; (ii) that Mr Torabi was paid according to the time spent by him; (iii) that the software used by Mr Torabi was indeed Xtrack (Mr Torabi had referred to Transmission, because Xtrack is based on Transmission); (iv) that Mr Torabi had used

XTrack to monitor filesharing via BitTorrent; and (v) that the IP addresses identified by Mr Torabi were the IP addresses of uploaders/seeders of the files in question.

30. Strictly speaking, the Claimants should have filed an expert report from Mr Torabi complying with the requirements of CPR r. 35.10, PD35 and the Protocol containing the matters set out in his statement and in Mr Becker's second statement, but in all the circumstances I am prepared to overlook this omission.
31. No evidence has been filed by any of the Other Claimants, and Mr Becker's evidence concerning the Other Claimants is limited to the passage quoted in paragraph 16 above.

The draft order and draft letter

32. The draft order annexed to the Claim Form and contained in Exhibit 2 to Mr Becker's first witness statement is in the following terms:

“UPON the Application as set out in the Claim Form dated ... 2011 and Application Notice dated

AND UPON the Applicants undertaking not (without further order of the Court) to use or disclose the information provided to it pursuant to this order (or any of it) save for the purposes of these proceedings, or save for the purpose of bringing separate proceedings against any person(s) identified pursuant to this Order, and save for the purposes of any pre-action correspondence relating thereto.

AND UPON reading the documents marked in the Court file as having been read

AND UPON the Respondent not consenting to this Order but having indicated through their solicitors, Baker & McKenzie, that it does not contest to the making of the Order herein;

AND UPON it appearing to the court that there is a prima facie case that each of the respective subscribers associated with the internet protocol addresses listed in Schedule 1 to this order has copied one or more of each of the Applicants' works (the 'Works') without the respective Applicant's permission for the purpose of making it available via file sharing web sites for third parties to download which may give rise to a claim for copyright infringement;

AND UPON the Applicants having undertaken to the Court that they have a genuine intention to pursue a claim against any of the subscribers with whom a compromise is not reached and where there is a legitimate and appropriate legal basis to do so;

AND UPON it appearing to the Court that on the aforementioned facts each of the Applicants have a real

prospect of success in a claim by the Applicants for relevant infringement of the copyright in one or more of the Works;

AND UPON each of the Applicants undertaking not to disclose to the general public, by making or issuing a statement to the media, the names or addresses of any person or persons whose identity is made known to the Applicants as a result of the grant of the relief ordered below until after (1) the express consent of the respective person, or (2) the Applicants have commenced proceedings to enforce their copyright and related rights against such person or persons as contemplated by paragraph of this Order;

IT IS ORDERED THAT;

- 1 The Respondent shall within a reasonable period of time from the date of this Order disclose to the First Applicant (if or to the extent known or otherwise available to the Respondent, after carrying out a reasonable search) the name and postal address of the registered owner or owners of each of the internet account or accounts that were assigned to the internet protocol address listed in Schedule 1 hereto, on the dates, times and time zones shown therein. Such disclosure shall be in electronic diary form subject to asymmetric encryption as specified to the First Applicant so far as reasonably practicable and convenient to the Respondent.
- 2 The Applicants are granted permission (to the extent that it is necessary) to use the information provided to it pursuant to the Order in paragraph 1 herein for the purposes of bringing separate proceedings for copyright infringement against those said persons (or any of them), and for the purposes of any pre-action correspondence relating thereto.
- 3 Until such time as it has complied with the Order in paragraph 1 herein, the Respondent shall not delete or destroy its records of the information sought.
- 4(a) The First Applicant shall be the only Applicant entitled to request details of IP addresses held by the Respondent pursuant to this Order. The First Applicant shall issue a request to the Respondent for the details of the registered owner or owners of the IP addresses listed in Schedule 1 in batches of no more than 1000 IP addresses (each a 'Batch').
- 4(b) Within 7 days of the date of this Order, the First Applicant, on behalf of all the Applicants, shall pay into

an escrow account to be held by the Respondent's solicitors, Baker & McKenzie LLP, (the 'Escrow Account') a sum equal to £2.20 per IP address requested within the initial Batch together with £2500 costs to be held as security for the costs specified in paragraph 5 below.

- 4(c) At least 7 days prior to the making of any further request to the Respondent in respect of subsequent Batches, the First Applicant, on behalf of all of the Applicants, shall pay into the Escrow Account a sum equal to £2.20 per IP address requested within each subsequent Batch.
- 4(d) For the avoidance of doubt, the Respondent shall be under no obligation to disclose details of any IP address requested within a Batch unless and until the corresponding payment into the Escrow Account has been made.
- 4(f) The First Applicant shall be entitled to set-off the amounts to be paid into the Escrow Account in respect of subsequent Batches (in accordance with paragraph 4(c)) against any sums remaining in the Escrow Account and not drawn down by the Respondent on the basis of paragraph 4(e). If any sums remain in the Escrow Account after the final Batch has been requested by reason of paragraph 4(e), the Respondent shall return such sums to the Respondent [sic] as soon as reasonably practicable.
- 5 The Respondents shall be entitled within 14 days of invoicing the First Applicant to draw down such amount from the Escrow Account to cover its reasonable costs will include all the reasonable costs (including solicitors' costs) of (1) considering the Application, (2) responding to, preparing for and attending (if necessary) the hearing of this Application, (3) complying with this Order (including reasonable software development and costs for the purposes of efficiently complying with this and future orders to be agreed) and (4) responding to queries and complaints pertaining to this Order which are received by the respective Respondent after the date on which disclosure takes place.
- 6 To the extent that the Respondent's reasonable costs exceed the amount contained within the Escrow Account, the First Applicant shall, within 30 days of being invoiced in writing, pay to the Respondent the outstanding reasonable costs of complying with the

Order in any event such costs to be assessed if not agreed.

- 7 The Order in paragraph 4 herein is without prejudice to the rights (if any) of the Applicants to seek to recover the said costs and/or their own costs of this application (or any of them) from the persons identified pursuant to this Order (or any of them) whether by way of an order for costs or damages in these or any other proceedings, or by any other means whatsoever. However, the Applicants will not use or disclose any documents and/or information disclosed pursuant to this Order for any purpose other than pursuing a claim for infringement of the copyright of the Applicants copyright in one or more of the Works.
- 8 The Applicants shall include in every first letter of claim to each potential defendant a copy of this order and the letter in the form set out in Schedule 2 hereto.
- 9 Within six months of the date of disclosure, the First Applicant shall provide to the Respondent a written report stating precisely from the relevant names disclosed how many of those persons (1) were sent letters of claim; (2) makes a positive and expressed confession of liability; (3) by their own volition accepts the First Applicant's compromise agreement without an expressed confession of liability; (4) requests the Applicants commences proceedings; and (5) against whom the Applicants have issued legal proceedings.
- 10 Within twelve months of the date of disclosure, the Applicants shall destroy all copies of any data which has not been used to either send a letter or claim or issue legal proceedings for infringement of copyright on the terms set out in this Order and shall provide written confirmation to the Respondent that such destruction has taken place."

33. The intention is that Schedule 1 will consist of a copy of the CD-ROM in Exhibit 1 to Mr Becker's statement. Schedule 2 contains a draft letter in the following terms:

"Dear

GOLDEN EYE (INTERNATIONAL) LIMITED ('GEIL')

Nature of GEIL's rights

It is with regret that we are writing this letter to you. However, GEIL is very concerned at the illicit distribution of films over the internet.

GEIL has the exclusive licence of all of the rights in the film sold under the name '[E]' ('the Work'). The Work has been made available for sale in the United Kingdom.

This letter is written pursuant to the Code of Practice ('the Code') for pre-action conduct in intellectual property disputes. This letter follows the Code and your response should also follow the Code. Applicant copy of the relevant part of the Code is enclosed with this letter.

This letter will set out the claim made by GEIL. In accordance with the Code, you are required to provide a full written response as soon as is reasonably possible. We draw your attention to paragraph 4.1 of the Code.

Forensic Analyst

We have obtained the services of a forensic computer analyst to search for and identify internet addresses from which our copyright works (including the Work) are being made available on so called 'peer to peer' (P2P) internet sites for the purposes of making them available for download by third parties without our client's consent or licence.

Evidence

GEIL's forensic computer analyst has provided us with evidence that the following UK date and time, [B] [C], all or part of the Work was made available from the internet protocol (or IP) address [Applicant], specifically for the purpose of downloading by third parties. We attach a copy of his report. We showed this evidence to your internet service provider Telefonica UK Limited ('O2') who would not supply us with any information without a Court order. We therefore made an application to Court asking for an Order against O2 that they disclose the names and addresses associated with the IP address on the date and time in question. On 2011 Mr Justice , sitting in the High Court, ordered O2 to give us disclosure of your name and address for the purpose of this letter. For your information we enclose a copy of that Order. In accordance with that Order, O2 identified you as the subscriber noted in their systems as on their network associated with the IP address on the date and at the time in question. Please be assured that we have stringent security measures in force to ensure that, so far as is humanly possible, the data we hold is fully protected.

Infringing Acts

The act of file sharing the Work without the consent of GEIL is unlawful and, in particular, has caused damage to our business. In effect, every copy of the Work that is downloaded represents

a potential lost sale. Whenever the Work is made available for download to other parties there is the opportunity for multiple downloads to take place resulting in lost revenue. In addition to GEIL selling direct, we also enter into licensing agreements for third party organisations to distribute our content. File sharing also results in lost royalty revenue and weakening of the brands saleability.

We have set out below the infringing acts you are liable for to GEIL:

1. either for copying the Work on to the hard drive of your personal (or office) computer ('PC') (pursuant to the sections 16(1)(a) and 17 of the Copyright Designs and Patents Act 1988) ('The Act'); and/or for
2. making the Work available to third parties for downloading (pursuant to sections 16(1)(d) and 20 of the Act). Please note that such making available can be caused simply by a person connected to your internet connection downloading the Work, during the course of which the part downloaded is then made available to other third parties connected to the network in question.

In the event that you were not responsible for the infringing acts outlined above, you should make full disclosure to us of the other parties at your residence using your internet connection to make the Work available for download.

Legal Consequences

As we have stated above, the extensive file sharing activity is causing damage to GEIL's business. We are therefore left with no alternative but to monitor carefully its intellectual property rights and enforce them against infringers.

In the event that this matter cannot be resolved, it may become necessary for GEIL to bring a claim against you for copyright infringement. This claim would be brought in the civil court, where liability is determined on the balance of probabilities. In that event, we must make you aware that if successful, we will be entitled to recover from you damages and possibly a contribution towards the legal costs if you choose to instruct lawyers. If GEIL secures a judgment, and in the event that you were not able to pay whatever sums the court may order you to pay, we would have no option but to take steps to enforce the debt against you.

Proposed Settlement

GEIL is prepared to give you the opportunity to avoid legal action by proposing a settlement offer, the details of which are set out below. Our offer to resolve the claim against you is intended, on this occasion, to focus your attention on the potentially serious consequences of your actions (or inaction, by permitting a third party to use your internet connection). We also trust that these actions will not be repeated. Our offer is that you:

1. promise in a written undertaking not to upload, download, make available or otherwise share the Work or any of GEIL works (or other intellectual property) and/or permit others to do the same using your internet connection, at any time in the future, either from the above IP address or any other;
2. agree to delete any copies of the Work (and any other intellectual property of GEIL from your hard drive and/or operating system and/or any copies saved to disk (or other media), other than those that were purchased by you from a legitimate source; and
3. pay £700.00 as compensation to GEIL for its losses.

Next Steps – payment and undertakings

You can provide the undertaking (referred to at 1 and 2 above) by signing the written undertakings enclosed with this letter and returning them to us, together with your payment, using the attached payment form. Payment must be made either by cheque, bank transfer, credit card or debit card. No other form of payment will be accepted.

Alternatively you can make payment or speak to a member of our Copyright Infringement Department on 0871 990 6500 or pay online at www.goldeneyeint.com.

For the avoidance of doubt, these undertakings will represent an agreement between you and GEIL and if you act in breach of that agreement, we will have no option but to take further action against you. In accordance with the Code, a response is required as soon as reasonably possible. We consider 14 days to be a reasonable period. Accordingly, if this matter is to settle, the payment and undertakings must be made and received by us within **14 days** of receipt of this letter.

In the event that either the payment or undertakings are not received within fourteen days of the date of this letter, GEIL reserves the right to take further action which could include commencement of proceedings and possibly an application to your ISP to slow down or terminate your internet connection.

Legal Advice

If you are in any doubt about the contents of this letter and its seriousness, we would recommend that you seek legal advice as a matter of urgency. All submissions from you must be in writing. You may also contact us by email at info@goldeneyeint.com (quoting the reference at the top of this letter) or by fax on 0871 990 6510.

Yours faithfully

Copyright Infringement Department

Golden Eye (International) Limited”

34. Although the draft letter is expressed in terms appropriate to claims for infringement of copyrights of which Ben Dover Productions is the owner and Golden Eye is the exclusive licensee, and paragraph 8 of the draft order on its face requires all letters to be in that form, counsel for the Claimants explained that it was intended that the letter would be suitably adapted in the case of claims concerning infringements of copyrights owned by the Other Claimants.

“Speculative invoicing”

35. Consumer Focus accepts that consumers infringe copyright online, in particular through P2P filesharing. Consumer Focus also accepts that copyright owners have a legitimate interest in obtaining legal remedies to combat such infringements, for example by obtaining blocking injunctions against ISPs pursuant to section 97A of the CDPA 1988 (as to which, see *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch), [2011] RPC 28 and *Dramatico v BskyB*).
36. Consumer Focus contends, however, that the present claim is a manifestation of a more unsavoury practice called “speculative invoicing”, which has attracted considerable media attention in the last couple of years. Consumer Focus describes this as follows. In essence, it involves the sending of letters before action to thousands of internet subscribers whose internet connection is alleged to have been used for small-scale copyright infringement and whose names and addresses have been obtained by means of *Norwich Pharmacal* orders against their ISPs. Without seeking to confirm whether the internet subscriber was the person responsible for the uploading/downloading of the copyright work that has been detected, the internet subscriber is requested to pay a substantial sum which has no relation to the actual damage caused by the alleged copyright infringement or the costs incurred. Typical sums demanded are in the range £500 to £1000. Invariably, there is a profit-sharing arrangement between the party conducting the litigation and the client, with the former getting the lion’s share. The tactic is to scare people into paying the sums by threatening to issue court proceedings. If this does not work, proceedings are not normally issued. This is because the economic model for speculative invoicing means that it is more profitable to collect monies from those who pay rather than incur substantial costs in pursuing those who do not pay in court. Where proceedings are issued, they are not pursued if a default judgment cannot be obtained.

37. Consumer Focus says that, because speculative invoicing is indiscriminate, it can cause real suffering on the part of consumers. In support of this, Consumer Focus relies upon a response by Citizens Advice (an operating name of the National Association of Citizens Advice Bureaux) dated July 2010 to an Ofcom consultation on “Online infringement of copyright and Digital Economy Act 2010 – draft initial obligations code”. The response set out a number of examples of cases of individuals who had contacted CAB after receiving letters asking for substantial sums about which they were concerned. The following example is typical:

“A CAB client in Buckinghamshire was worried about the consequences of not paying a £295 demand for copyright breach despite being certain that no breach had occurred in her household. At the time of the claimed download the client was at work, her eldest child was away at university and the two younger children were at school. She checked the download history of all the computers and found no evidence to substantiate the claim.”

Similar examples are given in the decision of the Solicitors Disciplinary Tribunal and the judgments of HHJ Birss QC referred to below.

ACS:Law and Media CAT

38. Consumer Focus has drawn particular attention to the activities of a solicitor called Andrew Crossley who traded as ACS:Law. By a decision dated 6 February 2012 the Solicitors Disciplinary Tribunal ordered that Mr Crossley be suspended from practice for a period of two years from 16 January 2012. The following account is based partly on the Tribunal’s decision and partly on the judgments of HHJ Birss QC referred to below.
39. Between 2006 and 2009 another firm of solicitors called Davenport Lyons (referred by the Tribunal as “Firm A”) had developed and pursued a scheme for recovering compensation for copyright owners whose copyright works had been subject to filesharing. In April 2009 ACS:Law entered into an agreement with Davenport Lyons under which Davenport Lyons transferred this work to ACS:Law, including the members of staff involved and permission to use the precedents that had been created. In May 2009 four of Davenport Lyons’ clients transferred their instructions to ACS:Law. Subsequently, ACS:Law obtained two further clients, one of whom was Media C.A.T. Ltd (“Media CAT”).
40. ACS:Law instructed four companies to conduct monitoring of IP addresses involved in P2P filesharing. In the case of Media CAT, the monitoring was carried by NG3. Using information provided by the monitoring companies, ACS:Law obtained *Norwich Pharmacal* orders on behalf of its clients against ISPs requiring disclosure of the names and addresses of the subscribers to whom the IP addresses detected had been allocated at the relevant times. Once ACS:Law had the names and addresses, it sent letters of claim to the subscribers together with supporting documentation.
41. A point of some significance which is scarcely mentioned in the Tribunal’s decision, but which HHJ Birss QC noted in his judgments, is that, at least in the case of Media CAT’s claims, the letters of claim concerned pornographic films.

42. The letters of claim demanded payment of a specified sum as compensation. In the case of Media CAT, the sum demanded varied, but in general it was initially £540 and later £495. Mr Crossley's own evidence was that the reason for the reduction was that "the client wants to bring the figure below £500 because he believes there is a psychological barrier at £500 that prevents people from paying so he is trying to optimise revenue on settlement".
43. ACS:Law entered into retainers for "non-contentious" work with its clients which provided for the net sums recovered (the damages and costs paid by the persons to whom letters of claim were sent less applicable disbursements and the ISPs' costs) to split between ACS:Law, the monitoring company and the client. In the case of Media CAT, the split was 52.5% to ACS:Law, 12.5% to NG3 and 35% to Media CAT. (It should be noted that the third and fourth judgments of HHJ Birss QC cited below refer to ACS:Law receiving 65% of the revenue. It appears that he was unaware that NG3 received 12.5%.) In addition, ACS:Law entered into retainers for "contentious" work with three clients, including Media CAT, which incorporated collective conditional fee agreements.
44. As at 30 June 2010, ACS:Law had sent 20,323 letters of claim and had recovered the total sum of £936,570.92, of which ACS:Law received £341,078.92.
45. As at 9 August 2010 the Solicitors' Regulation Authority had received 511 complaints about ACS:Law. In addition, at least 30 individuals had complained to the consumer magazine Which? Many also complained to their MPs.
46. Over a period from August to November 2010 ACS:Law acting on behalf of Media CAT commenced claims for copyright infringement against 27 individuals in the Patents County Court. In November 2010 they applied for default judgment in eight of these cases using a procedure almost unheard of in intellectual property cases called a request for judgment ("RFJ"), which is without notice to the defendant. These RFJs came before HHJ Birss QC on paper. In a judgment dated 1 December 2010 he refused the RFJs (see *Media CAT v A* [2010] EWPC 17). The judgment questioned whether the RFJ procedure was appropriate for copyright cases of the kind brought by Media CAT. The RFJ procedure is designed for claims for specified sums of money (and certain other claims) where no judicial decision is required, whereas Media CAT's claims raised difficult and potentially controversial legal issues. The judgment also analysed Media CAT's particulars of claim briefly, and raised a number of concerns with the way the matter was presented. One was that Media CAT did not appear to be either the owner of or an exclusive licensee of the copyrights, but rather the beneficiary of an agreement with such persons giving it the right "to identify, pursue and prosecute instances of copyright infringement". Another was that Media CAT alleged that the defendants could be liable for infringement where third parties had gained access to the defendants' internet connections due to inadequate security.
47. After the judgment in *Media CAT v A* the Patents County Court received a letter from a defendant in another case brought by Media CAT. The letter complained about various aspects of the way in which Media CAT's case was being conducted. On 17 December 2010 HHJ Birss QC convened a hearing for directions in all 27 Media CAT cases commenced before the Patents County Court on 17 January 2011 (see *Media CAT v Billington* [2010] EWPC 18). On 13 January 2011 Mr Crossley attended the court office with 27 notices of discontinuance, and asked the Court to vacate the

hearing on 17 January 2011. HHJ Birss QC declined to vacate the hearing, but after some discussion on that day the matter was adjourned for a week. At the adjourned hearing two witness statements from Mr Crossley were put before the Court setting out the history of Media CAT's claims. He made it clear that MediaCAT intended to re-issue claims which had been discontinued, saying that the reason for the discontinuance was to enable them to be reformulated. Some of the claims had been settled, but the defendants in a number of claims applied for the notices of discontinuance to be set aside as an abuse of the process.

48. On 8 February 2011 HHJ Birss QC handed down a judgment setting aside the notices of discontinuance as an abuse of process: see *Media CAT v Adams* [2011] EWPC 6, [2011] FSR 8. The judgment merits reading in full, but for present purposes the following points are particularly pertinent.

49. First, HHJ Birss QC commented on the standing of Media CAT to bring the claims as follows:

“4. The claimant Media CAT has claimed at various stages to be (i) a copyright protection society (whose members are the owners of the copyright in the works), (ii) the exclusive territorial licensee of rights in the work, and (iii) to represent the owners of copyright or exclusive licensees of that copyright. It is none of those. Copyright protection societies or collecting societies (such as the PRS, MCPS and the like) are reputable organisations concerned with licensing copyright in various contexts under licensing schemes. Media CAT is not one of those and Mr Ludbrook, Media CAT's counsel at this hearing, accepted Media CAT was not a ‘copyright protection society’. No copyright lawyer would use that term to describe Media CAT. Also no copyright lawyer would call Media CAT an exclusive territorial licensee of the copyright. It does not have a licence to do any of the acts restricted by copyright (such as copying the films or issuing them to the public, see sections 16(1) and 92(1) of the Copyright Designs and Patents Act 1988). Finally Media CAT does not represent the copyright owners in the sense that it brings the proceedings in a representative capacity nor do I understand it to act on behalf of the copyright owners in the sense that its acts can bind the copyright owners by a form of agency. Mr Ludbrook did not seek to persuade me that Media CAT was any of these things.

5. So who is Media CAT? At best it is a company with a contract which gives it ‘all rights necessary to allow [*Media CAT*] to inquire claim demand and prosecute through the civil courts where necessary any person or persons identified as having made available for download a film for which [*an agreement*] has expressly licensed’. The expression quoted comes from clause 1.1.1 of an agreement between Media CAT and a company called Sheptonhurst Ltd dated 19th November 2009. According to the agreement Sheptonhurst are the owners of copyright in the films (clause 2.2) and the agreement purports

to give Media CAT the right I have described. It also purports to give Media CAT the 'sole and exclusive right to demand collect and receive all revenues in respect of illegal file sharing' on the terms of the agreement. The extent to which it is legally possible for a company like Media CAT to acquire the rights it claims in relation to copyright is open to question and has not been tested in court."

50. Secondly, HHJ Birss QC was critical of the letters of claim sent by ACS:Law on behalf of Media CAT, in particular for the following reasons:

- “17. ... A claimant or potential claimant in a civil case is not required by the law to write a mealy mouthed or apologetic letter to a potential defendant. Robust correspondence between lawyers and sophisticated parties is part of the legal process. However letters which deal with issues of the complexity of the ones arising in this case need to be considered very carefully if they are addressed to ordinary members of the public.
18. The letters assert Media CAT is a copyright protection society (which it is not) and the exclusive territorial licensee of rights granted by the copyright owner (which it is not). ... The letter would be understood by many people as a statement that they have been caught infringing copyright in a pornographic film, that Media CAT has evidence of precisely that and that a court has already looked into the matter (a copy of the Order of Chief Master Winegarten is provided). They may think that their own ISP has decided that they are indeed infringing. ...
19. A sum of £495 is demanded as compensation. This sum is said to include damages as well as 'ISP administration costs (and its legal costs where applicable), a contribution to our clients legal costs incurred to date and all additional costs'. However no breakdown of the figure is given. The letter states that if this sum is agreed no further payment will be sought in relation to the infringement(s) being written about and the matter will be closed. In a section headed 'next steps - commencing proceedings' it is made clear that legal proceedings will be commenced if the matter cannot be settled to Media CAT's satisfaction. ...
20. The letter ends with a statement that 'this letter complies with the Code of Practice for Pre-Action Conduct in Intellectual Property Disputes (January 2004) a copy of which is available on our website'. That sounds official but there is in fact no formal Pre-action Protocol for Intellectual Property. The CPR includes a Practice Direction – Pre-action Conduct which applies generally and 9 specific pre-action protocols are in force which deal with particular areas of practice. Intellectual Property cases are not one of those areas. There was an attempt

some years ago to settle a pre-action protocol for IP cases but the protocol was not adopted by the court. It may be the informal one is being referred to. The absence of an official protocol is the reason why CPR Pt 63 r63.20(2), which relates to proceedings before this the Patents County Court, refers only to the general Practice Direction – Pre-action Conduct.

21. Perhaps many, maybe more of the recipients of these letters have been squarely infringing the copyright of Sheptonhurst on a major scale and know that they have been doing exactly that. They may think £495 is a small price to pay and settled immediately. That is a matter for them. However it is easy for seasoned lawyers to under-estimate the effect a letter of this kind could have on ordinary members of the public. This court's office has had telephone calls from people in tears having received correspondence from ACS:Law on behalf of Media CAT. Clearly a recipient of a letter like this needs to take urgent and specialist legal advice. Obviously many people do not and find it very difficult to do so. Some people will be tempted to pay, regardless of whether they think they have actually done anything, simply because of the desire to avoid embarrassment and publicity given that the allegation is about pornography. Others may take the view that it all looks and sounds very official and rather than conduct a legal fight they cannot afford, they will pay £495. After all the letter refers to an order of the High Court which identified them in the first place. Lay members of the public will not know the intricacies of the *Norwich Pharmacal* jurisdiction. They will not appreciate that the court order is not based on a finding of infringement at all.”
51. Thirdly, HHJ Birss QC elaborated on his concerns about Media CAT’s allegations of infringement:
 - “27. The Particulars of Claim also mentioned unsecured internet connections and tied in with that alleged infringement by the individual defendant either by infringing themselves or ‘by allowing others to do so’. The judgment notes that I am aware of no published decision in this country which deals with the issue of unsecured internet connections in the context of copyright infringement and refers in passing to a decision of German Bundesgerichtshof (BGH) on the point. The point about ‘allowing’ is that the word used in s16(2) of the 1988 Act is ‘authorising’ not ‘allowing’. They are by no means the same and the difference may be very important if the allegation is about unauthorised use of an internet router by third parties.
 28. This question of unsecured internet connections and infringing by ‘allowing others’ is a critical one since Media CAT’s monitoring exercise cannot and does not purport to identify the individual who actually did anything. All the IP address

identifies is an internet connection, which is likely today to be a wireless home broadband router. All Media CAT's monitoring can identify is the person who has the contract with their ISP to have internet access. Assuming a case in Media CAT's favour that the IP address is indeed linked to wholesale infringements of the copyright in question (like the *Polydor* case (above)), Media CAT do not know who did it and know that they do not know who did it. ...

29. Media CAT's case on this is in two parts. Of course Media CAT cannot know who actually used the P2P software, so in paragraph 3 of the Particulars of Claim they plead that the software was used either by the named defendant who was identified by the ISP, or by someone they authorised to use the internet connection or someone who gained access to the internet connection 'due to the router having no or no adequate security'. Then in paragraph 5 the plea is that "in the premises" the defendant has by himself, or by allowing others to do so, infringed. So taken together these two paragraphs show that the Particulars of Claim is pleaded on the basis that one way or another the defendant must be liable for the infringement which is taking place.
30. But the argument is based on equating 'allowing' and 'authorising' and on other points. What if the defendant authorises another to use their internet connection in general and, unknown to them, the authorised user uses P2P software and infringes copyright? Does the act of authorising use of an internet connection turn the person doing the authorising into a person authorising the infringement within s16(2)? I am not aware of a case which decides that question either. Then there is the question of whether leaving an internet connection 'unsecured' opens up the door to liability for infringement by others piggy backing on the connection unbeknownst to the owner. Finally what does 'unsecured' mean? Wireless routers have different levels of security available and if the level of security is relevant to liability - where is the line to be drawn? No case has decided these issues...."
52. Fourthly, HHJ Birss QC held that the notices of discontinuance were an abuse of the process for two reasons. First, they would give the copyright owners, who had not been joined to the proceedings, an unwarranted collateral advantage stemming from a breach of section 102 of the CDPA 1988 and the avoidance of CPR r. 19.3, namely that the copyright owners would avoid being subject to CPR r. 38.7. Secondly, they would give Media CAT, ACS:Law and the copyright owners an unwarranted collateral advantage of avoiding judicial scrutiny of the underlying claims on which the *Norwich Pharmacal* orders were based. His reasons for reaching the latter conclusion are too long to quote in full, but they include the following:
 - "98. The question in my judgment is whether the effect the notices of discontinuance undoubtedly have of bringing these cases to

an end and thereby terminating any scrutiny by the court of the claims is an unwarranted advantage to Media CAT amounting to an abuse of the court's process. In my judgment it is the existence of a huge wider pool of parallel claims including but not limited to the 2[7] now before the court which is a decisive factor here. Problems with the 2[7] claims before the court of the kind discussed in this judgment are generic to all of them and to all the other claims Media CAT is making against the individuals identified by the *Norwich Pharmacal* orders in the first place.

99. Media CAT and ACS:Law have a very real interest in avoiding public scrutiny of the cause of action because in parallel to the 2[7] court cases, a wholesale letter writing campaign is being conducted from which revenues are being generated. This letter writing exercise is founded on the threat of legal proceedings such as the claims before this court.
100. ... Simple arithmetic shows that the sums involved in the Media CAT exercise must be considerable. 10,000 letters for Media CAT claiming £495 each would still generate about £1 Million if 80% of the recipients refused to pay and only the 20% remainder did so. Note that ACS:Law's interest is specifically mentioned in the previous paragraph because of course they receive 65% of the revenues from the letter writing exercise. In fact Media CAT's financial interest is actually much less than that of ACS:Law. Whether it was intended to or not, I cannot imagine a system better designed to create disincentives to test the issues in court. Why take cases to court and test the assertions when one can just write more letters and collect payments from a proportion of the recipients?
101. Beyond Mr Crossley's statement the only evidence I have seen of Media CAT making good an intention to press the claims in court is the 8 RJs seeking default judgment in the October/November 2010. Mr Crossley's explanations never refer to a trial and never mention joining the copyright owners into the proceedings. His statements concerning his and his clients intent to litigate would all be true even if all Media CAT ever intended was to go as far as RJs. I have seen no evidence of actions evidencing a desire to press these claims beyond applications for judgment in default. Furthermore even assuming Media CAT and ACS:Law knew at the start that they would have to litigate some claims sometime to some extent, it is not at all clear what Media CAT intends to do now. Mr Crossley says he was keen to continue the litigation and he stands by the initial letters of claim. In my judgment the letters of claim are flawed and not a solid place to stand. Mr Crossley is keen to continue the litigation but he is not doing so.

102. The GCB episode is damning in my judgment. This shows that Media CAT is a party who, while coming to court to discontinue, is at the very same time trying to ram home claims formulated on exactly the same basis away from the gaze of the court. That will not do. I find that these notices of discontinuance are indeed an abuse of the court's process. The advantage of discontinuing as opposed to applying to amend is unwarranted in that it avoids judicial scrutiny of the underlying basis for wider campaign orchestrated by Media CAT and ACS:Law to generate revenue under the various agreements such as the Sheptonhurst agreement.”
53. Fifthly, HHJ Birss QC made the following observations about the *Norwich Pharmacal* jurisdiction:
- “13. The *Norwich Pharmacal* jurisdiction has been considered and used in many further cases and wider contexts. It plays an important role in the courts armoury to see that justice is done. It is not a requirement that the applicant will be bringing court proceedings, see *British Steel Corp v Granada Television Ltd* [1981 AC 1096, Lord Fraser at 1200C-G and *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29 [2001] 1 WLR 2033, Lord Woolf CJ at [41]-[47]. In *Ashworth* the reason for seeking the identity of the person in question was to discipline the person, which in practise would mean they would be dismissed (see [19]).
14. Nevertheless there is a potential difficulty with the *Norwich Pharmacal* process which is put into focus by the cases before me. The respondent to the *Norwich Pharmacal* application for disclosure - while obviously wishing to ensure that an order is not made when it would be inappropriate to do so – has no direct interest in the underlying cause of action relied on. The respondent is not going to be sued. A *Norwich Pharmacal* application is not and cannot be the place in which to try the cause of action. That happens when the person's identity is revealed and then usually proceedings are commenced. Even if proceedings are not commenced – in a situation like *Ashworth* where a single name is being sought in order to discipline the person – no doubt that person would be able to take whatever steps to defend themselves they wished to and if necessary the matter could come to an appropriate court or tribunal.
- ...
112. I cannot imagine that the court making the *Norwich Pharmacal* orders in this case did so with a view to setting in train an exercise that was to be conducted in the manner that has subsequently emerged. In my judgment when a *Norwich Pharmacal* order is sought of the kind made in this case, it may well be worth considering how to manage the subsequent use

of the identities disclosed. Perhaps consideration should be given to making a Group Litigation Order under CPR Part 19 from the outset and providing a mechanism for identifying tests cases at an early stage before a letter writing campaign begins. When *Anton Piller* (search and seizure) orders are made the practice is for a supervising solicitor who does not act for the claimant to be closely involved in order to ensure that the orders are not abused. The supervising solicitors are experienced practitioners. Perhaps a court asked for a *Norwich Pharmacal* order of the kind made here should consider requiring some similar form of supervision from a[n] experienced neutral solicitor.”

54. Subsequently HHJ Birss QC struck out the subsisting claims, made a “stage one” wasted costs order against Mr Crossley and joined Mr Crossley to the proceedings for the purposes of the defendants seeking an order for costs against him under section 51 of the Senior Courts Act 1981: see *Media CAT v Adams (No 2)* [2011] EWPC 10, [2011] FSR 29. My understanding is that the costs proceedings were subsequently settled.
55. ACS:Law ceased trading at the end of January 2011. In March 2011 the Solicitors Regulation Authority commenced disciplinary proceedings against Mr Crossley. At the hearing before the Tribunal, Mr Crossley admitted six allegations of breach of the Solicitors’ Code of Conduct 2007, including:
 - i) acting in a way that was likely to diminish the trust the public places in him or in the legal profession;
 - ii) entering into arrangements to receive contingency fees for work done in prosecuting or defending contentious proceedings before the courts of England and Wales except as permitted by statute or the common law;
 - iii) acting where there was a conflict of interest in circumstances not permitted under the Rules, in particular because there was a conflict or significant risk that his interests were in conflict with those of his clients; and
 - iv) using his position as a solicitor to take or attempt to take unfair advantage of other persons, being recipients of letters of claim either for his own benefit or the benefit of his clients.

Infringement claims brought by Golden Eye

56. So far as the evidence before me goes, Golden Eye has only brought three claims for infringement arising out of information obtained by virtue of the *Norwich Pharmacal* orders made by Proudman and Vos JJ. All three claims were issued in the Northampton County Court, in at least two cases using the Money Claim Online system (“MCOL”). I would observe that MCOL is unsuitable for copyright infringement claims and should not be used for that purpose. All three claims were subsequently transferred to another county court and thence to the Patents County Court.

57. In each case the Particulars of Claim were in the following form (the example quoted is from *Golden Eye v Maricar*):

“The Claimant is the exclusive licensee in the UK of rights in the film sold under the name Fancy an Indian? (the film), including the right to act in relation to any breach of copyright. On 27th November 2009 the Claimant believes the defendant unlawfully made all or part of the film available from his IP address for downloading by third parties. On 29th September 2010 the Claimant sent a letter before action to the Defendant setting out in full its claim for breach of copyright. The Defendant failed to reply. The Claimant sent another letter to the Defendant on 8th November 2010 to which no response was received.

The Claimant claims #700 for breach of copyright. The Claimant claims interest under section 69 of the County Courts Act 1984 at the rate of 8% a year from 27/11/2009 to 21/01/2011 on #700.00 and also interest at the same rate up to the date of judgment or earlier payment at a daily rate of #0.15.”

58. In two of these cases, Golden Eye served a notice of discontinuance after the claims had been transferred to the Patents County Court. In one of those cases the defendant applied for various orders including an order that the copyright owner, Ben Dover Productions, be added. In a third case Golden Eye obtained a default judgment, but the defendant applied to set it aside. On 23 September 2011 HHJ Birss QC directed an oral hearing of the applications in the latter two cases: see *Golden Eye v Maricar* [2011] EWPC 27. The evidence before me does not reveal what happened subsequently. It appears probable that both cases were settled.

Similarities and differences

59. Counsel for Consumer Focus was at pains to emphasise the similarities between the present case and the ACS:Law/Media CAT cases, while counsel for the Claimants was at pains to emphasise the differences.
60. Counsel for Consumer Focus particularly stressed the following similarities:
- i) Golden Eye had entered into agreements with the Other Claimants under which Golden Eye was not licensed by the copyright owner to do any of the acts restricted by the copyrights in the films, but only to “act for it in relation to any alleged breaches of copyright arising out of [P2P filesharing]”.
 - ii) Those agreements typically provided for Golden Eye to receive 75% of the revenue (slightly less in some cases).
 - iii) Golden Eye intended to send letters of claim to up to 9,124 Intended Defendants.

- iv) The draft letter of claim which Golden Eye proposed to send was similar to the letters of claim sent by ACS:Law, and included some (though not all) of the objectionable features commented on by HHJ Birss QC.
- v) The letter claimed £700 by way of compensation without any attempt at justifying that figure. As counsel pointed out, if all 9,124 Intended Defendants paid that sum, the revenue generated would be £6,386,000, of which Golden Eye would receive approximately £4.8 million (given that it receives 100% of the revenue where the copyright owner is Ben Dover Productions, but it receives less than 75% in some cases).
- vi) The conduct of the three claims brought by Golden Eye against alleged infringers as a result of the earlier *Norwich Pharmacal* orders suggested a desire to avoid judicial scrutiny of such claims.

61. Counsel for Golden Eye particularly stressed the following differences:

- i) ACS:Law has not been involved in Golden Eye's claims. Golden Eye brought the present claim itself, albeit that it instructed solicitors and counsel for the purposes of the hearing before me. There is therefore no question of a solicitor acting improperly in the various ways that Mr Crossley did.
- ii) The copyright owners have been joined to this claim as claimants from the outset.
- iii) In the case of the agreement between Golden Eye and Ben Dover Productions, as explained below, there is no dispute that it constitutes an exclusive licence giving Golden Eye title to sue.

62. An additional difference which was not mentioned by counsel for the Claimants, but which I regard as relevant, is that the Claimants appear to be taking a somewhat less ambitious approach than Media CAT to the scope of their potential claims of infringement against the Intended Defendants. I shall return to this point below.

63. I accept that there are both similarities and differences between the present claim and those made by ACS:Law/Media CAT. In any event, the present claim must be considered on its own merits.

The legal context

64. Although the legal context for the present application consists primarily of the jurisprudence concerning an equitable remedy under English law, it is also necessary to have regard to a number of domestic and European legislative provisions.

CDPA 1988

65. The CDPA 1988 includes the following provisions:

“Exclusive licences

92.(1) In this Part an ‘exclusive licence’ means a licence in writing signed by on behalf of the copyright owner authorising the

licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable by the copyright owner.

...

Provisions as to damages in infringement action

97. ...

(2) The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to-

- (a) the flagrancy of the infringement, and
- (b) any benefit accruing to the defendant by reason of the infringement,

award such additional damages as the justice of the case may require.

...

Rights and remedies of exclusive licensee

101.(1) An exclusive licensee has, except against the copyright owner, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment.

(2) His rights and remedies are concurrent with those of the copyright owner; and references in the relevant provisions of this Part to the copyright owner shall be construed accordingly.

(3) In an action brought by an exclusive licensee by virtue of this section a defendant may avail himself of any defence which would have been available to him if the action had been brought by the copyright owner.

...

Exercise of concurrent rights

102.(1) Where an action for infringement of copyright brought by the copyright owner or an exclusive licensee relates (wholly or partly) to an infringement in respect of which they have concurrent rights of action, the copyright owner or, as the case may be, the exclusive licensee may not, without the leave of the court, proceed with the action unless the other is either joined as a plaintiff or added as a defendant.

- (2) A copyright owner or exclusive licensee who is added as a defendant in pursuance of subsection (1) is not liable for any costs in the action unless he takes part in the proceedings.
- (3) The above provisions do not affect the granting of interlocutory relief on an application by a copyright owner or exclusive licensee alone.
- (4) Where an action for infringement of copyright is brought which relates (wholly or partly) to an infringement in respect of which the copyright owner and an exclusive licensee have or had concurrent rights of action—
 - (a) the court shall in assessing damages take into account—
 - (i) the terms of the licence, and
 - (ii) any pecuniary remedy already awarded or available to either of them in respect of the infringement;
 - (b) no account of profits shall be directed if an award of damages has been made, or an account of profits has been directed, in favour of the other of them in respect of the infringement; and
 - (c) the court shall if an account of profits is directed apportion the profits between them as the court considers just, subject to any agreement between them;

and these provisions apply whether or not the copyright owner and the exclusive licensee are both parties to the action.

...”

The Enforcement Directive

66. Article 3 of European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (“the Enforcement Directive”) provides as follows:

“General obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”

The Human Rights Act 1998

67. Section 6(1) of the Human Rights Act 1998 provides that “It is unlawful for a public authority to act in a way which is incompatible with a Convention right”, and section 6(2)(a) defines “public authority” as including a court.

The Convention rights

68. The Convention rights that are relevant in the present case are those guaranteed by Article 8 of, and Article 1 of the First Protocol to, the European Convention on Human Rights. Article 8 provides:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

69. Article 1 of the First Protocol provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The Charter of Fundamental Rights of the European Union

70. The Charter of Fundamental Rights of the European Union (“the Charter”) was originally proclaimed by the European Parliament, Council and Commission at Nice in December 2000. As amended in December 2007, it became legally binding with the coming into force of the Lisbon Treaty in December 2009.

71. The Charter includes the following provisions:

“Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.
- ...

Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.
- ...

Article 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”

72. Protocol No 30 on the application of the Charter to Poland and to the United Kingdom, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, provides as follows:

“Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United

Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”

73. None of the provisions of the Charter quoted in paragraph 71 above are in Title IV.

Data Protection Directive

74. European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data includes the following provisions:

“Article 1

Object of the Directive

1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

...

Article 7

Member States shall provide that personal data may be processed only if:

...

- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

Article 13

Exemptions and restrictions

1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 when such a

restriction constitutes a necessary measures to safeguard:

...

- (g) the protection of the data subject or of the rights and freedoms of others.”

Data Protection Act 1998

75. Section 35 of the Data Protection Act 1998 provides:

- “(1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.
- (2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary –
 - (a) For the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or
 - (b) For the purpose of obtaining legal advice,or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.”

The *Norwich Pharmacal* jurisdiction

76. In *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 the claimants were the owners and licensees of a patent for a chemical compound known as furazolidone. It appeared that the patent was being infringed by illicit importations of furazolidone manufactured abroad. In order to obtain the names and addresses of the importers the claimants brought actions against the Commissioners of Customs and Excise alleging infringement of the patent and seeking orders for the disclosure of the relevant information. On a summons for inspection of documents, the Commissioners claimed privilege against production of the relevant documents. Graham J ordered discovery of the names and addresses of the importers. The Court of Appeal reversed that decision. The appellants appealed to the House of Lords. At the hearing of the appeal, the claimants abandoned the contention that they had a cause of action for infringement by the Commissioners themselves, and the appeal proceeded on the basis that the case was and always had been an action solely for discovery.

77. Their Lordships held that, as Lord Reid put it at 175B-C:

“... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do

not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”

It followed that *prima facie* the Commissioners were under an equitable duty to disclose the information sought. Furthermore, in the circumstances of the case there was nothing to preclude the making of an order for discovery. Accordingly, the House of Lords allowed the appeal.

78. Since then, a substantial body of jurisprudence has developed with regard to the exercise of this jurisdiction. Two subsequent decisions of the House of Lords are cited by HHJ Birss QC in the passage from his third Media CAT judgment cited in paragraph 53 above. For present purposes, two decisions of the Court of Appeal are particularly pertinent.
79. *Totalise plc v Motley Fool Ltd* [2001] EWCA Civ 1897, [2002] 1 WLR 1233 concerned the appropriate costs order on a *Norwich Pharmacal* application for disclosure of the name and contact information of a person who had posted defamatory statements on a website. Aldous LJ giving the judgment of the Court of Appeal said:
 - “24. It is not necessary to construe section 35 or paragraphs 5 and 6 of Schedule 2, but it is manifest from paragraph 6 of Schedule 2 [of the Data Protection Act 1998] that no order is to be made for disclosure of a data subject's identity, whether under the *Norwich Pharmacal* doctrine or otherwise, unless the court has first considered whether the disclosure is warranted having regard to the rights and freedoms or the legitimate interests of the data subject. By virtue of section 10 of the Contempt of Court Act 1981, if applicable, the court must also be satisfied that disclosure is necessary in the interests of justice.
 25. In a case such as the present, and particularly since the coming into force on 2 October 2000 of the Human Rights Act 1998, the court must be careful not to make an order which unjustifiably invades the right of an individual to respect for his private life, especially when that individual is in the nature of things not before the court: see the Human Rights Act 1998, section 6, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, articles 10 and (arguably at least) 6(1). There is nothing in article 10 which supports Mr Moloney's contention that it protects the named but not the anonymous, and there are many situations in which - again contrary to Mr Moloney's contention - the protection of a person's identity from disclosure may be legitimate.
 26. It is difficult to see how the court can carry out this task if what it is refereeing is a contest between two parties, neither of

whom is the person most concerned, the data subject; one of whom is the data subject's prospective antagonist; and the other of whom knows the data subject's identity, has undertaken to keep it confidential so far as the law permits, and would like to get out of the cross-fire as rapidly and as cheaply as possible. However, the website operator can, where appropriate, tell the user what is going on and to offer to pass on in writing to the claimant and the court any worthwhile reason the user wants to put forward for not having his or her identity disclosed. Further, the court could require that to be done before making an order. Doing so will enable the court to do what is required of it with slightly more confidence that it is respecting the law laid down in more than one statute by Parliament and doing no injustice to a third party, in particular not violating his convention rights.”

80. In *Rugby Football Union v Viagogo Ltd* [2011] EWCA Civ 1585 the RFU alleged that Viagogo had permitted a large number of tickets for the Autumn International 2010 and the Six Nations 2011 matches held at the RFU's stadium at Twickenham to be advertised on Viagogo's website for sale at prices far above the face value of the tickets. The RFU contended that both the sellers and the purchasers of those tickets have committed actionable wrongs against the RFU, which made great efforts to prevent the sale of such tickets at an inflated price on a “black market”; that Viagogo have become innocently involved in such wrongdoing in such a manner; and that the court should make a *Norwich Pharmacal* order requiring Viagogo to identify the persons advertising and selling such tickets and identifying the tickets so sold by block, row, seat number and price.
81. At first instance Tugendhat J identified five issues for decision:
 - i) had arguable wrongs been committed against the RFU?
 - ii) was Viagogo mixed up in those arguable wrongs?
 - iii) was the RFU intending to try to seek redress for those wrongs?
 - iv) was disclosure of the information which the RFU required necessary for it to pursue that redress?
 - v) should the court exercise its discretion in favour of granting relief?
82. Tugendhat J answered all five questions in the affirmative. In the Court of Appeal, Viagogo advanced a new argument that the judge should have had regard to the fact that the order sought involved an interference with the fundamental rights of individuals under Articles 7 and 8 of the Charter and that, in the light of those provisions, the Data Protection Directive and section 35 of the Data Protection Act 1998, disclosure should only have been ordered if it was both strictly necessary and proportionate. In support of this argument Viagogo relied upon the decisions of the Court of Justice of the European Union in Case C-73/07 *Tietosuojavaltuutettu v Satakunen Markkinapörssi Oy* [2008] ECR I-9831 and Case C-92/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I-0000. The Court of Appeal

proceeded on the basis that it had to be shown that the disclosure was both necessary and proportionate: see the judgment of Longmore LJ, with whom Patten and Rafferty LJJ agreed, at [12] and [27].

83. The Court of Appeal affirmed Tugendhat J's decision. In relation to the questions of necessity and proportionality, Longmore LJ said:

“25. The judge concluded that the RFU had no available means of finding out the information it was seeking other than through Viagogo and that the making of the order was, therefore, necessary. In his oral argument Mr Howe did not suggest that there were such other available means of obtaining such information. His submission was rather that the RFU had the remedy in their own hands because, instead of issuing tickets to Members Clubs and sponsors, they could issue them only to named individual applicants and require them to present personal identification in the form of a passport or other document when they entered the ground. That, of course, would be wholly inimical to the way in which the RFU wishes to distribute tickets for important matches and it can hardly be appropriate for the owner of a website to require the RFU to make such fundamental alteration to its ticketing operations.

26. In the absence of any plausible suggestion as to how the RFU could obtain information as to the identity of those selling tickets for more than their face value, it seems to me that a *Norwich Pharmacal* order is, indeed, necessary and I would not disagree with the judge under this head.

...

28. Once it is established that there is arguable wrongdoing by unidentified individuals and that there is no realistic way of discovering the arguable wrong doers other than a *Norwich Pharmacal* order, it will generally be proportionate to make such an order revealing the identity of those arguable wrongdoers. There can be no reasonable expectation of privacy in respect of data which reveal such arguable wrongs and Viagogo's own conditions of business point out to their customers that there may be circumstances in which their personal data will be passed on to others. Mr Mill submitted that the acceptance of such conditions constituted a waiver by Viagogo's customers of confidentiality in their personal data. I doubt if that is right but the fact that Viagogo's conditions of business contemplate that personal data of their customers may be revealed is not wholly irrelevant to proportionality.

29. I would prefer to say that the requirement that Viagogo disclose a limited amount of personal data in this case is proportionate because there is no other way in which arguable wrongdoing can be exposed. In this case, as in many other

Norwich Pharmacal cases, necessity and proportionality may go hand in hand. The terms of the order must, of course, be proportionate but Viagogo have never suggested that some more limited form of order would be appropriate. The only personal data ordered to be revealed are the names and addresses of the arguable wrongdoers. That seems to me to be both proportionate and just.”

Is there a duty of full and frank disclosure on a *Norwich Pharmacal* application?

84. In *R v Kensington Income Tax Commissioners ex parte de Polignac* [1917] 1 KB 486 Warrington LJ said at 509:

“It is perfectly well settled that a person who makes an *ex parte* application to the court—that is to say, in the absence of the person who will be affected by that which the court is asked to do—is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.”

85. Counsel for Consumer Focus submitted that an applicant for a *Norwich Pharmacal* order should be regarded as subject to the same duty of full and frank disclosure as an applicant seeking an injunction or other order without notice to the respondent. He acknowledged that there was nothing in the existing case law since *Norwich Pharmacal* was decided 40 years ago to suggest that applicants were subject to such a duty and that applications for *Norwich Pharmacal* orders were usually made on notice to the respondent, as in the present case. He argued, however, that applications for *Norwich Pharmacal* orders were made without notice to “the person who will be affected by that which the court is asked to do” i.e. the Intended Defendants.
86. This is an ingenious argument which may require further consideration in another case. In my judgment it is not necessary to decide whether it is correct for the purposes of the present claim, however, for the following reasons. First, as a result of Consumer Focus’s intervention, I have had the benefit of adversarial argument on behalf of the Intended Defendants. Secondly, the duty of full and frank disclosure normally comes into play when the respondent to the application applies to set aside the order on the ground of non-compliance with that duty. It is well established that the court may set aside and order made on a without notice application, and decline to grant a fresh order, if the applicant has not complied with the duty. At the stage of the without notice application, however, the court will normally assume that the applicant is complying with the duty. Thirdly, counsel for Consumer Focus identified five particular matters in his skeleton argument which he contended that the Claimants should address. In the event, the Claimants have addressed each of these matters in further evidence.

87. Nevertheless, there are two specific points which call for further comment. First, as I have recorded above, it is now apparent that in the Media CAT cases NG3 received 12.5% of the revenue. It seems clear that that fact was not disclosed to the court on the applications for *Norwich Pharmacal* orders. Paragraph 7.6 of the Protocol for the Instruction of Experts to Give Evidence in Civil Claims expressly prohibits payments to an expert witness which are contingent upon the outcome of the case, since it is contrary to the expert's overriding duty to the court imposed by CPR r. 35.3. *Prima facie* an arrangement of the kind entered into by NG3 is contrary to that principle: see *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381 at [63]-[73]. If an applicant for a *Norwich Pharmacal* order wishes to contend that such an arrangement is acceptable, then, as counsel for the Claimants accepted, the arrangement ought to be disclosed to the court. But in my view that this is so by virtue of the principles applicable to expert witnesses regardless of whether there is a duty of full and frank disclosure of the kind discussed above.
88. The second is that, although the Claimants have filed further evidence answering the five questions raised by counsel for Consumer Focus in his skeleton argument, they have chosen not to adduce any evidence to address another point which counsel for Consumer Focus made in his oral submissions. This is what happened as a result of the orders made by Proudman and Vos JJ. I do not know, because Golden Eye has not disclosed, how many subscribers were identified in response to those orders. Nor do I know how many letters of claim Golden Eye sent or with what results. It is probable, however, that a substantial number of subscribers were identified, a substantial number of letters of claim sent and substantial sums of money paid to Golden Eye by some of the recipients of such letters. Nor do I know how many claims Golden Eye issued or with what results. I only know the information recorded in paragraphs 56-58 above because it was set out in the judgment of HHJ Birss QC cited there. Despite a specific challenge by counsel for Consumer Focus, Golden Eye has not explained why it discontinued at least two claims. Even assuming that the Claimants are under no obligation to reveal these matters, their failure to do so is something that I consider that the court can and should take into account.

Have arguable wrongs been committed against the Claimants?

89. Consumer Focus raised three matters for consideration under this heading.

Golden Eye's title to sue the Intended Defendants

90. Counsel for Consumer Focus accepted that the Ben Dover Agreement fulfilled the requirements for an exclusive licence in section 92(1) CDPA 1988, so as to give Golden Eye title to sue the Intended Defendants for infringement of copyright; but he submitted that the agreements between Golden Eye and the Other Claimants did not. Counsel for the Claimants did not argue to the contrary, and I accept that submission.
91. As counsel for the Claimants pointed out, however:
- i) Golden Eye has title to sue in respect of all films covered by the Ben Dover Agreement;

- ii) joinder of Ben Dover Productions as a claimant will comply with section 102(1) CDP A 1988;
- iii) in the case of the Other Claimants, the fact that Golden Eye does not have title to sue is no bar to claims being brought by the Other Claimants.

Are the agreements between Golden Eye and the Other Claimants champertous?

92. Consumer Focus contended that the agreements between Golden Eye and the Other Claimants were champertous, and therefore unenforceable as being contrary to public policy. As Lord Phillips of Worth Matravers MR explained when delivering the judgment of the Court of Appeal in *Factortame (No 8)*:

“31. Champerty is a variety of maintenance. Maintenance and champerty used to be both crimes and torts. A champertous agreement was illegal and void, involving as it did criminal conduct. Sections 13(1) and 14(1) of the Criminal Law Act 1967 abolished both the crimes and the torts of maintenance and champerty. Section 14(2) provided, however:

‘The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.’

Thus, champerty survives as a rule of public policy capable of rendering a contract unenforceable.

32. ‘A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse’: see *Chitty on Contracts*, 28th ed (1999), vol 1, para 17-050. Champerty ‘occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit’: *Chitty*, para 17-054. Because the question of whether maintenance and champerty can be justified is one of public policy, the law must be kept under review as public policy changes. As Danckwerts LJ observed in *Hill v Archbold* [1968] 1 QB 686, 697: ‘the law of maintenance depends upon the question of public policy, and public policy ... is not a fixed and immutable matter. It is a conception which, if it has any sense at all, must be alterable by the passage of time.’”

93. Counsel for Consumer Focus advanced two arguments under this heading, which I consider that it is important to distinguish between. The first argument is that the agreements are champertous because they constitute assignments of bare causes of action coupled with a division of the proceeds recovered: see *Giles v Thompson* [1994] 1 AC 142 at 153G, 161B-C (Lord Mustill). In my judgment counsel for the Claimants is correct to submit that the short answer to this argument is that the agreements do not constitute assignments of causes of action. Under clause 2.2 of the agreements the Other Claimants granted Golden Eye “the right to act” for them, but

that is not the same thing. That the agreements do not assign any causes of action is confirmed by clause 2.3(c), under which Golden Eye may require the Other Claimants to “lend [their] name[s]” to proceedings. Thus the Other Claimants are claimants in this claim, and the Claimants accept that the Other Claimants will be necessary claimants in any claims brought against the Intended Defendants relating to their copyright works.

94. The second argument is that the agreements are champertous because they are agreements to conduct litigation coupled with a division of the spoils. Counsel for Consumer Focus submitted that agreements to conduct litigation (or providing advocacy services) coupled with a division of the proceeds were subject to a “per se” rule that they were champertous, rather than to a case-by-case assessment of their effect on the proper administration of justice. That submission is supported by the decision of the Court of Appeal in *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25, [2011] 1 WLR 2111. It begs the question, however, of whether the agreements in question are “agreements to conduct litigation” in that sense. There was no dispute about that in *Sibthorpe*, since the agreements in issue were conditional fee agreements between solicitors and their clients. As Lord Phillips explained in *Factortame (No 8)* at [60]:

“There is good reason why principles of maintenance and champerty should apply with particular rigour to those conducting litigation or appearing as advocates. To demonstrate this we can do no better than cite a passage in the judgment of Buckley LJ in *Wallersteiner v Moir (No 2)* [1975] QB 373, 401-402:

‘A contingency fee, that is, an arrangement under which the legal advisers of a litigant shall be remunerated only in the event of the litigant succeeding in recovering money or other property in the action, has hitherto always been regarded as illegal under English law on the ground that it involves maintenance of the action by the legal adviser. Moreover where, as is usual in such a case, the remuneration which the adviser is to receive is to be, or to be measured by, a proportion of the fund or of the value of the property recovered, the arrangement may fall within that particular class of maintenance called champerty ... It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can, I think, be summarised in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes

similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations ...”

95. In the present case, counsel for the Claimants submitted that the agreements in question were not agreements to conduct litigation in that sense, and therefore a less strict approach was appropriate. He pointed out that Golden Eye do not purport to be solicitors (or any other form of legal representative), nor do they purport to provide the services that solicitors provide, nor are they officers of the court. He argued that it made no difference that Golden Eye acted in person through Mr Becker, rather than instructing solicitors, some of the time. For the purposes of the hearing before me, of course, the Claimants instructed solicitors and counsel. Counsel for the Claimants went on to submit that the mere fact that the Other Claimants appointed Golden Eye to act on their behalf on terms that Golden Eye received 75% (or less) of the proceeds did not jeopardise the proper administration of justice, and therefore the agreements were not champertous.
96. In *Factortame (No 8)* the Court of Appeal was concerned with agreements between the claimants and Grant Thornton under which Grant Thornton received 8% of the damages. Lord Phillips dealt with the nature of the services provided by Grant Thornton as follows:
- “23. When we come to consider the law of champerty we shall find that its application requires an analysis of the facts of the particular case. Special principles apply to those who are entitled to have the conduct of litigation, and in particular to solicitors. On behalf of the minister, Mr Friedman argued that those principles had application to Grant Thornton because the services that they were providing were, in large measure, the type of services that solicitors customarily provide in the course of the conduct of litigation. In addition, or by way of an alternative to this submission, Mr Friedman submitted that some of the services provided by Grant Thornton were in the nature of expert evidence and that principles of, or similar to, the law of champerty could render unenforceable an agreement by experts to give evidence in a case in consideration of a share of any recovery. Having regard to these submissions it has been necessary for us to consider the nature of the services provided by Grant Thornton and, in particular, whether they have been providing services which are customarily provided to litigants by solicitors.
24. Section 28 of the Courts and Legal Services Act 1990 makes provision for those who have the ‘right to conduct litigation’. Such a right can only be granted by ‘the appropriate authorised body’. The Law Society is such a body. The Institute of Chartered Accountants is not. Thus accountants have no right to ‘conduct litigation’. The right to conduct litigation is defined by section 119 of the Act. It means the right ‘(a) to issue proceedings before any court; and (b) to perform any ancillary

functions in relation to proceedings (such as entering appearances to actions)’.

25. Section 20 of the Solicitors Act 1974 makes it an indictable criminal offence for an unqualified person to ‘act as a solicitor’. It is plain, in the light of this, that the ‘conduct of litigation’ which is reserved to a solicitor or other authorised person by section 28 of the 1990 Act must be given a restricted ambit. It cannot embrace all the activities that are ancillary to litigation and which are sometimes carried on by a solicitor and sometimes by a person who has no right to conduct litigation.

26. Thus, in *Piper Double Glazing Ltd v DC Contracts* [1994] 1 WLR 777, where the issue was whether the fees for the services of claims consultants in relation to the conduct of an arbitration could be recovered as costs, Potter J observed, at p 783:

‘By acting as claims consultants in the arbitration, Knowles neither acted as a solicitor nor purported to act as a solicitor within the letter or spirit of section 20(1) or section 25(1) of the Solicitors Act 1974. An unqualified person does not act as a solicitor within the meaning of section 25(1) merely by doing acts of a kind commonly done by solicitors. To fall within that phrase, the act in question must be an act which it is lawful only for a qualified solicitor to do and/or any other act in relation to which the unqualified person purports to act as a solicitor ...’

27. Thomas Cooper have at all times had the conduct of the litigation on behalf of the claimants. Grant Thornton have done nothing for which they required authority under section 28 of the 1990 Act or which offended against section 20 of the 1974 Act . Their services have been ancillary to the conduct of the litigation by Thomas Cooper. Of what have those services consisted?

28. The bill of costs prepared by Thomas Cooper starts with a narrative which includes the following description of the role played by Grant Thornton:

‘The firm of Grant Thornton chartered accountants were appointed by the applicants and their solicitors to advise on, co-ordinate and play a major part in the gathering of voluminous and complex evidence as to loss, particularly that within their expertise as chartered accountants. Grant Thornton were also instrumental in the appointment of the independent experts instructed and again played a major part in the assisting and liaising with those experts and also with solicitors and

counsel. Grant Thornton worked closely with the experts to create the original model for calculating the losses claimed. Grant Thornton made a considerable number of modifications to the model and created several different versions to accommodate various contentions and arguments. Grant Thornton were engaged throughout in a supporting and advisory role to the [claimants] and their legal representatives. Grant Thornton's involvement was also very cost effective, as overall their charging rates were significantly lower than Thomas Cooper & Stibbard's rates and it will be appreciated that Thomas Cooper & Stibbard would have had to carry out all the work undertaken by Grant Thornton if Grant Thornton had not been involved.'

29. We consider that this is an accurate summary, subject to one comment. Grant Thornton's work consisted largely of important back-up services for the two independent experts, Mr Banks and Mr Anton. Many of those services, such as the collection of documentary evidence and liaison with the clients in Spain, could have formed part of the services provided by Thomas Cooper themselves. Most of the services would, however, more naturally have formed part of a package of forensic accountancy services which would have included the provision of the expert evidence itself. It was only the fact that they considered that they were precluded by their interest in recovering their outstanding accountancy fees from their clients' damages that led Grant Thornton to engage Mr Anton as an independent accountancy expert.
30. There can be no doubt that Grant Thornton played a very important role in the damages phase of the litigation. Particularly important was their input into the agreement of a computer model. As Mr Friedman pointed out, their fees outstripped those of Thomas Cooper. One further matter Mr Friedman emphasised: their services included advising the claimants on settlement offers."
97. The Court of Appeal concluded that the agreements were not champertous since they did not jeopardise the proper administration of justice. This was partly because of the nature of the services provided by Grant Thornton, but also because of the fact that liability had been determined when the agreements were entered into, the financial circumstances of the claimants, the modest percentage to which Grant Thornton were entitled and the fact that the preparation of the computer model was carried out jointly with the Ministry's experts: see [79]-[91].
98. There have been a number of other cases in the past decade or so in which courts have held that agreements to provide services connected with litigation in return for a percentage of the proceeds were not champertous:

- i) In *Stocznia Gdanska SA v Latreefers Inc. (No. 2)* [2001] 2 BCLC 116 a third party had agreed to fund the costs of a party to litigation in return for a 55% share of the proceeds. The Court of Appeal expressed a strong provisional view that in the particular circumstances of the case the agreement was not champertous: see the judgment of the Court delivered by Morritt LJ at [63].
- ii) In *Dal-Sterling Group plc v WSP South & West Ltd.* (unreported, 18 July 2001) the claimant, which operated as a claims consultant in the construction industry, agreed to provide consultancy services to a contractor pursuing claims against London Underground Ltd in return for 22.5% of any recovery above a specified level. HHJ Seymour QC, sitting in the Technology and Construction Court, held that the agreement was enforceable.
- iii) In *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No. 2)* [2002] EWHC 2130 (Comm), [2002] 2 Lloyd's Rep 692 Cresswell J held that an agreement under which salvage contractors were paid 5% of recoveries in respect of various "recovery services", which included various elements closely related to litigation, was enforceable.
- iv) In *Mansell v Robinson* [2007] EWHC 101 (QB) Underhill J held that an agreement under which services of an investigative and public relations nature were provided in return for 1% of the proceeds (plus a weekly fee and expenses) was not champertous.
- v) In *London & Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 (TCC) Coulson J held that a settlement agreement between the parties to building contract, the employer and the contractor, under which the contractor was entitled to "pursue, prosecute and if necessary enforce" claims against the tenant of the building using the employer's name on terms that the employer was to receive the first £200,000 of any proceeds, but thereafter the contractor was entitled to them, was not champertous.

99. I accept the submission of counsel for the Claimants that Golden Eye is not conducting litigation in the sense discussed above, and therefore the stricter rule applicable to agreements to conduct litigation is not engaged by the agreements between Golden Eye and the Other Claimants. It follows that it is necessary to consider whether those agreements jeopardise the proper administration of justice. There is no evidence of any pre-existing commercial relationship between Golden Eye and the Other Claimants, nor of any other pre-existing commercial interest of Golden Eye in the Other Claimants' causes of action against the Intended Defendants. Although Golden Eye is not conducting litigation, it has engaged and paid Mr Torabi. Furthermore, under the terms of the agreements, it has full control over the litigation. Liability of the Intended Defendants has not yet been established. It is probable that many of them are liable for infringement, but many may not be. Of most concern, to my mind, is the division of revenues. Nevertheless, with some hesitation, I do not feel able to conclude that the agreements are likely to jeopardise the proper administration of justice and thus champertous. They are commercial arrangements between Golden Eye and the Other Claimants under which Golden Eye undertakes the effort, cost and risk of applying for *Norwich Pharmacal* orders and making claims against alleged infringers, including it appears the costs of instructing solicitors and counsel, in return for a handsome share of the proceeds. There is nothing in the arrangement which

imperils the ability of the court properly to control the circumstances in which an order will be granted and the use which may be made of the information obtained if an order is granted or to control the conduct of subsequent claims against the Intended Defendants.

100. Finally, I should note that counsel for the Claimants argued that, even if the agreements were champertous, and therefore unenforceable, that would not present an obstacle either to the present claim or to claims against the Intended Defendants because the Other Claimants were parties to the present claim and would be parties to claims against the Intended Defendants. As at present advised, this argument appears to me to have force, but it is not necessary for me to decide whether it is correct.

The evidence of infringement

101. Consumer Focus served an expert report from Dr Richard Clayton. Dr Clayton is a Senior Research Assistant in the Computer Laboratory of the University of Cambridge. He worked for Demon Internet, then the largest UK ISP, from 1995 to 2000. In 2006 he was awarded a PhD for his thesis “Anonymity and Traceability in Cyberspace”. He has written or co-written some 40 peer-reviewed publications. He has advised Parliamentary Select Committees, and has acted as an expert witness in several criminal and civil cases.
102. Dr Clayton’s expert report provides a lucid explanation of the technical issues surrounding traceability, that is to say, determining “who did that?” on the internet. Mr Torabi took issue via Mr Becker’s second statement with a number of points of detail in Dr Clayton’s report. Clearly I cannot resolve those disputes.
103. I do not understand there to be any dispute, however, as to the basic position, which may be summarised as follows:
- i) Most ISPs allocate IP addresses to consumers dynamically, so that a particular IP address is allocated for a few hours, day or possibly weeks.
 - ii) Since 2009 ISPs who have been served with the relevant statutory notice are required by UK law to retain records of which customer was using which IP address at any particular time for a period of one year.
 - iii) It is technically possible, using appropriate monitoring or tracking software, to identify IP addresses which are participating in P2P filesharing of particular files at particular times.
 - iv) For the results to be reliable, it is important to ensure that the monitoring software is functioning correctly. In particular, it is vital that the computer on which it is running has a correctly synchronised clock.
 - v) Even if the monitoring software is functioning correctly, ISPs sometimes misidentify the subscriber to whom the IP address which has been detected was allocated at the relevant time. This can occur, for example, because of mistakes over time zones.

- vi) Even if the monitoring software is functioning correctly and the ISP correctly identifies the subscriber to whom the IP address which has been detected was allocated at the relevant time, it does not necessarily follow that the subscriber was the person who was participating in the P2P filesharing which was detected. There are a number of alternative possibilities, including the following:
 - a) The IP address identifies a computer and someone else in the same household (whether a resident or visitor) was using the computer at the relevant time (which might be with or without the knowledge of the subscriber).
 - b) The IP address identifies a router and someone else in the same household (whether a resident or visitor) was using a computer communicating via the same router (which might be with or without the knowledge of the subscriber).
 - c) The IP address identifies a wireless router with an insecure (either open or weakly encrypted) connection and someone outside the household was accessing the internet via that router (in all probability, without the knowledge of the subscriber).
 - d) The IP address identifies a computer or router, the computer or a computer connected to the router has been infected by a trojan and someone outside the household was using the computer to access the internet (almost certainly, without the knowledge of the subscriber).
 - e) The IP address identifies a computer which is open to public use, for example in an internet café or library.
 - vii) It is not possible to estimate an overall likely rate of erroneous identification. All that can be said with certainty is that there will be an unknown percentage of errors.
104. Dr Clayton made certain criticisms of the verification procedures carried out, or not carried out, by Mr Vogler and Mr Torabi. Some of these criticisms, though not all, have been answered by Mr Torabi in his response via Mr Becker. In particular, Mr Torabi has identified the clock synchronisation source he used, which he says is accurate to 0.1 second.
105. Overall, it seems to me that the Claimants' evidence is sufficiently cogent to establish a good arguable case that (1) P2P filesharing of the Claimants' copyright works took place via the IP addresses and at the dates and times identified by Mr Torabi, and (2) many, but not all, of the subscribers to whom those IP addresses were allocated by O2 at those dates and times were the persons engaged in such filesharing.
106. Consumer Focus did not dispute that the persons who engaged in such filesharing had infringed the Claimants' copyrights for the reasons given in *Dramatico v BSKyB*. As Consumer Focus rightly contends, however, an unknown percentage of the 9,124 subscribers who will be identified by O2 if the order sought is granted (that is to say, of the Intended Defendants) will not be guilty of having committed the infringements.

Was O2 mixed up in those arguable wrongs?

107. Consumer Focus did not dispute that O2 was mixed up in the infringements.

Are the Claimants intending to try to seek redress for those arguable wrongs?

108. Consumer Focus contended that the Claimants were not genuinely intending to try to seek redress. In support of this contention counsel for Consumer Focus argued that (i) the division of revenue between Golden Eye and the Other Claimants had all the hallmarks of a money-making exercise for Golden Eye, (ii) the sum of £700 requested in the draft letter was unsupported and unsupportable, (iii) the Claimants were equivocal about their willingness to pursue infringement actions and (iv) the conduct of the three claims brought by Golden Eye against alleged infringers suggested a desire to avoid judicial scrutiny.
109. I have no hesitation in rejecting this contention so far as Golden Eye and Ben Dover Productions are concerned. In my judgment Mr Becker's evidence establishes a genuine commercial desire on the part of Golden Eye and Ben Dover Productions to obtain compensation for infringements of their copyrights. As counsel for the Claimants pointed out, it is not a requirement for the grant of *Norwich Pharmacal* relief that the applicant intend, still less undertake, to bring proceedings against the wrongdoer(s). Sending a letter before action with a view to persuading the wrongdoer to agree to pay compensation and to give an undertaking not to infringe in the future is one way of seeking redress. There is no requirement for the intending claimant to commit himself to bringing proceedings if redress cannot be obtained consensually.
110. Furthermore, a claimant faced with multiple infringers is entitled to be selective as to which ones, if any, he sues. In making that decision, the claimant is entitled to have regard to the costs of litigation. As matters stand, claims for copyright infringement are automatically and compulsorily allocated to the multi-track by CPR r. 63.1(3). Even under the streamlined procedures introduced for claims in the Patents County Court in October 2010, litigating a claim for damages of £700 is likely to be uneconomic, except perhaps as a test case. The Government has announced its intention to introduce a small claims track for (*inter alia*) copyright claims in the Patents County Court in the near future, which will provide some assistance to claimants with low-value claims, but that is not a complete panacea. If Consumer Focus is right to suggest, as discussed below, that £700 is excessive by an order of magnitude, then even bringing a small claim is unattractive.
111. Yet further, given the economic realities I have just referred to, a claimant with a large number of low-value claims could not be criticised for adopting a policy of not pursuing those claims if a substantive defence is filed (i.e. the defendant neither admits the claims nor allows judgment to be entered in default). For this reason, although I agree with counsel for Consumer Focus that Golden Eye's failure to explain why it discontinued the two claims discussed above invites the inference that it wanted to avoid judicial scrutiny of the claims, I do not consider that it is possible to place much weight on this factor.
112. Counsel for the Claimants also relied upon the undertaking offered by the Claimants in the sixth recital of the draft Order as confirming the genuineness of their intention to bring claims against the Intended Defendants where appropriate. As counsel for

Consumer Focus submitted, this is a rather qualified undertaking. That is inevitable in the circumstances, however. The Claimants can hardly be expected to give an unqualified undertaking to sue regardless of what the Intended Defendants may say in response to the letters of claim. Indeed, Consumer Focus would rightly protest if the Claimants were to suggest doing that.

113. In the case of the Other Claimants, I am more doubtful. As I have pointed out, there is no evidence from them in support of this claim. Nevertheless, I cannot ignore the evidence provided by the agreements themselves that the Other Claimants are also copyright owners and the evidence provided by Mr Torabi's spreadsheets that they too have been victims of copyright infringement. As discussed above, I am troubled by the division of revenues that they have agreed with Golden Eye, but on the other hand it is for them to be the judge of their own commercial best interests. In that regard, it is relevant to note that some of them bargained a little harder with Golden Eye than others. On balance, therefore, I am satisfied that the Other Claimants are genuinely intending to try to seek redress.

Is disclosure of the information necessary for the Claimants to pursue that redress?

114. Consumer Focus accepted that, without the information sought by this claim, the Claimants cannot issue proceedings or engage in pre-action correspondence with the Intended Defendants. Nevertheless, counsel for Consumer Focus submitted that the disclosure was not necessary to obtain redress against the Intended Defendants since, in truth, the purpose of the exercise was not to protect the rights of the copyright owners.
115. I do not accept this submission. To the extent that the Claimants' copyrights have been infringed, it is plainly necessary for the information sought to be disclosed for the Claimants to be able to protect those rights by seeking redress as described above.

Is the order sought proportionate?

116. In addition to the reasons which were accepted by the Court of Appeal in *RFU v Viagogo*, there are two further reasons why it is necessary to consider the proportionality of the proposed order in the present case. The first is that Article 3(2) of the Enforcement Directive imposes a general obligation to consider the proportionality of remedies for the infringement of intellectual property rights, including orders for the disclosure of the identities of infringers: see Case C-324/09 *L'Oréal SA v eBay International AG* [2011] ECR I-0000 at [139]-[144]. The second is that the CJEU has held that, when adopting measures to protect copyright owners against online infringement, national courts must strike a fair balance between the protection of intellectual property rights guaranteed by Article 17(2) of the Charter and the protection of the fundamental rights of individuals who are affected by such measures, and in particular the rights safeguarded by Articles 7 and 8 of the Charter: see Case C-275/06 *Productores de Musica de España (Promusicae) v Telefonica de España SAU* [2008] ECR I-271 at [61]-[68] and Case C-70/10 *Scarlet Extended SA v Société belge des auteurs compositeurs et éditeurs (SABAM)* [2011] ECR I-0000 at [42]-[46], [50]-[53].

The correct approach to considering proportionality

117. In my judgment the correct approach to considering proportionality can be summarised in the following propositions. First, the Claimants' copyrights are property rights protected by Article 1 of the First Protocol to the ECHR and intellectual property rights within Article 17(2) of the Charter. Secondly, the right to privacy under Article 8(1) ECHR/Article 7 of the Charter and the right to the protection of personal data under Article 8 of the Charter are engaged by the present claim. Thirdly, the Claimants' copyrights are "rights of others" within Article 8(2) ECHR/Article 52(1) of the Charter. Fourthly, the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in *Re S* [2004] UKHL 47, [2005] 1 AC 593 at [17] is also applicable where a balance falls to be struck between Article 1 of the First Protocol/Article 17(2) of the Charter on the one hand and Article 8 ECHR/Article 7 of the Charter and Article 8 of the Charter on the other hand. That approach is as follows: (i) neither Article as such has precedence over the other; (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test – or "ultimate balancing test" – must be applied to each.

The Claimants' rights

118. The Claimants' position can be summarised as follows. They are owners of copyrights which have been infringed on a substantial scale by individuals who have been engaged in P2P filesharing. The only way in which they can ascertain the identity of those individuals and seek compensation for past infringements is by (i) obtaining disclosure of the names and addresses of the Intended Defendants, (ii) writing letters of claim to the Intended Defendants seeking voluntary settlements and (iii) where it is cost-effective to do so, bringing proceedings for infringement.

The Intended Defendants' rights

119. The Intended Defendants are not, of course, before me. With the assistance of Consumer Focus' submissions, however, it seems to me that the position of the Intended Defendants can be summarised as follows. It is likely that most of the Intended Defendants are ordinary consumers, many of whom may be on low incomes and without ready access to legal advice, particularly specialised legal advice of the kind required for a claim of this nature. The grant of the order sought will invade their privacy and impinge upon their data protection rights. Furthermore, it will expose them to receiving letters of claim and may expose them to proceedings for infringement in circumstances where they may not be guilty of infringement, where the subject matter of the claim may cause them embarrassment, where a proper defence to the claim would require specialised legal advice that they may not be able to afford and where they may not consider it cost-effective for them to defend the claim even if they are innocent.

The terms of the draft order

120. In consider the proportionality of the order sought, it seems to me that it is important to have regard to the precise terms of that order. The terms of the draft order having

been negotiated between Golden Eye and Baker & McKenzie, it is in a form that O2 is content with. Thus it may be regarded as proportionate as between the Claimants and O2. It does not follow, however, that it is proportionate as between the Claimants and the Intended Defendants.

121. The draft order contains a number of safeguards for the Intended Defendants, such as the second and eighth recitals and paragraphs 8 and 10. As HHJ Birss QC pointed out, however, it is important to bear in mind that a copy of the order will be sent to the Intended Defendants to explain to them why O2 has disclosed their names and addresses. For the reasons given in paragraph 119 above, it is important that the Intended Defendants are not given the wrong impression about what the Court decided when it made the order or why and that the order should not cause the Intended Defendants unnecessary anxiety or distress.
122. In my view the fifth and seventh recitals of the draft order are capable of giving consumers the wrong impression. The eighth recital, while designed to protect the Intended Defendants, is also capable of causing unnecessary distress because it could be read as an implicit threat of publicity once proceedings have been commenced. The reason why that may cause distress is because of the pornographic nature of the films combined with the fact that the Intended Defendant may not in fact have been a person who was engaged in filesharing of those films.

The draft letter

123. Although it is not normally the role of the courts to supervise pre-action correspondence, the draft order requires the letter of claim to be in the form set out in Schedule 2 and which I have reproduced above. In my view the ACS:Law/Media CAT episode shows very clearly why that this is an appropriate course to take, and why a court being asked to make a *Norwich Pharmacal* order in circumstances such as these needs carefully to consider the terms of the draft letter of claim. Once again, as HHJ Birss QC pointed out, the court needs to consider the impact of the letter of claim upon ordinary consumers who may not have access to specialised legal advice, who may be innocent of what is alleged against them and who may be embarrassed and/or distressed by being alleged to have been involved in filesharing involving pornography.
124. Considered in that light, and leaving aside the claim for £700 for the moment, I consider that the draft letter is objectionable in a number of respects. First, the reference to the Code of Practice is inappropriate both for the reasons given by HHJ Birss QC and because it was not designed for letters to ordinary consumers.
125. Secondly, the draft letter does not make it clear that the fact that an order for disclosure has been made does not mean that the court has considered the merits of allegation of infringement against the Intended Defendant.
126. Thirdly, the draft letter asserts under the heading “Infringing Acts” that the Intended Defendant is liable for infringement. Although the last paragraph under that heading implicitly acknowledges the possibility that the Intended Defendant may not be the person who was responsible for the infringing acts, this acknowledgement is not sufficiently explicit. Furthermore, the reference under the heading “Proposed Settlement” to “inaction, by permitting a third party to use your internet connection”

undermines the effect of the implicit acknowledgement. As HHJ Birss QC has explained, nothing less than authorisation suffices for infringement, at least in the context of a claim for damages.

127. Fourthly, the second paragraph under the heading “Legal Consequences” is too one-sided in that it sets out the consequences to the Intended Defendant of a successful claim without acknowledging the consequences to the relevant Claimant of an unsuccessful one.
128. Fifthly, the reference to “other intellectual property” under the heading “Proposed Settlement” is unjustified. There is no evidence that any other intellectual property rights of the Claimants have been infringed.
129. Sixthly, I consider that requiring a response within 14 days is unreasonable given that the Intended Defendants are consumers and that there is no urgency in the matter. 28 days would be reasonable.
130. Lastly, the threat to make “an application to your ISP to slow down or terminate your internet connection” is unjustified. Counsel for the Claimants accepted that the word “application” was inappropriate, and said that “request” would better convey what was intended. I do not agree that a threat even of that nature is justified in a letter of this kind, however.

The claim for £700

131. As noted above, counsel for Consumer Focus attacked the claim for £700 made in the draft letter as unsupported and unsupportable. In the draft letter no attempt is made to explain or justify this sum whatsoever. It is simply demanded “as compensation to GEIL for its losses”. Counsel for Consumer Focus submitted that it was inconceivable that every Intended Defendant could have caused the relevant copyright owner(s), or Golden Eye in the case of films covered by the Ben Dover Agreement, loss of £700. He submitted that the most that could be reasonably demanded was a figure an order of magnitude lower i.e. around £70.
132. Counsel for the Claimants in his submissions, and Mr Becker in second witness statement, sought to justify the figure by reference to the following points. First, the Claimants are not pursuing people who are mere downloaders. Each of the IP addresses in question has been used for seeding/uploading. Thus the Claimants contend that the loss of revenue that they have suffered is not merely that associated with a download by the infringer in question, but with an unknown number of downloads by other infringers. The Claimants contend that damages for this should be quantified on a reasonable royalty basis. Secondly, the Claimants contend that they are likely to obtain additional damages under section 97(2)(a) of the CDPA 1988, particularly on the ground of flagrancy.
133. I agree with counsel for Consumer Focus that the figure of £700 is unsupportable. My reasons are as follows. First, the Claimants know that an unknown percentage of the Intended Defendants are not infringers at all. Intended Defendants who have not in fact committed any infringements are not liable to pay any sum.

134. Secondly, in the case of those Intended Defendants who are infringers, the Claimants have no idea about the scale of the infringements committed by each infringer. Some might have infringed on a very substantial scale indeed, while others might only have infringed to a minor extent. In intellectual property cases, it is usual for the claimant to seek disclosure from the defendant pursuant to *Island Records Ltd v Tring International plc* [1996] 1 WLR 1256 before electing between inquiry as to damages and an account of profits, let alone before seeking to quantify his damages. If the Claimants were genuinely interested in seeking accurately to quantify their losses, then it seems to me that they would wish to seek some form of disclosure at least in the first instance. I appreciate that it may not be cost-effective for disclosure to be pursued if the Intended Defendant is unwilling to cooperate, but I do not consider that that justifies demanding an arbitrary figure from all the Intended Defendants in the letter of claim.
135. Thirdly, Mr Becker suggests that the reasonable royalty should be assessed on the basis of a “time limited license [*sic*] to exploit a work by providing copies of it on an unlimited worldwide basis”. This assumes that infringement by making available to the public occurs at the place where the uploading/seeding takes place, but that is not necessarily correct: see *Dramatico v BSKyB* at [67].
136. Fourthly, I do not think it can be assumed that additional damages will necessarily be awarded. Again, this may well turn on the extent of the infringement.
137. Fifthly, I think that Mr Becker’s response in his second witness statement to the point made by counsel for Consumer Focus referred to in sub-paragraph 60(v) above is telling:

“... it assumes that £700 will be successfully obtained from each of the 9000, when that is plainly wrong. In fact, it is likely that only a small proportion will result in a successfully obtained payment of any sum.”

This comes quite close to an admission that the figure of £700 has been selected so as to maximise the revenue obtained from the letters of claim, rather than as a realistic estimate of the damages recoverable by the relevant Claimant from each Intended Defendant. In any event, that is the inference I draw in the light of the matters discussed above and in the absence of any disclosure of the information referred to in paragraph 88 above.

138. Accordingly, I do not consider that the Claimants are justified in sending letters of claim to every Intended Defendant demanding the payment of £700. What the Claimants ought to do is to proceed in the conventional manner, that is to say, to require the Intended Defendants who do not dispute liability to disclose such information as they are able to provide as to the extent to which they have engaged in P2P filesharing of the relevant Claimants’ copyright works. In my view it would be acceptable for the Claimants to indicate that they are prepared to accept a lump sum in settlement of their claims, including the request for disclosure, but not to specify a figure in the initial letter. The settlement sum should be individually negotiated with each Intended Defendant.

Safeguards suggested by Consumer Focus

139. Consumer Focus suggested a number of possible safeguards for the Intended Defendants which it is convenient to consider at this juncture.
140. *Notification of the Intended Defendants.* The first possibility is notification of the Intended Defendants by O2 for their anonymous comment prior to the making of any order as suggested by Aldous LJ in *Totalise*. In my view this is impractical given the sheer number of Intended Defendants. Given encouragement and time, hundreds of the 9,124 Intended Defendants might respond to the invitation. Those who respond are likely to be those who dispute infringement. What is the court supposed to do if, say 200 respond denying infringement and the remainder are silent? Furthermore, the process of inviting comment would in itself invade the Intended Defendants' privacy to some extent. It would also add significantly to the overall costs of the process.
141. *Supervising solicitor.* The second possibility is the appointment of a supervising solicitor as suggested by HHJ Birss QC in *Media CAT v Adams*. In the context of a search and seizure order, the supervising solicitor has a clearly defined role, which is to serve the order, to explain it to the respondent, to take disputed items into his or her safekeeping and to report to the court on the execution of the order. I find it difficult to see what the role of a supervising solicitor would be in this context, however, particularly given that I have had the opportunity of considering the draft letter. Is the supervising solicitor intended to arbitrate between the Claimants and the Intended Defendants in some way? I agree that it would be desirable for some form of low-cost arbitration procedure to be made available, but arbitration requires the consent of both parties, it cannot be imposed.
142. *Group Litigation Order.* The third possibility is the making of a Group Litigation Order ("GLO"), again as suggested by HHJ Birss QC in *Media CAT v Adams*. In my judgment it is doubtful that the Claimants' claims against the Intended Defendants are suitable for a GLO, however. The GLO regime is primarily designed for large numbers of claimants suing a common defendant or group of defendants for sums of money that may be relatively small for each claimant but are large in aggregate. It is not really designed for a small number of claimants suing a huge number of unrelated defendants for very small sums of damages. This is particularly so given that the Intended Defendants do not have a common interest. On the contrary, they are likely to fall into a number of groups: (i) those who admit infringement; (ii) those who deny infringement on spurious grounds; (iii) those who deny infringement on grounds that give rise to a serious issue to be tried; and (iv) those who have not infringed on any view. Even the third group is likely further to divide into a number of sub-groups, as can be seen from sub-paragraph 103(vi) above. In any event, a more fundamental problem is that a GLO would not really address the principal concern raised by Consumer Focus, which is the impact of the Claimants' intended letters of claim upon the Intended Defendants. Indeed, if the letter of claim had to include a statement to the effect that any claim by the Claimants would be entered on a GLO group register and give information about the GLO regime, the effect could be even more intimidating to the ordinary consumer.
143. *Test cases.* The fourth possibility is the selection and determination of suitable test cases. In my view this suggestion has much to commend it. This is not something which this Court can direct at this stage, however. Furthermore, it must be

acknowledged that there are various practical problems to be faced. First, as discussed above, the Intended Defendants will fall into various groups. Only once they have been put on notice of the claims can their differing positions be ascertained. Only then can one start trying to identify suitable Intended Defendants willing to participate in test cases. This would require a fairly substantial communications exercise. Secondly, few of the Claimants' claims against the Intended Defendants are likely to be economic to litigate even in the Patents County Court even once the small claims track becomes available. Thirdly, many of the Intended Defendants will not have the means to do so. I suspect that these difficulties would be difficult to surmount without considerable assistance and support from an organisation such as Consumer Focus (or perhaps the Consumers' Association).

An alternative safeguard

144. I asked counsel for the Claimants whether the Claimants would be willing to accept that it be a condition of the making of an order that any resulting claims be brought in the Patents County Court, so as to ensure that they were dealt with by a specialised tribunal. He informed me that the Claimants would be willing to accede to that condition.

The claim by Golden Eye and Ben Dover Productions

145. If one considers first the claim by Golden Eye and Ben Dover Productions, the claim for a *Norwich Pharmacal* order is one made by a copyright owner and its exclusive licensee, both of whom have been joined to the claim and will be joined to any infringement claims. Given the commercial background explained above, there is nothing particularly unusual, let alone objectionable, about the Ben Dover Agreement. The mere fact that the copyright works are pornographic films is no reason to refuse the grant of relief, since there is no suggestion that they are obscene or otherwise unlawful. Golden Eye and Ben Dover Productions have a good arguable case that many of the relevant Intended Defendants have infringed their copyrights. I am satisfied that they do intend to seek redress for those wrongs and that disclosure is necessary to enable them to do so. In these circumstances, I conclude that the Claimants' interests in enforcing their copyrights outweigh the Intended Defendants' interest in protecting their privacy and data protection rights, and thus it is proportionate to order disclosure, provided that the order and the proposed letter of claim are framed so as properly to safeguard the legitimate interests of the Intended Defendants, and in particular the interests of Intended Defendants who have not in fact committed the infringements in question. This will require the draft order and the draft letter to be amended to address the concerns I have set out in paragraphs 121-138 above. In addition, it will be a term of the order that any claims against the Intended Defendants be brought in the Patents County Court.

The claim by the Other Claimants

146. If the Other Claimants were themselves making claims for *Norwich Pharmacal* relief, without the involvement of Golden Eye, then I would almost certainly reach the same conclusion. What then is the impact of Golden Eye's involvement? As discussed above, I have not accepted that the agreements between Golden Eye and the Other Claimants are champertous. Nor have I been persuaded that those agreements mean that the Other Claimants are not genuinely intending to try to seek redress. It does not

follow, however, that it is appropriate, when balancing the competing interests, to make an order which endorses an arrangement under which the Other Claimants surrender total control of the litigation to Golden Eye and Golden Eye receives about 75% of the revenues in return. On the contrary, I consider that that would be tantamount to the court sanctioning the sale of the Intended Defendants' privacy and data protection rights to the highest bidder. Accordingly, in my judgment, to make such an order would not proportionately and fairly balance the interests of the Other Claimants with the Intended Defendants' interests. (I do not consider Golden Eye to have any legitimate interest separate from those of the Other Claimants for this purpose.) If the Other Claimants want to obtain redress for the wrongs they have suffered, they must obtain it themselves.

Discretion

147. I doubt that there is an independent role for the exercise of discretion once the court has undertaken a thorough proportionality analysis. If there is, however, for the reasons set out above, I exercise my discretion to make an order in favour of Golden Eye and Ben Dover Productions on the terms indicated, but decline to exercise my discretion in favour of the Other Claimants.

An issue not raised

148. In Case C-461/10 *Bonnier Audio AB v Perfect Communication Sweden AB* the Högst domstolen in Sweden referred the following questions to the CJEU for a preliminary ruling:

- “1. Does Directive 2006/24 ... on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (the Data Storage Directive), and in particular Articles 3, 4, 5 and 11 thereof, preclude the application of a national provision which is based on Article 8 of Directive 2004/48 ... on the enforcement of intellectual property rights [the Enforcement Directive] and which permits an internet service provider in civil proceedings, in order to identify a particular subscriber, to be ordered to give a copyright holder or its representative information on the subscriber to whom the internet service provider provided a specific IP address, which address, it is claimed, was used in the infringement? The question is based on the assumption that the applicant has adduced evidence of the infringement of a particular copyright and that the measure is proportionate.
2. Is the answer to Question 1 affected by the fact that the Member State has not implemented the Data Storage Directive despite the fact that the period prescribed for implementation has expired?”

149. On 17 November 2011 the Opinion of Advocate General Jääskinen was published in eight languages, none of them English. The Advocate General advised the CJEU to answer the first question as follows in the French version:

“La directive 2006/24 ... modifiant la directive 2002/58/CE, ne s’applique pas au traitement des données à caractère personnel à d’autres fins que celles visées à l’article 1er, paragraphe 1, de cette directive. Par conséquent, ladite directive ne s’oppose pas à l’application d’une disposition nationale au titre de laquelle, dans le cadre d’une procédure civile, aux fins d’identifier un abonné déterminé, le juge enjoint à un fournisseur d’accès à Internet de divulguer au titulaire de droits d’auteur, ou à son ayant droit, des informations relatives à l’identité de l’abonné à qui ledit opérateur a attribué une adresse IP qui aurait servi à l’atteinte audit droit. Toutefois, ces informations doivent avoir été conservées pour pouvoir être divulguées et utilisées à cette fin conformément à des dispositions législatives nationales détaillées, qui ont été adoptées dans le respect du droit de l’Union en matière de protection des données à caractère personnel.”

That being so, there was no need to answer the second question.

150. Google Translate renders this answer as follows:

“Directive 2006/24 ... and amending Directive 2002/58/EC does not apply to the processing of personal data for purposes other than those referred to in Article 1, paragraph 1 of this Directive. Therefore, the directive does not preclude the application of a national provision under which, in the context of civil proceedings, in order to identify a specific subscriber, the judge ordered a provider access to the Internet to disclose to the holder of copyright, or his successor in title, information concerning the identity of the subscriber to whom the trader has allocated an IP address that would have been used to achieve that right. However, this information must be retained in order to be disclosed and used for this purpose in accordance with detailed national legislation, which were adopted in compliance with EU law on the protection of personal data.”

151. At the time of writing this judgment, the judgment of the Court is still awaited. No argument was raised before me that to the effect that the answer suggested by the Advocate General was wrong. Nor was it suggested that the present claim be stayed, or judgment postponed, until after the Court’s judgment.

Conclusion

152. For the reasons given above I shall make a *Norwich Pharmacal* order in favour of Golden Eye and Ben Dover Productions on the terms indicated, but I decline to make any order in favour of the Other Claimants. I shall hear counsel as to the precise wording of the order and of the letter of claim.