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Case No: A3/2012/1477

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY
Mr Justice Arnold
HC11C03290

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2012

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE SULLIVAN
and
LORD JUSTICE PATTEN

Between :

- (1) Golden Eye (International) Limited
(2) Ben Dover Productions
(3) Celtic Broadcasting Ltd
(4) Easy On The Eye
(5) DMS Telecoms Limited
(6) Gary Baker
(7) Harmony Films Limited
(8) Justin Ribeiro Dos Santos t/a Joybear Pictures
(9) Orchid Mg Limited
(10) Kudetta Bvba
(11) RP Films Limited
(12) Sweetmeats Productions T/A S.M.P.
(13) Sll Films Limited
Terence Stephens t/a One Eyed Jack Productions
- and -
Telefónica UK Limited & Anor
- and -
Open Rights Group

Claimants/
Appellants

Defendant/
Respondent

Intervener

Jonathan Cohen (instructed by **Wagner & Co**) for the **Appellant**
Guy Tritton instructed by the **Intervener**
The **Respondent** did not appear and was not represented

Hearing date : 10th December 2012

Approved Judgment

Lord Justice Patten :

1. The claimants in these proceedings are the owners of the copyrights in various pornographic films. In September 2011 they issued a Part 8 claim seeking *Norwich Pharmacal* relief against Telefónica UK Ltd (trading as O2) ("O2") in the form of the disclosure of the names and addresses of the customers of O2 who appear to have infringed their copyright through peer-to-peer ("P2P") filesharing using the BitTorrent protocol.
2. A distinction needs to be made between the position of the first and second-named claimants, Golden Eye (International) Ltd ("Golden Eye") and Ben Dover Productions ("BDP"), and the third to fourteenth claimants ("the Other Claimants"). Golden Eye seeks relief in respect of its own copyrights and also in respect of those of BDP of which it is the exclusive licensee under an agreement dated 14 December 2009 for a period of five years. It therefore has the same rights and remedies in respect of an infringement of BDP's copyrights as it would have had if they had been assigned to it: see CDPA 1988 s.101(a). To take account of the concurrent rights of the copyright owner it need only join BDP as a co-claimant in the proceedings which is what it has done: see s.102(1).
3. The position in relation to the Other Claimants is more complicated. Golden Eye is neither the assignee nor the exclusive licensee in respect of their copyrights. What they have done is to enter into agreements with Golden Eye (all in standard form) under which Golden Eye has been authorised to act for them in relation to any alleged breaches of copyright arising out of P2P copying of material across the internet. The agreements provide that:

“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.”
4. In consideration of the rights granted, Golden Eye has agreed to pay the Other Claimants a percentage of the sums recovered (described as “Revenue”) which varies between 25% and 37.5%. In commercial terms the arrangement is that Golden Eye will (at its own discretion) take such steps as are necessary to recover damages and costs in respect of the alleged infringements in return for a substantial share of those recoveries.
 5. In these circumstances Golden Eye issued the Part 8 Claim Form in the name of itself, BDP and the Other Claimants on 23rd September 2011 seeking the *Norwich Pharmacal* relief I have mentioned. The claim was issued by Golden Eye itself rather than by solicitors and was supported by a witness statement of Mr Julian Becker, one of its directors, dated 12th September 2011. On 7th October 2011 an acknowledgement of service was filed by O2’s solicitors indicating that O2 did not intend to contest the claim. But Chief Master Winegarten raised various points about the proposed order and adjourned the application to be heard by a judge.
 6. It is, of course, in the nature of these applications that the respondent to the disclosure application has no position on whether the order should be made and will usually (as in this case) consent to the relief being granted subject in appropriate cases to the payment of the costs incurred in making the disclosure. Wider and more fundamental issues such as whether the relief is excessive, a disproportionate invasion of the users’ Article 8 and data protection rights, or is unjustified by the evidence or the status of the claimants will usually be matters for the judge to consider unaided by any adversarial argument. In this case, however, the judge was assisted by counsel (Mr Tritton) instructed by Consumer Focus which is the trading name used by the National Consumer Council of England, Wales and Scotland; a statutory body set up under the Consumers, Estate Agents and Redress Act 2007. At a directions hearing on 16th January 2012 Arnold J. ordered the claimants to serve a copy of the claim form and the supporting evidence on Consumer Focus to allow them to decide whether they wished to make representations on behalf of potential defendants whose names and addresses would be disclosed as a result of the *Norwich Pharmacal* order sought against O2. Consumer Focus was given permission to intervene and Mr Tritton was able to make a number of important submissions both about the form of the order and as to whether it should be granted at all.
 7. As a result, the judge had a number of issues to contend with. In broad terms they can be summarised as follows:-
 - (i) had arguable wrongs been committed against the claimants? This included a consideration of the evidence of infringement and of Golden Eye’s entitlement to sue the intended defendants in the name of itself and the Other Claimants. In particular, Arnold J. had to decide whether the agreements entered into with the Other Claimants were champertous as alleged;
 - (ii) was O2 mixed up in such arguable wrongs?;

- (iii) were the claimants genuinely intending to try to seek redress for these arguable wrongs?;
 - (iv) was disclosure of the names and addresses necessary in order to enable the claimants to pursue that redress?;
 - (v) was the order sought proportionate having regard to the privacy and data protection rights of the intended defendants and the terms and contents of the draft order?; and
 - (vi) should the court exercise its discretion in favour of granting relief?
8. The judge held ([2012] EWHC 723 (Ch)) that on the evidence each of claimants' copyrights had been infringed by the filesharing activities of the intended defendants. A fuller account of the way in which the BitTorrent P2P technology operates is set out in the judgment of Arnold J. in *Dramatico Entertainment Limited & Ors v British Sky Broadcasting Limited & Ors* [2012] EWHC 1152 (Ch) but, for present purposes, the following short description will suffice. The user will download the necessary software on to his computer from the internet where it is freely available. Once installed, it enables the computer to operate as part of a P2P network through the internet together with other computers using the same software. The user can then download files hosted and made available by other P2P network users and in turn will upload files stored on his own computer by making them publicly available to other users on the system who are able to search for the file and then to transfer and share further copies with other users. There is therefore no dispute that the intended defendants who participate in the P2P network by accessing the claimants' films will infringe the relevant copyrights both by copying and by communicating the works to the public: see CPDA 1988 ss. 16 and 20.
9. This analysis of the operation of P2P filesharing does not, of course, establish that every one of the O2 customers whose IP addresses were used to participate in the P2P filesharing is necessarily an infringer. As the judge explained, the monitoring software used to identify the participants depends for its accuracy on it functioning properly and in particular on it having a correctly synchronised clock. But there may also be a number of non-technical reasons why the user may be innocent. The customer's computer may have been used to download the copyright material without his knowledge or consent; a visitor or outsider might have used a computer via the same wireless router particularly if it was insecure; or the computer may have been infected by a trojan. The existence of these uncertainties is, of course, relevant to the form of communication with subscribers which is permitted under the order if granted. Subsequent communication with them needs to take into account that the letter is likely to be received by a number of O2 customers who will have committed no actionable infringement of the claimants' copyrights but will doubtless be embarrassed by the allegation made. But the potential existence of an indeterminate number of such persons did not persuade the judge that the claimants had not established on the evidence an arguable case of infringement such as to justify *Norwich Pharmacal* relief and the contrary has not been argued before us.
10. The more difficult question for the judge under this first heading was whether the agreements entered into between Golden Eye and the Other Claimants were void and, for that reason, precluded the grant of relief to the Other Claimants under the

arrangements which they contained. Arnold J. carefully analysed the authorities on champerty, in particular in relation to the argument that agreements to conduct litigation in return for a share of the spoils were champertous if they jeopardised the proper administration of justice. It is unnecessary to repeat that analysis because it is not in issue on this appeal. What are important are the judge's conclusions which are set out in paragraphs 99 and 100 of his judgment:

“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.”

11. It was common ground that O2, as the internet service provider, had become mixed up in the alleged infringements but the third issue was more contentious. The judge was satisfied that Golden Eye and BDP did have a genuine commercial desire to obtain financial redress for the infringement of their copyrights. The fact that this was likely to take the form of a request for an agreed payment and a contractual undertaking not to infringe in the future was irrelevant. It is not necessary for a claimant for *Norwich Pharmacal* relief to demonstrate an intention to commence proceedings. In small claims of this kind a negotiated settlement is both effective and preferable. The position in relation to the Other Claimants was more problematic. They had filed no evidence of their own in support of the application and the judge had, as part of the factual background, a number of instances of what he referred to as speculative invoicing where copyright owners have sent letters before action to internet users identified as a result of *Norwich Pharmacal* orders requesting payment of significant sums (£500 to £1,000) in order to avoid court proceedings. The sums claimed usually bore no relation to the damage actually suffered and in the case of subscribers who have resisted payment, proceedings do not usually follow or, if issued, are not pursued to a trial. Consumer Focus was able to identify a number of such schemes which rely on the subscribers’ embarrassment at being faced with an allegation of illegally downloading pornography in order to secure payment from a significant number of addressees. There is no genuine intention in such cases to vindicate and protect the copyright owner’s rights. They are simply money-making schemes.
12. In his judgment Arnold J. refers to cases involving a solicitor (Mr Andrew Crossley) who traded as ACS:Law and sent out letters of claim in respect of similar copyright infringements under agreements with a company called Media CAT that he should receive up to 65% of the revenue. Media CAT was neither a copyright owner nor an exclusive licensee nor a copyright protection society but it masqueraded as the latter. Where claims were issued in the Patents County Court complaints were made about the way in which the claims were conducted and HHJ Birss QC delivered a number of highly critical judgments (see e.g. *Media CAT v Adams* [2011] EWPC 6) both in respect of the conduct of the proceedings and the pre-action correspondence. The claims were struck out and Mr Crossley was later the subject of disciplinary proceedings brought by the Solicitors Regulation Authority.
13. In the present case there are a number of similarities between the claims brought by Golden Eye and those brought by Media CAT as well as certain obvious differences. The judge analysed them as follows:
 - “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."

14. Despite these points of similarity with the cases of speculative invoicing, Arnold J. was satisfied that all of the claimants did have a genuine intention to try to obtain redress for the infringement rather than to set up a money-making scheme designed to embarrass and coerce as many people as possible (regardless of whether they were

actual infringers) into making the payments demanded. In relation to the position of the Other Claimants, he said this:

“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.”

15. It is quite clear that the disclosure sought under the *Norwich Pharmacal* order was a pre-requisite to any claim and so the judge was faced with the question of whether it was proportionate to make the order. This required him to balance against the need to protect the intellectual property rights of the claimants the fundamental rights and freedoms of the internet users in relation to privacy and data protection. The enforcement of the claimants’ property rights is provided for under the CPDA 1988 and Article 3 of the European Parliament and Council Directive 2004/48/EC of 29th April 2004 which provides that:

“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.”
16. With the judge’s own safeguards in place the intended defendants seem to me to be as well protected against the risks which have been identified as the court can achieve consistently with the enforcement of the claimants’ own property rights. At this point the balance seems to me to tip in favour of making the order just as it did in relation to Golden Eye and BDP and it would have done in relation to the Other Claimants had they acted alone. Mr Tritton, who has appeared on the appeal on behalf of the Open Rights Group (who have replaced Consumer Focus as intervenors), submitted that one objectionable feature of the arrangements with Golden Eye was that it would become privy on disclosure to the otherwise protected data of the intended defendants even

though it was not asserting any property rights of its own. But that was not an objection which troubled the judge or formed the basis of his decision and it seems to me to be of no substance. Golden Eye will not be able to use any of the disclosed information received through its solicitors except for the purpose of enforcing the intellectual property rights of the Other Claimants. Since their enforcement does justify the disclosure sought, the interposition of Golden Eye on those terms does not affect the balance to be struck.

17. In addition there is, of course, Article 1 of the First Protocol to the European Convention on Human Rights and Article 17 of the Charter of Fundamental Rights of the European Union (“the Charter”) which provides that:

“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.”
18. In relation to the intended defendants, the Court has to consider Article 8 of the Convention and Articles 7 and 8 of the Charter which guarantee (subject to stated exceptions) the right to respect for private and family life and the protection of personal data. These are re-enforced by the Data Protection Directive (95/46/EC of 1995) and by s.35 of the Data Protection Act 1998.
19. The conduct of this balancing exercise as part of a proportionality review is a matter of considerable importance and was one of the reasons why Arnold J. gave permission for this appeal. He described his task and his approach to the resolution of competing rights in paragraphs 116 and 117 of his judgment:

“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."
20. The Supreme Court has subsequently approved this as a correct statement of the approach to the question of proportionality in *Rugby Football Union v Consolidated Information Services Limited* [2012] UKSC 55 and it is not therefore necessary to revisit that issue in this judgment. In terms of outcome, it is enough to note that Lord Kerr (at paragraph 46) recognised that there is no presumption that the need to identify arguable wrongdoers should, so to speak, trump the privacy and data protection rights of the subscribers and that:

"The particular circumstances affecting the individual whose personal data will be revealed on foot of a *Norwich Pharmacal* order will always call for close consideration and these may, in

some limited instances, displace the interests of the applicant for the disclosure of the information even where there is no immediately feasible alternative way in which the necessary information can be obtained.”

21. That statement was made by reference to the facts of the present case as summarised by Arnold J. in paragraph 119 of his judgment:

“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.”

22. But the judge then proceeded to consider as part of the proportionality review various amendments to the proposed order including some suggested by Consumer Focus which could meet some of the concerns referred to by him in paragraph 119. This process involved removing various recitals from the order to avoid giving the impression that the court has already made a finding of infringement against its recipients and to remove an implicit threat of publicity following the commencement of any proceedings. The draft order also contained the letter of claim which is to be sent to all identified P2P users who appear to have downloaded the copyright material. The judge considered the letter to be objectionable in a number of respects. As drafted, it gave any reader the impression that the court had already made a finding of infringement and failed therefore to make clear the possibility that the addressee might not be responsible for the downloading of the relevant files. The judge also considered that the threat contained in the letter to make “an application to your ISP to slow down or terminate your internet connection” was unjustifiable.

23. The other aspect of the letter which had to be considered was the claim for a payment of £700. This was criticised by counsel for Consumer Focus as excessive. The judge agreed. He said that the scale of the infringements appeared to be largely unknown and could not be quantified without further disclosure. There was therefore no established basis for a claim for substantial or additional damages. The figure quoted was arbitrary. The judge said:

“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."

24. Some of the other safeguards suggested by Consumer Focus (e.g. the use of a supervising solicitor, a group litigation order, or the selection of test cases) were rejected by the judge as inappropriate or impractical. But with the incorporation of the amendments to the draft order and letter of claim, the judge was satisfied that it was proportionate to make *Norwich Pharmacal* orders in favour of Golden Eye and BDP in respect of their own copyrights:

"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.”

25. However, in relation to the Other Claimants the judge held that even in its amended form the making of the order would not be proportionate. He said:

“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.”

26. The Other Claimants appeal against the refusal of the order on two related grounds. They submit that having found that with the benefit of the amendments the making of the order was proportionate because the interests of the claimants in enforcing their copyrights outweighed those of the intended defendants in protecting their privacy and data protection rights, it was both illogical and inconsistent for the judge to deny the self-same relief to the Other Claimants merely because they have chosen to pursue their claims with the assistance of Golden Eye under arrangements which the judge had previously found to be both lawful and not part of a speculative invoicing scheme. The judge’s statement in paragraph 146 that to grant the order would amount to the court sanctioning the sale of the intended defendants’ privacy and data protection rights to the highest bidder was, they say, not only wrong in itself but also contradicted the view expressed in paragraph 113 of his judgment that this was a legitimate commercial arrangement for the Other Claimants to enter into in order to vindicate their intellectual property rights.
27. It seems to me that both of these criticisms are well-founded. The specific factors which in this case weigh in favour of preserving the data protection rights of P2P fileshare users over the enforcement of the Claimants’ copyrights were summarised

by the judge in paragraph 119 of his judgment quoted in paragraph 20 above. But the vulnerability of the users, the inability of would-be defendants to afford specialist legal advice, and the propensity in a case such as this for even innocent subscribers to pay up rather than face the embarrassment of being accused of illegally downloading pornography are common features which have to be taken into account in relation to the relief sought by all the claimants. They are as relevant to the enforcement of the copyrights of Golden Eye and BDP as they are to those of the Other Claimants. If *Norwich Pharmacal* relief is to be denied to this latter group simply on account of the litigation arrangements entered into with Golden Eye then it is necessary to identify some additional impact which those arrangements have on the position of the intended defendants over and above the factors listed in paragraph 119.

28. The only additional factor identified by the judge in paragraph 146 of his judgment as affecting the balance of competing interests is what he describes as the Other Claimants' surrender of total control of the litigation to Golden Eye in return for a substantial share of the recoveries. But the judge does not suggest that this will of itself increase the likelihood of innocent or vulnerable defendants being unfairly coerced into making some unjustified payment. To do so would be inconsistent with his earlier findings that this was not a form of speculative invoicing and his own reformulation of the terms of the order and the letter before action in order to minimise that risk.
29. It must follow that the judge's refusal to grant relief to the Other Claimants was based on his disapproval of the recovery sharing arrangements with Golden Eye which is confirmed by his statement that to make the order would be tantamount to the court sanctioning the sale of the intended defendants' rights to the highest bidder. I have to say that I find those reasons difficult to follow. The court is not sanctioning the sale of anything. Indeed its ability to control the process (as the judge has done in this case) and ultimately to refuse relief was the primary reason why Arnold J. rejected the submission that the litigation arrangements made with Golden Eye in this case do not jeopardise or undermine the proper administration of justice. If the arrangements are not therefore unlawful and are not simply a money-making exercise designed to take advantage of the vulnerability of the subscribers rather than a genuine attempt to protect the rights of the Other Claimants, I can see no justification for refusing relief based on a disapproval of those arrangements. Indeed it is difficult to articulate what that disapproval can be based on.
30. I would therefore allow this appeal.

Lord Justice Sullivan :

31. I agree.

The Master of the Rolls :

32. I also agree.