

KEEP AN EYE ON INTERNET
DOWNLOADING – PRIVACY AND
DATA PROTECTION RIGHTS COULD
TRUMP COPYRIGHT PROTECTION



LATEST NEWS 2 April 2012

On the 26 March 2012, Mr Justice Arnold handed down an important judgment in *Golden Eye International Ltd and others v Telefonica UK Ltd (O2) and Consumer Focus (Intervener)* [2012] EWHC 723 (Ch) on the scope of applications for *Norwich Pharmacal* orders (NPO) which seek disclosure of the identities of individuals suspected of copyright infringement.

Legally, the case is of interest in showing how the court applies the proportionality test when balancing the competing interests of copyright protection and a consumer's right to privacy and protection of their personal data.

Practically, the case is of interest because it may lead to the curtailment of the practice of "speculative invoicing". The judgment can be accessed at <http://www.bailii.org/ew/cases/EWHC/Ch/2012/723.html>

Background

There were 14 claimants. 13 were owners of copyright in pornographic films and one was an exclusive licensee. Ben Dover Productions was the main claimant and had granted Golden Eye a royalty free worldwide exclusive licence in the copyrights (which included the right to bring litigation). The remaining claimants had entered into agreements with Golden Eye to empower it to conduct litigation on their behalf, in return for between 25% and 37.5% of any money recovered.

The claimants alleged copyright infringement by P2P filesharing of these films. A tracking service was used to track down the IP addresses which had been used to make the films available. The claimants then sought an NPO against O2 for the release of the information as to who these IP addresses belonged to.

Golden Eye planned to send letters of claim to 9,124 individuals (the "Intended Defendants"), and ask each of them to pay £700 in "compensation" for alleged copyright infringement. Golden Eye also threatened to take court action and/or "apply" to the subscribers' internet service provider to slow down or terminate their connections. Golden Eye had previously obtained NPOs against other ISPs but had only brought three of these cases to court. One had been discontinued. Two appeared to have been settled.

O2 did not oppose the claimants' application. The Judge asked Consumer Focus to make submissions on behalf of the Intended Defendants.

Duty of disclosure

Counsel for Consumer Focus submitted that an applicant for an NPO should be subject to the same duty of full and frank disclosure as an applicant seeking an injunction without notice. Although 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, applications for NPOs were in effect made without notice to “the person who will be affected by that which the court is asked to do” i.e. the Intended Defendants. The court acknowledged the ingenuity of this submission, but held that it was not necessary to decide this point in the present case.

The letters of claim

The Judge referred to the speculative invoicing campaign in the ACS:Law case and stated that where an NPO is applied for, a court “needs carefully to consider the terms of the draft letter of claim”. The High Court found that the letters of claim Golden Eye intended to send to O2 customers were “objectionable in a number of respects”. Amongst other issues the letters did not make it sufficiently clear that subscribers were not necessarily liable for all copyright infringement that might have occurred on their internet connection. The content might have been made available by someone else in the same household (including a visitor) without the subscriber’s knowledge; the computer or router might have been hacked into; or the IP address might identify an internet connection open to public use, e.g. in an internet café.

The £700 demanded

The Judge agreed with Counsel for Consumer Focus that the £700 Golden Eye planned to demand from subscribers was “unsupportable”. The Judge said that Golden Eye should proceed in the conventional manner, i.e. to require the consumers who admit that they have infringed copyright to disclose information about the extent of the infringement and then individually negotiate a settlement sum with those consumers.

The order sought

The proposed NPO contained an undertaking on behalf of Golden Eye not to disclose the names of the subscribers to the public without their consent until they became defendants to proceedings. Although this was designed to protect the subscribers, the Judge held that it was “capable of causing unnecessary distress because it could be read as an implicit threat of publicity once proceedings have been commenced”.

The judgment

In respect of the applications by Golden Eye and Ben Dover Productions, the Judge held that it was proportionate to order disclosure of the subscribers’ personal details, provided that the order and the proposed letter of claim were framed in such a way as properly to safeguard the legitimate interests of subscribers, particularly those who had not in fact committed the alleged copyright infringements.

However, the Judge declined to grant an order in favour of the other 12 copyright owners, and thus to endorse their agreements with Golden Eye. That “would be tantamount to the court sanctioning the sale of the Intended Defendants’ privacy and data protection rights to the highest bidder.” If these claimants wanted redress for the wrongs they had suffered, they would have to obtain it themselves.

Consumer Focus was represented by **Guy Tritton** of **Hogarth Chambers**

Michael Hicks and **Jonathan Moss** of Hogarth Chambers have previously represented one of the three Defendants against whom Golden Eye brought proceedings.

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