



Neutral Citation Number: [2019] EWHC 1827 (Ch)

Claim Nos: BL-2019-000273

And BL-2019-000037

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: Double-click to add Judgment date

**Before :**

**Mr RECORDER DOUGLAS CAMPBELL QC**  
**(sitting as a High Court Judge)**

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**B E T W E E N:**

**MIRCOM INTERNATIONAL CONTENT MANAGEMENT & CONSULTING LTD**  
**AND OTHERS**

**Claimants in claim no. BL-2019-000273**

**GOLDEN EYE INTERNATIONAL LTD AND OTHERS**

**Claimants in claim no. BL-2019-000037**

**- and -**

**(1) VIRGIN MEDIA LIMITED**  
**(2) PERSONS UNKNOWN**

**Defendants**

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**Jonathan Cohen QC** (instructed by Wagner & Co Solicitors) for the **Claimants**

**Jaani Riordan** (instructed by in-house solicitors for **Virgin Media Limited**)

Hearing date: 14<sup>th</sup> June 2019

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## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

## **Mr Recorder Douglas Campbell QC:**

### **Introduction**

1. Should the Court grant **Norwich Pharmacal** relief to the Applicants, such that the First Defendant (“Virgin”) must disclose the names and addresses of tens of thousands of residential broadband subscribers who are accused of downloading explicit pornographic films? That is the question which I have to decide.
2. More specifically I have to decide as follows:
  - (a) Does the correct legal approach to such claims remain that set out in the 2012 Golden Eye litigation? See **Golden Eye (International) Ltd v Telefónica UK Ltd**, [2012] EWHC 723 (Ch), [2012] RPC 28 (Arnold J); **Golden Eye (International) Ltd v Telefónica UK Ltd (Open Rights Group intervening)** [2012] EWCA Civ 1740, [[2013] Bus LR 414, (Court of Appeal).
  - (b) Does the Applicants’ evidence as served justify the order sought? If not, should I make the order sought on the basis of the Applicants’ proposal for rectification thereof?
3. There are or may be disputes as to ancillary matters such as costs, but both sides focussed on the larger points of principle at the hearing. I will hear the parties on all such ancillary matters at the effective hearing following this judgment.

### **The claims generally**

4. The first claim in time (“the Mircom Claim”) was issued by Part 8 claim form on 5<sup>th</sup> February 2019. The First Claimant in that claim (“Mircom”) is not a copyright owner. The second to eleventh Claimants in that claim are all film production companies. The second claim in time (“the GEIL Claim”) was issued by Part 8 claim form on 11<sup>th</sup> February 2019. It is similar to the first claim. The First Claimant in that claim (“Golden Eye”) is not a copyright owner either, and the second to seventh Claimants are again film production companies. I will refer simply to Mircom, Golden Eye, and the “other Claimants” generally.
5. The draft orders sought in each claim are quite complicated. Each runs to nearly 10 pages excluding schedules and includes a number of undertakings, safeguards and other details. The main provision is that Virgin should, upon request by the Applicants, provide details of the registered owner(s) of certain IP addresses identified by the Applicants as having unlawfully downloaded the other Claimants’ pornographic films. This information is to be requested by the Applicants in batches of “*no more than 5000 IP addresses per fortnight*”. Schedule 2 to each order consists of a letter of claim to be sent by Mircom or Golden Eye to such registered owner(s), which sets out the relevant allegations of copyright infringement by such registered owner(s) and proposes terms of settlement. Mircom or Golden Eye, as the case may be, “*shall not send more than 500 letters per week ...*”.
6. Virgin submitted that Mircom and Golden Eye “... *are companies whose entire business consists of obtaining disclosure orders of this kind, making threats of infringement*

*and offering to settle for a fixed fee ...*”. This was not specifically disputed by the Applicants, eg by identifying any other business activities conducted by Mircom or Golden Eye.

7. Conversely the Applicants submitted, and Virgin did not dispute, that there is at least a good arguable case to the effect that the other Claimants own copyright in the pornographic films relied upon. The names of the relevant films are listed in various schedules and leave little to the imagination.

8. Both claims were issued against Virgin and persons unknown, the latter being the registered account owners whose names and addresses are sought. Virgin claims to be neutral, but it served a 71 page skeleton explaining in great detail why the relief sought be refused. It also served a 6 page note after the hearing in further support of its position. Finally Virgin had a third go at setting out additional arguments in further support of its position upon receipt of this judgment in draft.

9. I agree with the Applicants that Virgin is not neutral. However I do not see what turns on that. Virgin plainly has an *interest* in these claims, since it is likely that if the orders sought are granted then a substantial number of the residential broadband customers who are identified by Virgin will receive demands for payment from the Applicants (in particular, from Mircom or Golden Eye). Even though Virgin would then be acting under compulsion of Court orders, its customers may not fully appreciate this and may instead blame Virgin.

10. I do not accept the Applicants’ further submission that by “descending into the arena” the burden shifts to Virgin to show why the relief sought should not be granted. On the contrary the burden remains on the Applicants to show that it should be.

11. In any event I was greatly assisted by Virgin’s submissions. These were all the more useful because the individuals who would be most affected by the disclosure are not themselves before the Court. All the points made by Virgin are points which could, and probably would, have been made by such individuals had they been represented.

12. There was a minor dispute between the parties as to whether **Norwich Pharmacal** claims such as these should be treated as applications or as trials. My attention was drawn to **Ab Bank v Abu Dhabi Commercial Bank PJSC** [2017] 1 WLR 810 at [10] (Teare J) which confirms that a Norwich Pharmacal application is one for final relief, not an interim remedy. However nothing of substance appeared to turn on this. It merely assisted Virgin with some submissions on peripheral procedural matters.

13. The Applicants offered various proposals to rectify potential defects in their evidence, should I otherwise be persuaded to grant the relief sought. I attach the Applicants’ proposals, described by them as “Proposed Evidence Rectification”, at Annex 1. I will return to these later.

Does the correct legal approach to such applications remain that set out in the 2012 Golden Eye litigation?

14. The 2012 litigation was brought by Golden Eye and other claimants against Telefónica UK trading as O2 (“O2”) for a similar **Norwich Pharmacal** order. In the event O2 did not appear, and the application was instead opposed by Consumer Focus, a statutory body created by the Consumers Estate Agents and Redress Act 2007.

15. Both sides took me through the 2012 judgments in some detail. The overall effect can be summarised as follows.

- 1) The Court of Appeal approved the vast majority of the judgment below, subject to one point dealt with separately below.
- 2) For instance the conditions which have to be satisfied in order for the Court to grant **Norwich Pharmacal** relief are set out in paragraphs 81-85 of the first instance judgment, see also paragraph 7 on appeal.<sup>1</sup> All of these conditions are important but the relevant balancing exercise forming part of the proportionality assessment “*is a matter of considerable importance*” (see paragraph 18 of the appeal judgment).
- 3) Both judgments accept that the persons identified by a **Norwich Pharmacal** order will have their privacy and data protection rights invaded and they may be exposed to proceedings for infringement, may be caused embarrassment and may consider it not cost effective for them to defend any claim even if innocent (para 119 below, para 20 on appeal).
- 4) That said, with appropriate amendments made to the proposed letter that was to be sent to persons identified by the order (such amendments having been identified by Arnold J),<sup>2</sup> it was proportionate to make such an order (see paragraph 145 below, paragraph 23 on appeal).
- 5) A key reason why it was just to make such order was Arnold J’s finding that 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 (see paragraphs 112-113 below, 14 on appeal).
- 6) This last point leads me to the one matter on which the Court of Appeal differed from Arnold J. The Court of Appeal held that given his finding that all of the Claimants were genuinely intending to vindicate their intellectual property rights, he should not have refused relief for the other Claimants (see paragraphs 25-28 on appeal).
- 7) One of the amendments made to the proposed letter by Arnold J was the removal of the figure of £700 sought in settlement, which was said to be “unsupportable” and “arbitrary” (see paragraphs 131-138 below, paragraph 22 on appeal).
- 8) The proposed letter also acknowledges, as did the Applicants before me, that the registered owners identified may not necessarily be responsible for the actual infringement for various reasons (see eg paragraphs 27, 103, 106 below, and

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<sup>1</sup> Note that despite the reference to “arguable wrongs” in the list of conditions to be satisfied, the test actually applied at first instance was “good arguable case”: see paragraph 105. Both parties accepted that “good arguable case” was the test I should apply: see also Flaux J in **Ramilos v Buyanovsky** [2016] EWHC 3175 (Comm) at [23].

<sup>2</sup> In 2012, the Patents County Court (as it then was) did not have a Small Claims Track, whereas now it does: see the first instance judgment at paragraph 110. This track would now be generally suitable for claims up to £10 000: see CPR Part 63.27(1)(b).

paragraph 9 on appeal). That is to say, there will be “*an unknown percentage of errors*” in identification.

16. The Applicants went on to submit that the present case was indistinguishable from the 2012 Golden Eye litigation and I should simply apply the same approach to the present facts. Virgin disagreed for two main reasons, namely:

- 1) Because of the Supreme Court’s judgment in **Rugby Football Union v Viagogo** [2012] UKSC 55.
- 2) Because of Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (more commonly known simply as “the GDPR”) and the Data Protection Act 2018 (“DPA 2018”).

17. Virgin drew my attention to a number of further authorities (all predating the GDPR) but these seem to be merely applications of the relevant principles. I accept that there needs to be an individualised assessment of proportionality in every case.

18. Virgin also drew my attention to the **Media CAT** litigation which was discussed at some length both at first instance and on appeal in the 2012 Golden Eye litigation. I did not find this helpful and I will not prolong this judgment by repeating what previous courts have already said about it.

*Has Viagogo changed the approach to be taken?*

19. The submission that it has is an unpromising one for a number of reasons.

- 1) First, Viagogo was decided after the first instance decision but before the appeal and there is no reason to suppose that the Court of Appeal was unaware of it.
- 2) Secondly, the approach set out by Arnold J in **Golden Eye** at [117] (and later itself approved by the Court of Appeal) was expressly approved as a “correct statement” by Lord Kerr JSC<sup>3</sup> in **Viagogo** at [44]-[45].
- 3) Thirdly Lord Kerr JSC did note that the applicant’s motive in **Viagogo** was the “entirely worthy” one of seeking to promote the sport of rugby and ensuring that members of the public could attend rugby matches (see [45]), but that merely meant that **Viagogo** was a more attractive case on the facts. Lord Kerr did not say or suggest that the result in **Golden Eye** was wrong.

20. I reject the argument that **Viagogo** has changed the relevant legal approach.

*What is the impact of the GDPR?*

21. This argument is more substantial. There are 3 parts to it, as follows:

- (a) First, are the raw IP addresses (ie the data which the Applicants already possess) “personal data” within the meaning of Art 4(1) GDPR?

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<sup>3</sup> With whom Baroness Hale, Lord Clarke, Lord Reed, and Lord Phillips all agreed.

- (b) Secondly, if disclosure is provided as sought are the Applicants thereby “data controllers” within the meaning of Art 4(7) or merely “data recipients” within the meaning of Art 4(9)?
- (c) Thirdly, does it make a difference that the Applicants have agreed to provide the following undertaking namely “*The First Applicant undertakes within 14 days of the date of this Order to register as a data controller with the Information Commissioner’s Office in the United Kingdom, and to appoint a data protection officer who is domicile and ordinarily resident in the United Kingdom and meets the requirements of the General Data Protection Regulation*”.

*Legal context:*

22. Recital 26 GDPR provides as follows, my emphasis:

- (26) *The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.*

23. Art 4 GDPR provides in part as follows:

*Article 4*

***Definitions***

*For the purposes of this Regulation:*

- (1) ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
- (7) ‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing

*of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;*

- (9) *‘recipient’ means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;*

24. My attention was also drawn to the Court of Justice decision in **Breyer v Federal Republic of Germany** Case C-582/14, EU:C:2016:779, [2017] 1 WLR 1569. This was heard under Directive 95/46/EC, the predecessor directive, and considered whether dynamic internet protocol addresses were “personal data” under that directive. The Court of Justice considered recital 26 of Directive 95/46 which stated in part that “*to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person ...*” This wording is very similar to that appearing in recital 26 of the GDPR.

25. The facts were that Mr Breyer had accessed several websites operated by German Federal institutions using dynamic IP addresses, such that the website operator (ie the German state) was unable to identify him from that information but his internet service provider could do so. The Court held that answering this question this depended on “*whether the possibility to combine a dynamic IP address with the additional data held by the internet service provider constitutes a means likely reasonably to be used to identify the data subject*”: see [45]. It then answered that question as follows:

*“46 Thus, as the Advocate General stated essentially in point 68 of his Opinion, that would not be the case if the identification of the data subject was prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant.*

*47 Although the referring court states in its order for reference that German law does not allow the internet service provider to transmit directly to the online media services provider the additional data necessary for the identification of the data subject, it seems however, subject to verifications to be made in that regard by the referring court that, in particular, in the event of cyber attacks legal channels exist so that the online media services provider is able to contact the competent authority, so that the latter can take the steps necessary to obtain that information from the internet service provider and to bring criminal proceedings.*

*48 Thus, it appears that the online media services provider has the means which may likely reasonably be used in order to identify the data subject, with the assistance of other persons, namely the competent authority and the internet service provider, on the basis of the IP addresses stored.*



*49 Having regard to all the foregoing considerations, the answer to the first question is that Article 2(a) of Directive [95/46](#) must be interpreted as meaning that a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of that provision, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person.”*

26. Paragraph [47] appears to be saying that in the event of cyber attacks the online media services provider (ie the German state) is able to contact the competent authority (presumably some part of the German criminal system) so that the latter can obtain additional data from the internet service provider for purposes of criminal proceedings. In paragraph [48] the Court concludes that the relevant legal test “thus” appears to be satisfied in relation to the online media services provider.

### *Analysis*

27. This is not simply a matter of importing the result of **Breyer** into domestic law since much will depend on the circumstances in any given case. For instance it seems to me that the actual result in **Breyer** depends on specific factual aspects of the German legal system, in particular German criminal procedure. It would seem surprising (to me, at least) if the mere fact that a party is able to obtain a **Norwich Pharmacal** order to identify a natural person under the English civil system automatically makes that procedure “*means reasonably likely to be used*” to identify the natural person, with the consequence that otherwise pseudonymised data automatically becomes personal data. I do not think it makes any difference to the conclusion of principle even where (as here) making such applications is a key part of the normal business of the Applicants, given the time and cost involved in making such applications.

28. However I will assume that the mere possibility of granting the relief sought means that the Applicants’ schedules of IP addresses are therefore “personal data” in the Applicants’ hands. In any event it seems to me that the data in question will certainly become personal data in their hands if the orders sought are granted. I therefore answer the first question as “yes”.

### Would the Applicants be “data controllers” within the meaning of Art 4(7) or merely “data recipients” within the meaning of Art 4(9)?

29. I was told that there was no legal authority on this point, and both sides addressed me solely on the basis of the wording of the Regulation.

30. The Applicants also submitted that if they were “data controllers” by virtue of receiving this disclosure, and that this in turn means they had to be registered with the ICO before receiving it, then most parties to actions in the civil court system would be unable to benefit from disclosure. They submitted that this was not the position under the Data Protection Act 1998, and it is not the position under the Data Protection Act 2018.

31. I do not consider this “floodgates” line of argument takes the Applicants anywhere. If the GDPR requires parties to actions in the civil court system to be registered with the ICO before receiving disclosure, then that is what will have to happen.

32. More substantively, the Applicants submitted that even if an order for disclosure is made, the Applicants still do not “[determine] the purposes and means of the processing of personal data”. On the contrary, these purposes and means of processing are determined for them by the rules of civil procedure and the conditions under which the information is imparted. In support of this submission they also drew my attention to Schedule 2, Part 1, paragraphs 5(2) and 5(3) of the DPA 2018 which provide as follows:

***Information required to be disclosed by law etc or in connection with legal proceedings***

...

*(2)The listed GDPR provisions do not apply to personal data where disclosure of the data is required by an enactment, a rule of law or an order of a court or tribunal, to the extent that the application of those provisions would prevent the controller from making the disclosure.*

*(3)The listed GDPR provisions do not apply to personal data where disclosure of the data—*

*(a)is necessary for the purpose of, or in connection with, legal proceedings (including prospective legal proceedings),*

*(b)is necessary for the purpose of obtaining legal advice, or*

*(c)is otherwise necessary for the purposes of establishing, exercising or defending legal rights,*

*to the extent that the application of those provisions would prevent the controller from making the disclosure.*

The “listed GDPR provisions” are identified at Schedule 2, part 1, paragraph 1 of the 2018 Act and refer to major parts of the GDPR. So the GDPR is disapplied for many purposes connected to legal proceedings anyway.

33. Virgin had no convincing answer to the Applicants’ submission and I accept it.<sup>4</sup> It follows that if the order is made, the Applicants would be “recipients” of personal data but not “controllers” thereof, and thus not subject to the more onerous obligations on “controllers”. This conclusion is supported by the natural meaning of these words in any event.

34. Virgin sought to draw a distinction between Golden Eye and Mircom, and the other Claimants, as regards their respective entitlement to process the data in question. The

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<sup>4</sup> Virgin had another go at this in their first round of unsolicited post-hearing submissions. I accept the Applicants’ submission that this is too late. I also reject Virgin’s explanation for failing to make these submissions at the hearing, namely that “*it was not possible to address it adequately in the time available at the hearing*”. Virgin had half a day of time at the hearing, the same as the Applicants.

Applicants submitted that nothing turns on this, since the other Claimants can exercise their own rights via Golden Eye and Mircom for this purpose. Virgin did not persuade me that this was wrong.

35. It follows that my answer to the second question is “they are merely data recipients”. That means it is unnecessary to consider the third question. If it had been necessary, I would in any event have held that the Applicants’ proposed undertaking would still have been sufficient to deal with any issues arising out of the GDPR. So nothing turns on the GDPR after all.

#### Does the Claimants’ evidence as served justify the order sought?

36. In the 2012 litigation Arnold J concluded as follows:

*“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.”*

37. Virgin submitted that this was not the case for a variety of reasons specific to the evidence in this case. I will call these the “evidential points”.

- a) Various defects in the fact evidence of Mr Becker (for Golden Eye) and Mr Hoffmann (for Mircom). The main one was that the list of IP addresses now relied upon is not in evidence at all.
- b) Various defects in the expert evidence of Mr Fieser, Mr Paige, and Dr Sarre.
- c) Various defects in the licence agreements upon which Mircom and Golden Eye rely.
- d) The fact that the evidence of file sharing was gathered in Germany.
- e) The evidence showed was a greater risk of “false positives”, ie incorrect identifications, today than there had been in 2012.

38. Another general requirement before granting **Norwich Pharmacal** relief is that the applicants “genuinely intend” to try to seek redress for such arguable wrongs. Virgin submitted that whatever the evidential position before Arnold J in 2012, subsequent events showed that none of the Applicants had any genuine intention to pursue infringement actions now. I will call this the “genuine intention” point.

39. Virgin also made various submissions about whether I should exercise my discretion to order disclosure. This is in principle a separate point, but Virgin’s submissions very largely overlapped with that made under other heads and I do not consider it separately.

#### *The evidential points*

##### Defects in fact evidence

40. Virgin submitted, and I accept, that the fact evidence submitted by the Applicants was not of the standard which the Court is entitled to expect. By way of example:

- a) Mr Hoffmann's witness statement is dated 26<sup>th</sup> February 2018. In paragraph 1 he explains that Mircom seeks disclosure "*of the names and addresses of the subscribers associated with the IP addresses listed in a spreadsheet attached as Exhibit 1*". But there was no Exhibit 1.
- b) In a witness statement dated 26 June 2018, Mr Wagner purported to exhibit a spreadsheet marked "MWH1", described as a spreadsheet setting out the IP addresses of subscribers for the period 27 February to the dates shown on the spreadsheet. This cannot be the same as Mr Hoffmann's own intended Exhibit 1 since it post-dates Mr Hoffmann's witness statement. Further this exhibit does not even set out any IP addresses, merely information including an "infringement ID" which appears to be date-related.
- c) In any event even exhibit MWH1 is not what is sought. Mircom actually seeks the names and addresses of a spreadsheet which was sent to Virgin by email on 7 June 2019. This spreadsheet is not in evidence, nor is there any explanation of how it was produced.
- d) Finally Virgin claimed there were a number of evidential difficulties in the new spreadsheets. For instance it was said that in some instances a film had only been partly downloaded, and that this meant there was no infringement; and in some cases the spreadsheet referred to films not tied to any licensee.

41. The Applicants submitted these defects were merely "technical". I accept this may be true for the fourth point, particularly since these difficulties only seemed to affect a few entries in the relevant spreadsheet. I do not accept this for any of the first three points which are in my view fundamental.

42. I should say that the Applicants explained (and I accept) that their new spreadsheet was produced shortly before the hearing in view of the fact that Virgin Media's data retention policy was retention for one year. This does explain why the Applicants did not press for the data apparently referred to in its witness statements, which are all well over a year old. It does not explain the lack of evidence to support the new spreadsheet.

43. The Applicants also suggested that I could still grant relief on the basis of the approach set out in the Annex, which is essentially to replace the fact evidence complained of with new fact evidence. I deal with this below.

#### Defects in expert evidence

44. Virgin made similar submissions in relation to the Applicants' expert evidence. In my judgment this evidence is not acceptable either. By way of example:

- a) Mircom relied on the evidence of Dr Sarre and Mr Fieser. Dr Sarre's report is said to show that the software used to identify infringement, namely "FileWatchBT" is reliable. However Dr Sarre's report was "commissioned by telephone" by a Mr Eichner on 1<sup>st</sup> April 2010, so the instructions are not documented and the report itself is dated 3<sup>rd</sup> May 2010. I do not accept that I should simply assume that a 9 year old expert report remains up to date, particularly one given in the field of computer software.
- b) There are a number of reasons why Dr Sarre's report does not comply with CPR Part 35, but one is the lack of a statement of truth. I was shown a separate statement of

truth dated January 23, 2014 (ie nearly 4 years after the report, and also over 5 years old today). This statement of truth refers at paragraph 5 to “the trial” but nobody seemed to know what trial, if any, Dr Sarre meant.

- c) Mr Fieser gave a statement dated 20<sup>th</sup> December 2017 in which he claimed that FileWatchBT had not materially changed between 3 May 2010 and the date of his statement (which is, of course, over 18 months ago now). However Mr Fieser also said that this software was used to identify “*the alleged infringing IP addresses and their acts of infringement set out in Exhibit 1 to Mr Hoffmann’s statement*”. I have no idea what Mr Fieser meant by this since, as stated above, I have not seen any such Exhibit 1.
- d) Golden Eye relied on the evidence of Mr Paige dated 19<sup>th</sup> August 2016, but if anything this is even worse. There is no statement of truth; no clarity as to what his instructions were; his evidence refers to static IP addresses, not dynamic ones; and his evidence appears to relate to a software program called “Observer”. Yet Mr Fieser gave a statement (also unsupported by a Statement of Truth) dated 1<sup>st</sup> December 2017 in which he seemed to think the software mentioned in Mr Paige’s report was called “International IP Tracker”. Virgin also drew my attention (without comment by the Applicants) to evidence from Ms Griffin, Senior Legal Counsel of Virgin, suggesting that Mr Paige was a former detective who was arrested and dismissed after receiving a controlled substance.
- e) It also appeared that Golden Eye was no longer licensed to use the software (now called “IPP”) which it claimed to have used to identify the list of potential infringers.

45. The last of these defects might be regarded as “technical” but the first four points are fundamental. The Applicants again proposed that I should grant relief on condition that they were allowed to replace their current expert evidence with new evidence.

46. I do not accept this proposed way forward, particularly because I have not yet seen any of the proposed further fact or expert evidence. I appreciate that in the 2012 litigation Arnold J granted relief despite various defects in the evidence before him (see eg paragraph [30] thereof). However, I cannot believe by doing so in that instance Arnold J intended this to become the usual practice. On the contrary I consider it was all the more important for the Applicants to get it right this time round.

47. Thus the defects in both the fact and expert evidence are so fundamental that I will dismiss these applications. If it is simple and straightforward as the Applicants say to prepare and serve acceptable evidence then this dismissal will not present them with any great problem. All they need to do is to correct what they have said are technical defects.

48. I will in any event consider the remaining points, all of which were fully argued.

#### Various defects in the licence agreements upon which Mircom and Golden Eye rely.

49. I accept Virgin’s submission that the licence agreement between the other Claimants and Golden Eye do not confer title on Golden Eye to sue in its own name (eg as an exclusive licensee). However this was true in the 2012 litigation as well. The current licence wording used today is the same as that set out in paragraph [13] of the first instance 2012 judgment. It was then held that the fact that Golden Eye do not have title to sue in their own names was no

bar to claims being brought by the other Claimants (see *ibid* at [91(3)]. I reach the same conclusion. Hence although Virgin is correct nothing turns on it.

50. It is not clear to me whether the same objection runs in relation to the Mircom licences, but I agree with the Applicants that it makes no difference whether or not it does, given that the other Claimants are parties to that action too.

The fact that the evidence of file sharing was gathered in Germany.

51. I agree with Virgin that any act of alleged copyright infringement which takes place in Germany would not be actionable in the UK. However on analysis it seems that Virgin's complaint is merely that the Applicants' evidence of infringement was gathered in Germany. Provided that the act of infringement identified by the relevant software itself takes place in the UK I cannot see what turns on this.

Greater risk of false positives?

52. As part of Virgin's attack on the Applicants' expert evidence, it relied on evidence from its solicitor, Ms Withers dated 6 March 2019. I agree with the Applicants that this evidence also suffers from a number of deficiencies, the main one being that Ms Withers purports to give evidence about "*important developments relevant to peer-to-peer file-sharing since [the Applicants] expert reports were prepared*": see paragraph [50] thereof and immediately thereafter. This appears to me to be both unattributed hearsay, contrary to PD32 paragraph 18.2, and also expert evidence served without permission. Virgin attempted to rectify these evidential failings of its own by serving a statement in reply from a Mr Oaten, an analyst in its internet security team, but this was also expert evidence served without permission.

53. For these reasons it is difficult for me to place weight on Virgin's evidence. In any event it is not clear to me that the allegedly "*important developments*" identified – eg increased use of wireless access points and shared internet connections; changes in the BitTorrent protocol; increased use of Tor, proxies, and Virtual Private Networks, etc - have any material impact on the number of false positives which the exercise is inevitably going to produce. The possibility of false positives was considered in the 2012 litigation and it was not held to be a reason to refuse the order.

*The genuine intention point*

54. This point was put in various ways, but Virgin's central allegation was that the Applicants did not genuinely intend to sue anyone. Instead Virgin variously alleged that the Applicants were part of a "*money-making scheme*" or "*shakedown*", and that they intended to "*continue to ride the 'gravy train' of letter-writing in the absence of court supervision*".

55. There is no doubt that Arnold J's finding of fact in the 2012 litigation was a key part of his decision. It was also a key part of the Court of Appeal's subsequent decision to grant relief in favour of the other Claimants in that action. Whether I am similarly satisfied that the Applicants are genuinely intending to vindicate their intellectual property rights is a matter I must consider on the evidence before me, 7 years later.

56. It seems to me that in order to be so satisfied, I need to know more about how the Applicants have used the information which they have obtained from the Court over the last 7

years. For instance one of the major changes which Arnold J made to the proposed letter before action last time was to remove the reference to a fixed sum of £700. However I do not even know whether the Applicants have nevertheless routinely demanded that sum.

57. Nor do I know very much about the number of letters sent, other than via one source as follows. Pursuant to what I am told was an order made against Virgin Media on the application of Mircom in 2014, Mircom's solicitor Mr Wagner stated (by email dated 3 June 2015) that letters were sent to 749 persons; 76 made confessions of liability; 15 settled the claim without admission of liability; and no proceedings had been issued.

58. Virgin pointed out several oddities in this statement. First, if only 749 letters had been sent then one wonders what happened about the (presumably) tens of thousands of other subscribers who were identified in previous **Norwich Pharmacal** orders. Secondly, if 658 people did not reach a compromise, why was nobody sued? I accept that there may have been valid reasons (eg the sum sought was considered by Mircom to be too low to justify proceedings) but there was no evidence to say so. Virgin submitted that this evidence showed that Mircom had no real intention to sue anyone but simply wanted money.

59. I accept the Applicants' submission that they cannot be expected to sue everyone and that it is not necessarily abusive for them to seek a sum by way of settlement which is higher than that which would be awarded by a Court. However I do accept Virgin's submission that in order to perform the difficult and delicate balancing exercise which the law requires, I do at least need to consider whether the Applicants still have a genuine intention to try to obtain redress for the infringement rather than merely setting 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.

60. I also accept Virgin's submission that in order to consider this question, I need to know how the Applicants have actually used the information provided to them under previous Court orders, now going back a number of years. This is not something which the Applicants' current evidence addresses, nor is it information which they have offered to supply, hence this is a further reason why I refuse the applications sought.

61. I have considered whether I should go further, and set out in terms the information which I consider would be acceptable. However neither party spent much time explaining precisely what sort of information it said should be required. Virgin's position was essentially that little useful information had been given thus far, whereas the Applicants' response was essentially that there would be nothing definitive about this or that item of missing information if considered in isolation. In addition it seems to me that this topic is best considered within the context of an application where it does matter, rather than in the context of an application where it does not. I therefore decline to do so.

### Conclusion

62. The applications fail for the reasons set out above. I will hear counsel on the form of the order (including as regards ancillary matters) which should be made.

Annex 1

Proposed Evidence Rectification Language (Applicants)

1. This order shall not take effect for the benefit of the Mircom Applicants unless, by 4.30pm on 8 July 2019, the Mircom Applicants serve the following documents on the Respondent:
  - (a) A statement of truth from Dr Frank Sarre conforming with that required by CPR Part 35 PD 3.3, which confirms that the content of his report at B/167 of the application bundle reflects his present opinion in respect of “FileWatchBT”.
  - (b) A statement of Mr Michael Eichner, in the same terms as that at B/237 of the application bundle, save that it shall formally exhibit a list of IP addresses obtained by use of “FileWatchBT” and shall be appended by a CPR compliant statement of truth.
  
2. This order shall not take effect for the benefit of the GEIL Applicants unless, by 4.30pm on 8 July 2019, the GEIL Applicants serve the following documents on the Respondent:
  - (a) A current licence agreement between Golden Eye (International) Limited and IPP International UG (haftungsbeschränkt) (“IPP”) for use of IPP’s monitoring and detection software (“the Software”).
  - (b) A statement of truth from Mr Patrick Paige conforming with that required by CPR Part 35 PD 3.3, which confirms that the content of his report at C/308 of the application bundle reflects his present opinion in respect of the Software.
  - (c) A statement of Mr Tobias Fieser in the same terms as that at C/318 of the application bundle, save that it shall formally exhibit a list of IP addresses obtained by use of the Software and shall be appended by a CPR compliant statement of truth.
  
3. The Applicants shall have permission to apply in the event that they seek any variation of orders (1) and (2)<sup>5</sup>.

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<sup>5</sup> Included to take account of the possibility that one of the individuals may be incapacitated or otherwise unavailable.