Golden Eye 'pay or else' letters

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IP & IT analysis: What can practitioners learn from the Golden Eye case? Christina Michalos, a media and intellectual property law barrister at 5RB, explores the issues surrounding speculative invoicing.

Original news

'Pay up or else' letters sent to Sky broadband customers over copyright infringements, LNB News 16/12/2015 126

Golden eye, the owner of multiple adult movie copyrights, is demanding compensation from Sky broadband customers who have illegally downloaded the firm's movies. The company has taken action against Sky broadband in the form of a court order, enabling them to have access to the personal details of customers who have pirated the pornographic films.

What is the background to this story and the original Golden Eye case?

In the early 2000s, a small number of copyright owners and their lawyers began to generate revenue using speculative invoicing--sometimes also referred to as volume litigation or 'pay up or else'. This practice involves sending letters demanding payment on threat of court action to thousands of internet subscribers whose internet connection was alleged to have been used for small-scale copyright infringement (typically using file sharing sites). The users' names and addresses were obtained by means of a *Norwich Pharmacal* order, or third party disclosure order, against their internet service provider (ISPs). It was a widely criticised practice because letters demanding money were often sent to members of the public, some of whom were vulnerable, with little access to legal advice, who would feel they had no option but to pay irrespective of whether they were infringers or not.

Golden Eye was the owner of copyright in pornographic films. In 2012, they made a *Norwich Pharmacal* application against O2 for disclosure names and addresses of O2's customers who were alleged to have infringed copyright in the films by means of peer-to-peer (P2P) file sharing. It was argued by the national consumer council that relief should be denied because claimants did not intend to seek redress and it was neither proportionate nor necessary. At first instance (*Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723 (Ch), [2012] All ER (D) 79 (Jul)), Arnold J held that the claimants did have a genuine intention to obtain redress for infringement, rather than to set up a money-making scheme designed to coerce as many people as possible to pay, whether infringing or not. He concluded that the interests of the copyright owners in enforcing their copyright outweighed the privacy rights of individual customers. There was a narrow appeal to the Court of Appeal by a group of other claimants who had granted Golden Eye the exclusive right to act on their behalf but to whom *Norwich Pharmacal* relief had been refused. This was overturned by the Court of Appeal (*Golden Eye (International) Ltd and others v Telefonica UK Ltd and another* [2012] EWCA Civ 1740, [2012] All ER (D) 221 (Dec)). *Golden Eye v Telefonica* was significant because, following significant criticism of such schemes, it indicated that this could be done lawfully.

In the light of Golden Eye v Telefonica, what are the legal rules around 'speculative invoicing' and what are the common issues with it?

The practice of speculative invoicing fell into disrepute because often the letters were sent to a person who had not actually infringed--eg merely a household bill payer or a computer owner. They were often excessively aggressive and threatening and sent to vulnerable members of the public with little access to legal advice. There was usually a profit-sharing arrangement between the party conducting the litigation and the client, with the former taking the lion's share. The tactic appeared to be to scare people into paying the sums 'invoiced' by threatening to issue court proceedings. If this did not work, proceedings were not normally issued. If proceedings were issued, they were not pursued if a default judgment could not be obtained. There have been a number of cases in which the practice was criticised (see for example HHJ Birss QC in *Media CAT v Adams* [2011] EWPCC 6). One solicitor was suspended by the Solicitors Regulatory Authority for two years after admitting a number of allegations in connection with a speculative invoicing scheme--including acting in a way likely to diminish the trust the public places in the profession and entering into impermissible contingency fee arrangements.

Golden Eye v Telefonica demonstrates that the practice of sending letters before action to those suspected of infringing via file sharing can be done lawfully. However, it requires letters to make clear that a *Norwich Pharmacal* order does not mean the court has considered the merits of infringement. Letters should also not contain unjustified threats to terminate internet connections.

Are these levels of payment of £700 likely to be enforceable?

No. Arnold J in his judgment in *Golden Eye v Telefonica* made clear that a random figure of £700 sought from all alleged infringers was unsupportable. Any settlement sum should be individually negotiated with each intended defendant and letters of claim should not refer to specific sums claimed in this way.

What recourse do broadband customers have who receive letters like this (whether they have downloaded a movie illegally or not)?

As always, the best tip would be to seek legal advice and to remember pro bono advice is available. There are also a lot of online resources that deal with speculative invoicing and provide support. Just google 'speculative invoicing' for a wealth of material.

The key issue is whether the user is an infringer or not. The fact that someone else is using your account to infringe does not make you liable if you have not authorised them to infringe. If the user is not an infringer, that is the answer to any claim and this should be made clear in response to the letter. There are many cases where this is the position. A classic example is a student house-share situation with the ISP bill in one name but several unrelated individuals using the broadband. If this is not accepted, the user should ask the copyright owner to provide evidence that that user infringed or authorised infringement. In many cases, this will be impossible.

If the user is an infringer, then (subject to any other defences) the best tactic is probably to try to swiftly negotiate a small payment on a without prejudice basis. In this regard, remember that the consumer groups argued in *Golden Eye v Telefonica* that the most that could be demanded reasonably would be around £70 and the starting point would be the level of a licence fee (ie what the user would have had to pay to watch it lawfully). Given that, in many cases, the copyright owner will not bother to issue proceedings or contest cases, another option is just to wait to see if they actually issue--but this carries a risk of increasing the user's liability for legal costs down the line.

What should lawyers advise their clients?

For the rights owners, read Arnold J's judgment in *Golden Eye v Telefonica* (para [120]-[138]), which makes a number of observations as to the form pre-action letters of this sort should take and as to the content of a *Norwich Pharmacal* order.

For broadband users, make sure you download material lawfully.

What else can companies do to combat piracy and illegal downloading?

Anyone who could definitively answer this question would be a millionaire. Rights owners are like Sisyphus pushing the anti-piracy boulder up the hill of infringement only to watch it roll back down again, as a cheerful pirate finds a clever new way round the law or technology.

Do you have any predictions for the future?

Although the UK government has decided not to allow fair compensation levies for private copying --a tax on recordable media etc distributed to copyright owners--, I suspect this will be revisited in future. Voluntary collective licensing whereby file sharing network users have to subscribe by paying a small fee is also something that may expand. The successful judicial review application by the British Academy of Songwriters, Composers and Authors, and the Musician's Union which led, exceptionally, to the quashing of the Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014, SI 2014/2361 just goes to show it is very difficult to predict the future when it comes to copyright (R (on the application of British Academy of Songwriters Composers and Authors and others) v Secretary of State for Business Innovation and Skills (The Incorporated Society of Musicians intervening) [2015] EWHC 2041 (Admin), [2015] All ER (D) 183 (Jul)).

Interviewed by Alex Heshmaty.

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