EXHIBIT 1

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DECLARATION

I, Willem A. Hoyng, state as follows:

I. Introduction

1. I read the declaration of Mr. Gerritzen and noted that he does not seem to dispute what I have stated, but only provides certain nuances to what I have stated.

2. However, I have to conclude that in providing certain nuances, Mr. Gerritzen makes some obvious mistakes, which I will touch upon below. Below, I refer to Fitbit's Reply In Support Of Its Motion To Compel The Production Of Certain Of Mr. Arie Tol's Email Communications as the "Reply" and to Mr. Gerritzen's declaration as the "Fitbit declaration".

II. General remarks

3. The Fitbit declaration agrees with me that the Dutch legal system does not allow for pre-trial discovery of documents or "fishing expeditions". The Dutch system of civil proceedings is based on an adversarial system, as becomes clear from Article 24 DCCP.

4. The Fitbit declaration elaborates rather extensively on Articles 21-24 of the DCCP. While I discussed these articles in my first declaration to provide background information, these provisions do not have direct relevance for the dispute at hand. I do note that the obligation of truth in Article 21 DCCP only leads to an obligation to spontaneously provide unfavourable information if, without such information, the information which a party chooses to provide would be untruthful. However, as I stated in my opinion, a party is free to choose which information is provided to the court. That information has to be truthful. This illustrates that generally there is a much narrower selection of documents relevant to Dutch court proceedings than in court proceedings in the United States.

5. As I have stated, under Dutch law no (statutory) confidentiality obligation is absolute (see paragraphs 17 and 41 of my first declaration). However, the *Telegraaf* case relates to very specific circumstances and is certainly not to be compared with the case at hand. In these proceedings, the State refused to provide information regarding the exercise of special powers by the Dutch Secret Service against journalists that had published articles on state secrets. This decision does not relate to individuals invoking privilege on the basis of a duty of confidentiality pursuant to their office, profession or position within the meaning of Article 843a (3) DCCP (or an indirect reliance on this by the client consulting the person entitled to privilege on the basis of Article 843a (4) DCCP). In the latter cases, according

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to Supreme Court case law, only in "highly exceptional circumstances" privilege can be outweighed by the interest in finding the truth (see also below in paragraph 33 et seq. below). In the present case, no such circumstances apply, as it seems to me that Fitbit only has a private interest in obtaining information from documents of which it does not know the contents, hoping to find something useful. The implied suggestion that the situation in the *Telegraaf* case would be comparable to the situation at hand is incorrect.

6. In paragraph 3.4, the Fitbit declaration states that according to the District Court The Hague, Article 1019a DCCP would not be applicable to potential infringement of a US patent. Although I do not agree with this decision, as it seems to amount to a discriminatory treatment which seems contrary to the Paris Convention and the TRIPS Agreement[1], this is equally unimportant for the case at hand. As I explained in my opinion, I do not think that there is a fundamental difference between Articles 843 (4) and 1019a (3) DCCP and, if there is a difference, it is clear that Article 843 (4) DCCP would be more strict in the sense that it would, if applicable to the case at hand, offer more grounds to refuse production and thus make Fitbit's position to obtain documents even more difficult.

7. The suggestion that I would have stated that Article 843a DCCP is only rarely used (in paragraph 3.5 of the Fitbit declaration) misses the point. My statement clearly referred to the measures stated under 10 of my first declaration (not discussed in the Fitbit declaration). In my practice of almost 50 years of patent litigation, I have come across these measures extremely seldomly. While Article 843a DCCP is used more frequently, the point is that, because of the strict requirements that need to be satisfied in order to obtain access to documents, this instrument cannot be compared with US pre-trial discovery (see Chapter IV of my first declaration).

III. Remarks of Fitbit's declaration with respect to IV of my first declaration

8. I explained in Chapter IV of my first declaration that, if Dutch law were applicable to Fitbit's claim, in view of the strict requirements of Article 843a DCCP, Fitbit's claim would most likely be rejected already for not satisfying the three cumulative requirements of Article 843a (1) DCCP.

9. I note Fitbit's declaration agrees with the fact that there are three separate requirements to be fulfilled, i.e. "legitimate interest" (Fitbit's declaration, paragraph 4.3), "specific documents" (Fitbit's declaration, paragraph 4.7) and "legal relationship" (Fitbit's declaration, paragraph 4.4). I do also note that Fitbit's declaration in fact does not dispute

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[1] Article 2.1 of the Paris Convention for the Protection of Industrial Property and Article 2 of the TRIPs Agreement.

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my reasoned opinion that a Dutch Court would refuse a claim for the Communication to be produced.

10. In paragraph 4.3, the Fitbit declaration advocates a broad interpretation of "legal relationship". It may be true that any kind of legal relationship could qualify as a legal relationship, but as the Fitbit declaration correctly notes, the existence thereof should be made sufficiently plausible. Whether or not it is the plaintiff seeking access to the documents, is not decisive in this respect (see e.g. my discussion of *Sisvel/Acer* in paragraph 31 of my first declaration). What matters is that the party seeking access shows that the documents are relevant to a certain legal relationship which it has made sufficiently plausible.

11. In paragraph 4.5, the Fitbit declaration basically argues that Fitbit does not have to fulfil the requirements of Article 843a DCCP, because not Dutch law but US law governs Fitbit's request. Which law is applicable is a question of US (private international) law, on which point I have not commented. My only conclusion is that if Dutch law would be applicable with respect to these documents (which as I understand are generated and kept in the Netherlands) a request for production would in my opinion not be honoured.

12. In this context I find support for my opinion in the reservations of the Netherlands in the Hague Convention of Evidence ("*Haags Bewijsverdrag*") as discussed in Exhibit 3 to the Fitbit declaration. Pursuant to Article 23, the Netherlands has declared that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

13. Finally, with respect to the requirement of "specified documents", Fitbit's declaration in paragraph 4.7 refers to the case *X/Theodoor Gilissen*. Fitbit is correct in not arguing that this case can be compared with the case at hand, in which Fitbit seeks, as I understand, basically all documents in Philips' possession relating to patent infringement litigation against Fitbit, virtually without any limitation.

IV. Remarks of Fitbit's declaration with respect to V.2 of my first declaration

IV.1. Fitbit's declaration ignores the enactment of Article 23b DPA and legislative history

14. In Chapter V.2 of my declaration, I expressed the opinion that in the case at hand the communications between Mr. Tol and Philips would be privileged under Dutch law. In the discussion thereof in section 5 of Fitbit's declaration, Fitbit's declaration seems to conveniently ignore the introduction of Article 23b DPA (including the legislative history on this point) and the implications thereof.

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15. Although Articles 165 (2) and 843a (3) DCCP indeed do not specify the exact group of people or professions to which legal privilege applies, it is incorrect that one has to rely on the case law of the Supreme Court or lower court case law in the absence thereof.

16. Dutch law is first and foremost based on statutory law, which is interpreted by the courts on the basis of various interpretation methods, such as grammatical, legislative and teleological interpretation. It is correct that in the end, the interpretation of the Supreme Court will be followed by the lower courts, but even with respect to Supreme Court case law there is no formal obligation on the lower courts to do so.[2] Moreover, it is incorrect that, as a rule, lower court decisions will be followed by other lower courts. In many instances in the Netherlands lower courts have disagreed with each other. According to Teuben, Supreme Court lawyer and former researcher at the University of Leiden, any binding force at the "horizontal" level, between different judges of equal rank, cannot be inferred from case law.[3]

17. It is correct that the Supreme Court has not explicitly ruled on the question whether or not a patent attorney would be awarded legal privilege, simply because that question has never been brought before the Supreme Court. However, it is not very likely that such case will ever be brought before the Supreme Court, as it is unmistakably clear from the legislative history that the legislator intended, with the introduction in 2003 of Article 23b(4) DPA[4], to award legal privilege to the patent attorney and to end controversy about this question, also in relation to foreign litigation.

18. In paragraph 5.7, Fitbit's declaration tries to restrict the meaning of Article 23b(4) DPA to the privilege of European Patent Attorneys before the European Patent Office ("EPO") based on the fact that the legislative history states that *"such professional secrecy is customary internationally: both European patent attorneys and patent attorneys in the United States have such obligation."*

19. This is incorrect. "European" in this sentence, in my opinion, refers to the patent attorneys in the various European countries. Moreover, Fitbit's opinion also ignores (when describing the privilege of patent attorneys admitted to the EPO) that the European Patent

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[2] See e.g. WvSv, A.L. Melai/M.S. Groenhuijsen e.a., Article 440 of the Code of Criminal Procedure, note 10.4 (**Exhibit A**): *"It should be borne in mind that we have no law of precedent in the Netherlands. The Supreme Court is not bound by its own jurisprudence - it can "switch" for reasons of its own - nor is the lower court bound by the decisions of higher courts, including the Supreme Court."*

[3] K. Teuben, "Rechtersregelingen in het burgerlijk (proces)recht" (in English: *"Court rules in civil (procedural) law"*) BPP nr. II, 2004/7.5.2.2 (**Exhibit B**).

[4] Fitbit's declaration suggests that Philips' translation of Article 23(b)(4) is not correct. I do not agree. It is crystal clear from that translation that the obligation is restricted to the activities as a patent attorney.

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