

# Injunctions Against Intermediaries in the European Union

Accountable, But Not Liable?

Tokyo, Nov/Dec 2018

# Talk Preview

- A **special type of remedy** that is taking-off in Europe, especially in the context of online IP enforcement;
- EU is eager in **exporting it** (ACTA, BTAs) and also US right holders are increasingly demanding it;

It allows to target those who did nothing wrong with the expectation that they can offer some help

- The basis of their duty is only the fact that they can do something
- Hence <*accountable* (for help), not liable>
- Third category next to secondary/primary liability

[context]

# Enforcement Measures

How to tell these apart?



vs.



vs.



# Enforcement Measures



YouTube

PROXIMATE

VS.



VS.



REMOTE

# Mostly remote providers



Website  
blocking



Internet  
disconnection



Password  
locking



Filtering

# [injunctions against intermediaries]

# Legal basis

- **European Union law**

Art. 8(3) InfoSoc;

- *also* Art. 11 EnforD; [Art. 63(1) UPCA]

“Member States shall ensure that right holders are **able to apply for an injunction to be addressed to intermediaries whose services are used** by third parties to infringe an intellectual property right.”



# Everyone is someone's intermediary



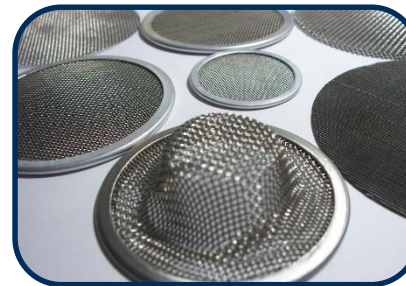
Website  
blocking



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# At first ..

- ‘**dynamite**’ (Spindler 2002)
- ‘the reach of this inconspicuous Article is **hardly foreseeable**’ (Spindler 2002)
- Broadly **misunderstood provision**, to some extent downplayed/misconstrued by national legislators
- Popularized by website-blocking
- NEW policy intervention > seeking accountability for help where no (tortious) liability exists

# In the meantime ..

“[the provision] obliges Member States to ensure that **an intermediary** whose services are used by a third party in order to infringe an intellectual property right **may, regardless of any liability of its own** in relation to the facts at issue, **be ordered to take measures aimed at bringing those infringements to an end and measures seeking to prevent further infringements**” (*Tommy Hilfiger*, para 22)

# Legal Innovation?

## Position to assist by taking particular steps

- Finds support in civil law and common law jurisdictions (Husovec 2017 CUP)
  - (DE) in rem remedies in property law (Section 1004 BGB)
    - Over 100 years of history
  - (UK) Lord Reid in *Norwich Pharmacal Company & Ors v Customs And Excise* [1973] UKHL 6 (26 June 1973):

“if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. (..) But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”

# Goals

- **NEW:** legally **PROACTIVE** [to avoid or prevent wrongdoing]
  - a) **Double identity standard** – same right, same infringer (AG, L’Oreal v eBay)
  - b) **Hilfiger standard** [?] - same nature infringement by the same market-trader
  - c) **Stay-down standard** - similar infringement, regardless of the wrongdoer (BGH)
    - pending relevant: C-18/18 *Glawischnig-Piesczek*

# Limits

- **General limit on IPR remedies**
  - Art 3 EnfD = Article 41 TRIPS [but instrumentalized]
  - Art 15 EcommD – prohibition of general monitoring
- **Human rights law**
  - Right to privacy/data protection (*Sabam; Scarlet*)
  - Right to freedom of expression (*UPC*)
  - Right to conduct a business (*UPC; Tommy Hilfiger*)

[let's see injunctions in  
action]

# Case 1



Website  
blocking



Internet  
disconnection



Password  
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Filtering



# Case 1: Website Blocking



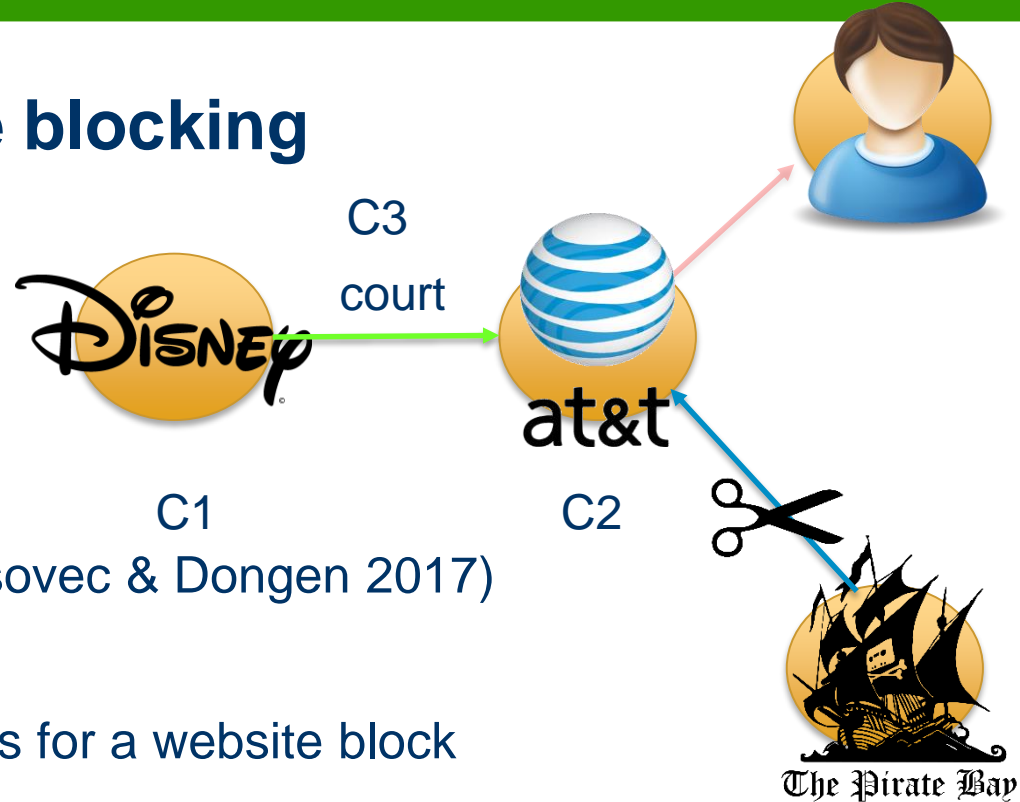
## Remote providers

- Mere conduits do not have to act upon notice
  - could be explained > they provide general infrastructure with a great potential for innovation
- Internet access providers are being sued **to block a specific website** or to disconnect users;
- ARGUMENT: voluntary measures are scarce; INT don't want to negotiate and if they do, they lead to unfair conditions;
- Proposal > allow such enforcement measures to be imposed by courts (mandatory assistance)

# Case 1: Website Blocking

## Illustration: website blocking

- By far, the most popular



[EU] lot of variation (see Husovec & Dongen 2017)

### [UK] typical:

- RH goes to court and asks for a website block
- RH bears only C1, C3 (ap. 5-10.000 EUR);
- RH does not have to prove effectiveness;
- C2 born by INT; **higher** with **smaller** intermediaries (5-6 zero sums)

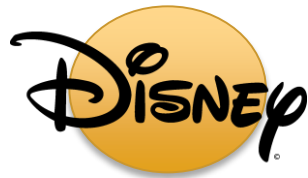
# Case 1 = Problem 1 [waste of resources]

- Allocation of resources will be an **improvement** if  $E(\pi) > C$
- This would mean requiring the effectiveness equal to overall costs;
  - The **courts don't have enough information** to do such assessment (most  $E(\pi)$ )
- **RH** know the benefits of measures ( $E(\pi)$ ); can assess the effectiveness of the measures looking at the impact on its sales;
- **PROBLEM:** current allocation does not force them to do so;
- Self-interested right holders apply as soon as the expected benefit from the proposed measures is higher than the cost they bear ( $E(\pi) > C(\text{own})$ )
- **IF**  $E(\pi)$  is not higher than overall costs, enforcement measures are **continuous waste of resources** (even after RH figure that out)

# Case 1: Opportunities

## Allocation of the entitlement

- *Coase theorem* > irrelevant, as long as TC zero



right holder

- right to sue for cooperation



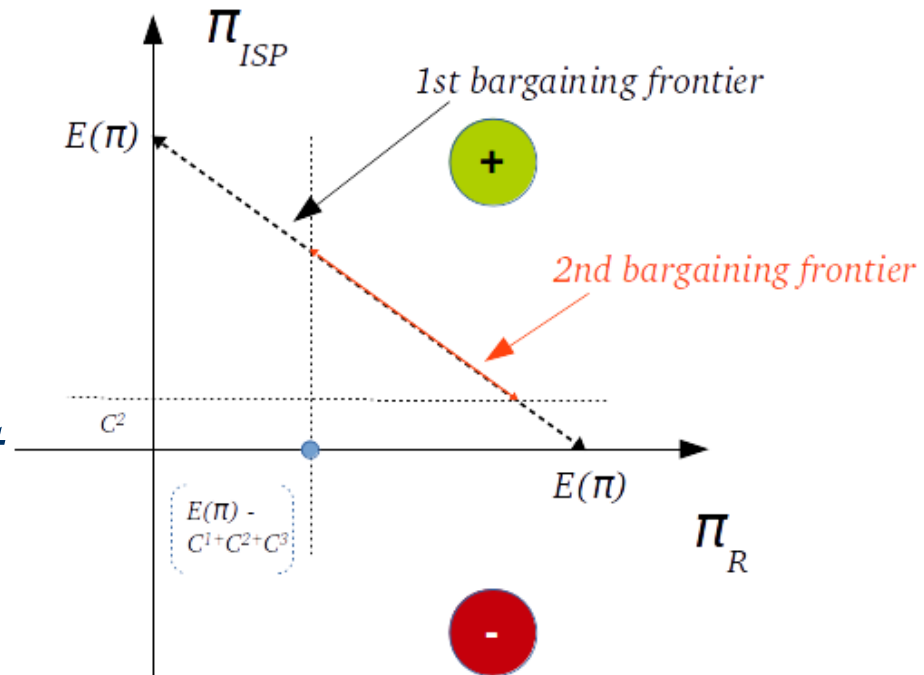
vodafone

intermediary

- voluntary measures
  - a) agreements
  - b) unilateral

# Case 1: Opportunities

- Impact on voluntary measures (if re-design.)
- giving a *credible threat* to voluntary negotiations; so it incentivizes them;
- if cost are *reimbursed at margin*, then collective action is very likely for bigger projects due to high upfront costs



# Case 2



Website  
blocking



Internet  
disconnection

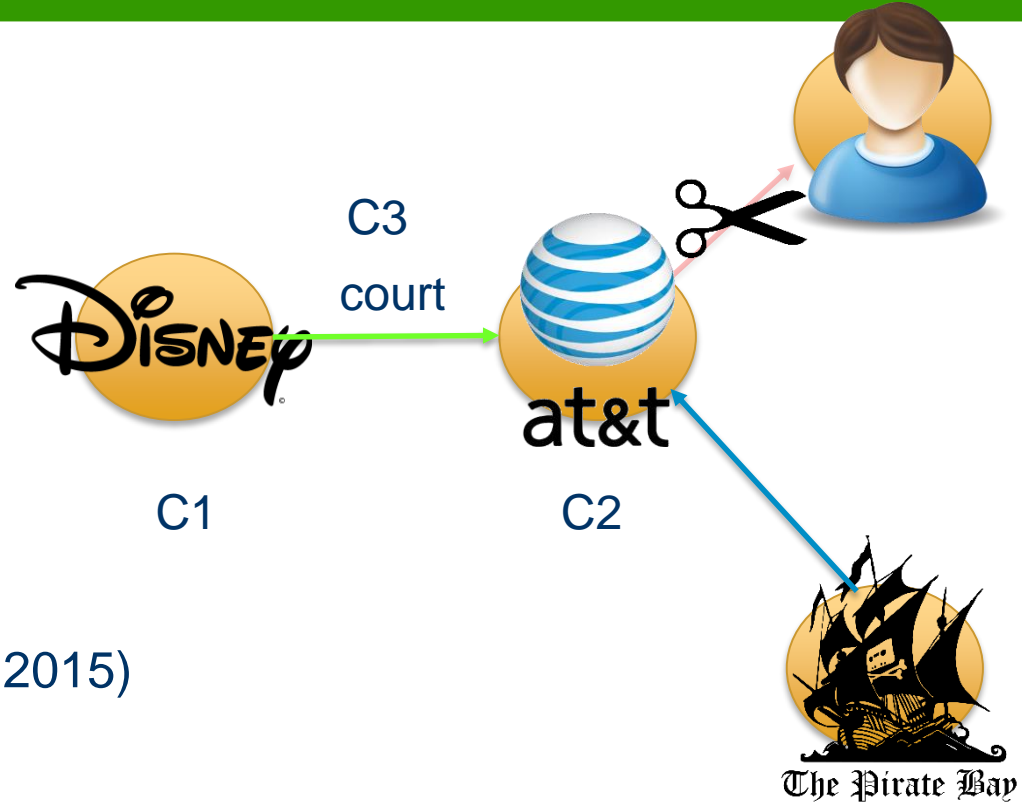


Password  
locking



Filtering

# Case 2: Internet Disconnections



**[Spain]** individual lawsuit

- (see Husovec & Peguera 2015)
- Right to fair trial?

**[Ireland]** imposing an entire three strikes scheme

- (see Kelly 2016)
- Injunctions giving power to legislate?

# Case 3



Website  
blocking



Internet  
disconnection



Password  
locking



Filtering



# Case 3: WiFi Locking

- German Federal Supreme Court (2010) I ZR 121/08 (open WiFi)
- Mere conduits **not liable under the E-Commerce Directive** for damages, but you can impose injunctions on them [ECD [x] Section 512(j) DMCA]
- A WiFi hot-spot operator has to prevent third party infringements by password protecting the hotspot
  - Germany has a very low availability of open wireless
  - Repeated attempts to overrule case-law by legislator
  - CJEU says not against EU law



# Case 3: WiFi Locking

Potential impact on ...



# Case 3: WiFi Locking



**Martin Husovec** @hutko · Mar 16

AG in #McFadden stresses importance of open WiFi for innovation! I and @EFF strongly agree! [eff.org/deeplinks/2015](http://eff.org/deeplinks/2015) ...

148. More generally, I would observe that any general obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, could be a disadvantage for society as a whole and one that could outweigh the potential benefits for rightholders.

149. First, public Wi-Fi networks used by a large number of people have relatively limited bandwidth and are therefore not particularly susceptible to the risk of infringement of copyright protected works and objects. (50) Secondly, Wi-Fi access points indisputably offer great potential for innovation. Any measures that could hinder the development of that activity should therefore be very carefully examined with reference to their potential benefits.



How much do we **trust our courts** when it comes to protecting new sources of **innovation**?

» CJEU doesn't pick up the argument

# Case 4



Website  
blocking



Internet  
disconnection



Password  
locking



Filtering

# Case 4: Filtering

## Proximate providers

- *E.g. hosting providers/information location tools providers*
- INT obtain a valid notice (stage 1) and have to take down the infringing content (stage 2) in order to avoid own liability;
- Injunctions against intermediaries are used to rewrite the process by forcing INT to **implement various filters unilaterally**
- ARGUMENT: Related to policy efforts both in the US/EU to introduce **stay-down (one notification per work [not per an infringement] with a permanent effect)**
- German courts are gravitating towards stay-down already for some time – based on injunctions



# Case 4: Filtering

Art. 8(3) InfoSoc

DMCA+

DMCA  
*NTD*

- YouTube's Content ID

# Problems Summary

Injunctions against innocent intermediaries:

1. can grant measures that are **waste of resources**
2. can grant RHs **power to de facto legislate** through court orders
3. can **stifle innovation** by means of enforcement measures
4. can **rewrite** boundaries drawn by tort law

[solutions within the  
system?]



# Solutions 1 & 4

- **Waste of resources** [Problem 1] & **Rewriting boundaries** [Problem 4]
- **OUTSOURCE** the costs & benefit analysis to RHs
- **INTUITION**: IF the courts cannot assess cost and *benefits*, then outsource that decision to the party that can best do such estimations; for this, full exposure to direct costs is necessary;
- **USEFUL**:
  - prevents over-use of remedy instead of tortious ones
  - In-builds time-limitation
- Has historical backing: UK + DE
  - But CJEU not willing to prescribe it for the EU

# Solutions 2 & 3

- **Legislating in disguise** [Problem 2]
  - Tighten the “prescribed by the law” scrutiny and reject complex, abstract and too far-reaching measures
  - E.g. reject three-strikes scheme if not legislated
- **Endangering innovation** [Problem 3]
  - The most difficult to solve
  - Require periodical review
    - E.g. abandon password-locking due to long-term costs
  - Allow to challenge based on innovation grounds

Thank you for **your attention!**

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