

Ideas from **the Netherlands**

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Overview for upcoming 30 minutes

- Dutch Situation
- Brein v Ziggo
- Proportionality/Efficiency Test
- Problems & Solutions

Art. 8(3) InfoSoc; - also Art. 11 EnforD; [Art. 63(1) UPCA]

- A **special type of remedy** against *intermediaries* that is taking-off in Europe
- It allows to target also those who **did nothing wrongful**
- The basis of their duty is only the fact that they **can do something**
- Hence <*accountable* (for assistance), not liable>

**Accountable,
not  liable.**

- Focus here: only **remote providers** who under most of the laws would not be liable in tort as secondary infringers

Dutch story

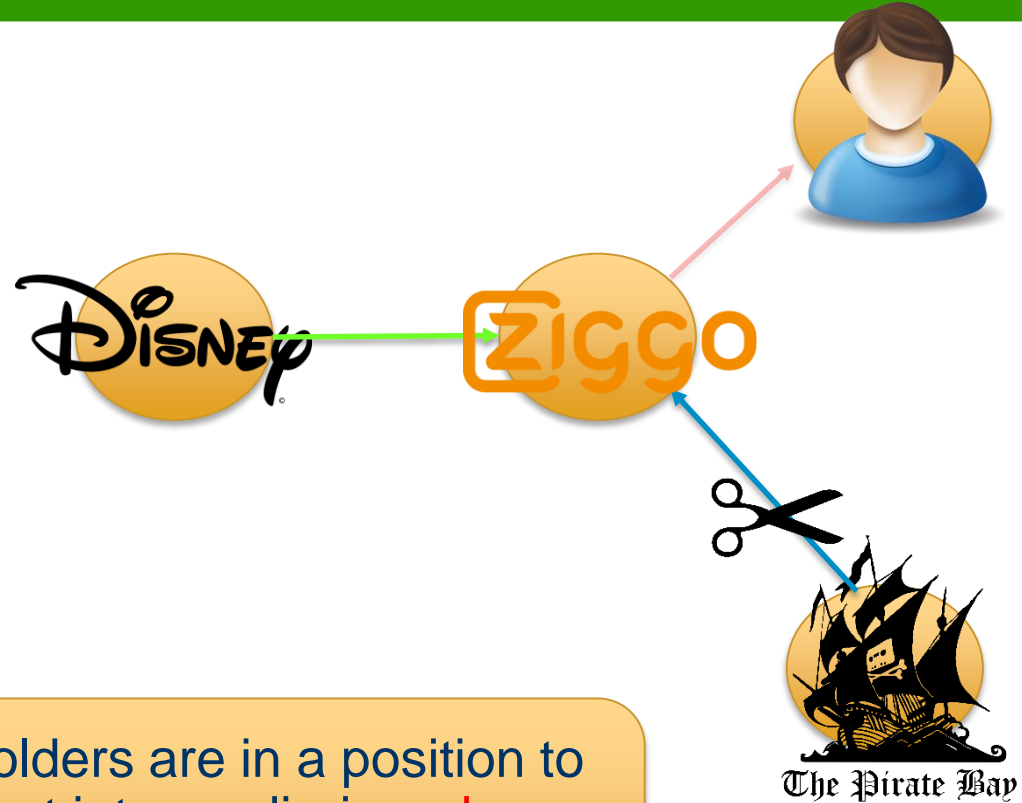
Brein v Ziggo/XS4ALL [1]

- 26d Auteurswet (Aw) (*copyright law*), 15e Wet op de naburige rechten (Wnr) (*neighbouring rights*)
- Brein sued two access providers to block TPB's domain name/IP addresses (+ new for 24h window), arguing:
 - AP are providing service which is used to infringe; 3rd party: a) TPB [communication or co-comm by facilitation] or b) users
- Hague District Court (January 11, 2012) granted (10 days rule), subscribers *are* third parties using to infringe; prop/effect (eBay) is OK;
 - Second suit against *other* providers (10 May 2012) also successful (though ex-post IP address submission closed)
- Hague Court of Appeals (January 28, 2014) rejected; users & TPB infringe; the blocking would be ineffective as it does not reduce overall level of infringing activity (despite TPB visits down);

Brein v Ziggo/XS4ALL [2]

- Parties applied for revision before Hoge Raad (Supreme Court)
- AG issued his opinion advising to refer two questions to CJEU; it also criticized effectiveness requirement as interpreted by Court of Appeals, arguing that EU standard is not too high;
- HR referred following (13 November 2015):
 - [1] Is The Pirate Bay **a direct infringer** of a right to communication to the public?
 - [2] If not, can a blocking injunction be issued **nevertheless** when a website to be blocked facilitates w/o itself infringing?
- **C-610/15 – currently pending**

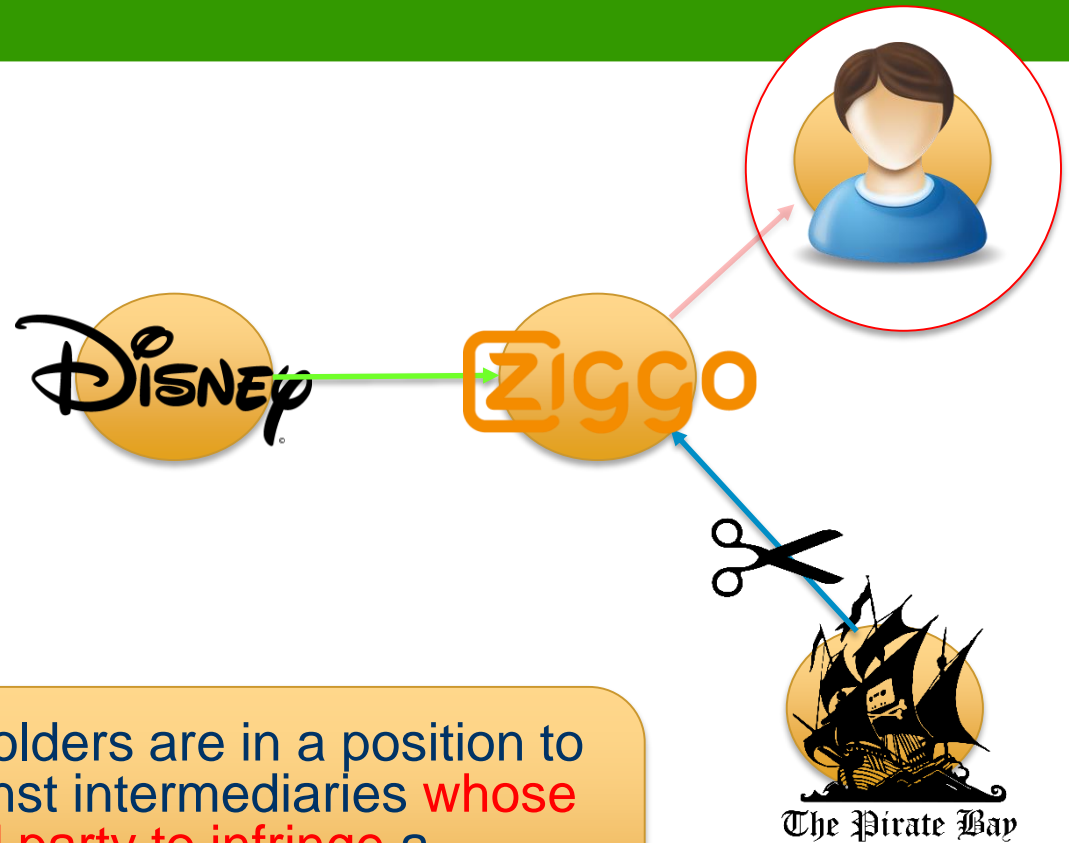
Illustration [1]



Art 8(3) InfoSoc ‘(..) rightholders are in a position to apply for an injunction against intermediaries **whose services are used by a third party to infringe a copyright or related right**’

3rd?

Illustration [2]

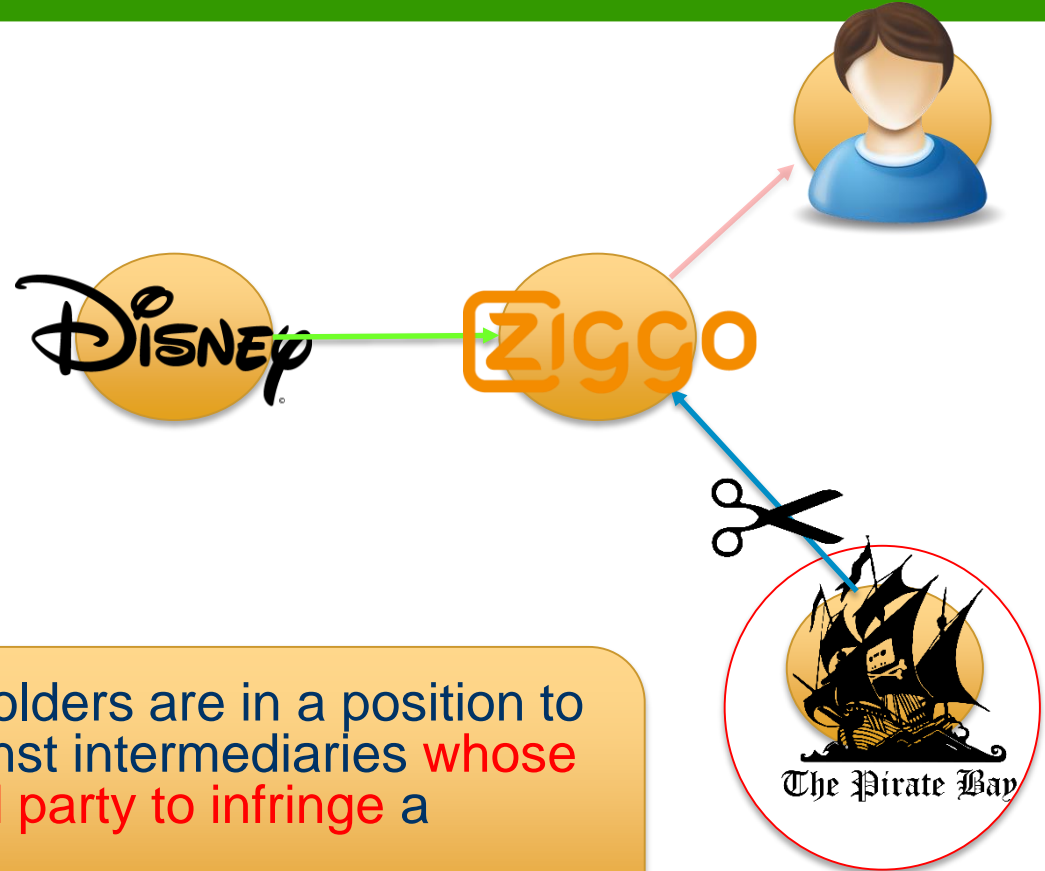


Art 8(3) InfoSoc ‘(..) rightholders are in a position to apply for an injunction against intermediaries **whose services are used by a third party to infringe** a copyright or related right’

> IF blocking users .. (Spain)

3rd?

Illustration [3]



Art 8(3) InfoSoc ‘(..) rightholders are in a position to apply for an injunction against intermediaries **whose services are used by a third party to infringe a copyright or related right**’

> IF blocking websites ..

3rd?

- IF TPB is a **non-infringer**, then can it be blocked? IF *not*, then **who is INF**:
- Non-harmonized accessory (secondary) liability (e.g. 830(2) BGB) posing an issue for definition of an '**infringing third-party**'; not prescribed;



- CJEU might again try to mimic secondary liability results within the test for communication to the public *ala GS Media* [injecting knowledge standard into the scope of exclusive rights]; *otherwise it has to abdicate on Union solution*;
- **Question:** what is the impact on the scope for domestic accessory liability provided 'on top'?
 - Precluded from application?
 - *GS Media* scenario, de facto yes
 - Other scenario – [?]

Bigger picture

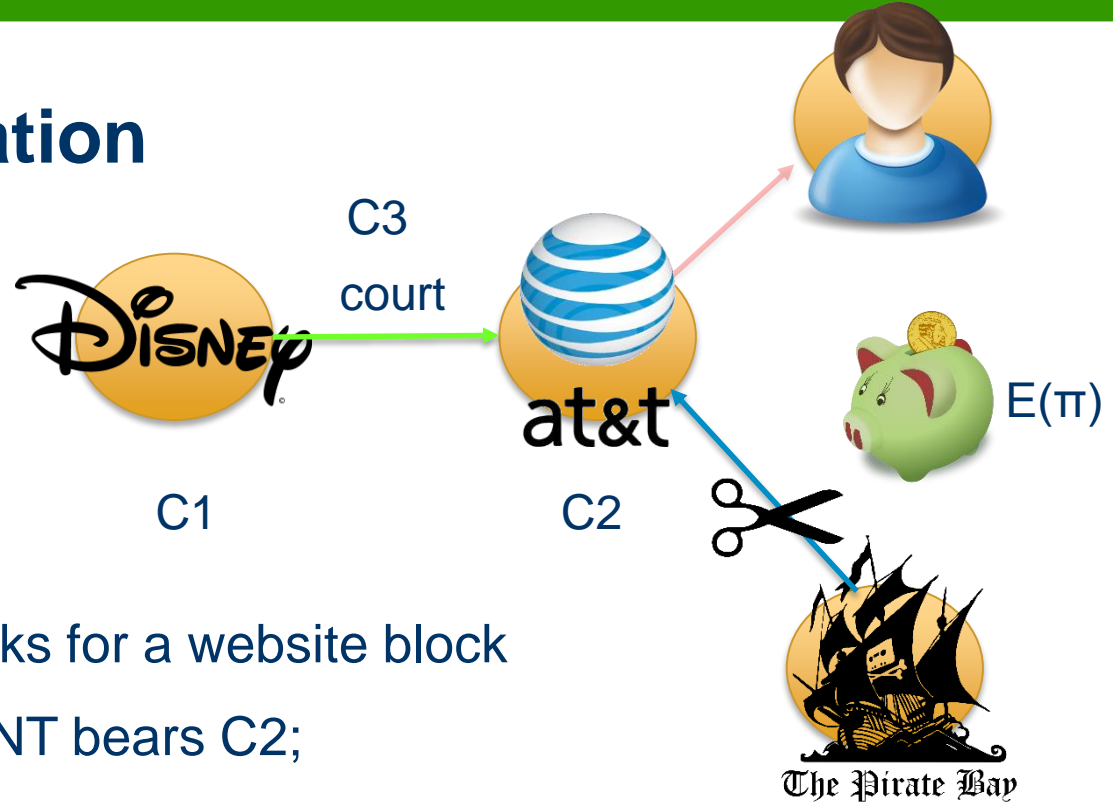
Proportionality exercise

- There is little doubt that website blocking injunctions are possible;
 - Q. are also mandated by the EU law?
- Main issue is their proportionality (Art 3 EnfD)
- **Framing** matters:
 - **[1]** exercise of constitutional-acceptance?
 - Implementing the safe-guards (e.g. targeting, implementation over-blocking checks, sunset clause, etc.)
 - ECtHR
 - **[1] + [2]** Autonomous IP-internal economic efficiency exercise?
 - Constitutional acceptance first, economic efficiency second (do benefits of enforcement off-set its costs);
 - *Hague Court of Appeals* not following efficiency > as benefits were not put in relation to costs / *Justice Arnold* the closest to this

Being realistic

- Courts are familiar with [1]; but incapable of screening for [2];
- They lack information on:
 - **Implementation Costs** [set-up + maintenance costs]
 - **Benefits** [a monetary value of precluded infringements attributable to the plaintiff]
- RH feel the benefits of such measures; can assess/approximate the effectiveness of the measures looking at the impact on their sales;
- However, proving the actual numbers is entirely different matter;
- IF the courts cannot assess cost and *benefits*, then we should **outsource that decision to the party that can best do such estimations**;
- for this, full exposure to direct costs is necessary (- see next slide);

Typical cost allocation



- RH goes to court and asks for a website block
- RH bears only $C1, C3$; INT bears $C2$;
- The block is statically **welfare-maximizing** if expected benefits outweigh *all* these costs ($E(\pi) - C^2 < C^1 + C^3$)
- **Today's** strategy: courts should compare $E(\pi) > C^2$ **[fails]**

Problem & Solution

- Self-interested right holders apply anytime the benefit from the proposed measures is higher than the cost they bear ($E(\pi) > C^1 + C^3$);
- **IF** $E(\pi) - C^2 < C^1 + C^3$, enforcement measures are **waste of resources** – since the courts do (and can) NOT moderate
- When all the direct costs are imposed [C^1, C^2, C^3], RH **will apply only if the proposed measure is welfare-maximizing** - $E(\pi) > C^1 + C^2 + C^3$
- Implementation *cost-allocation* is thus crucial!
- Courts are then relieved from screening for [2] and can read efficiency purely in terms of [1].
 - *For more see* Husovec, Martin, Accountable, Not Liable: Injunctions Against Intermediaries (May 2, 2016). TILEC Discussion Paper No. 2016-012. Available at SSRN: <https://ssrn.com/abstract=2773768>

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