

The Need For Reform: Where We Stand?

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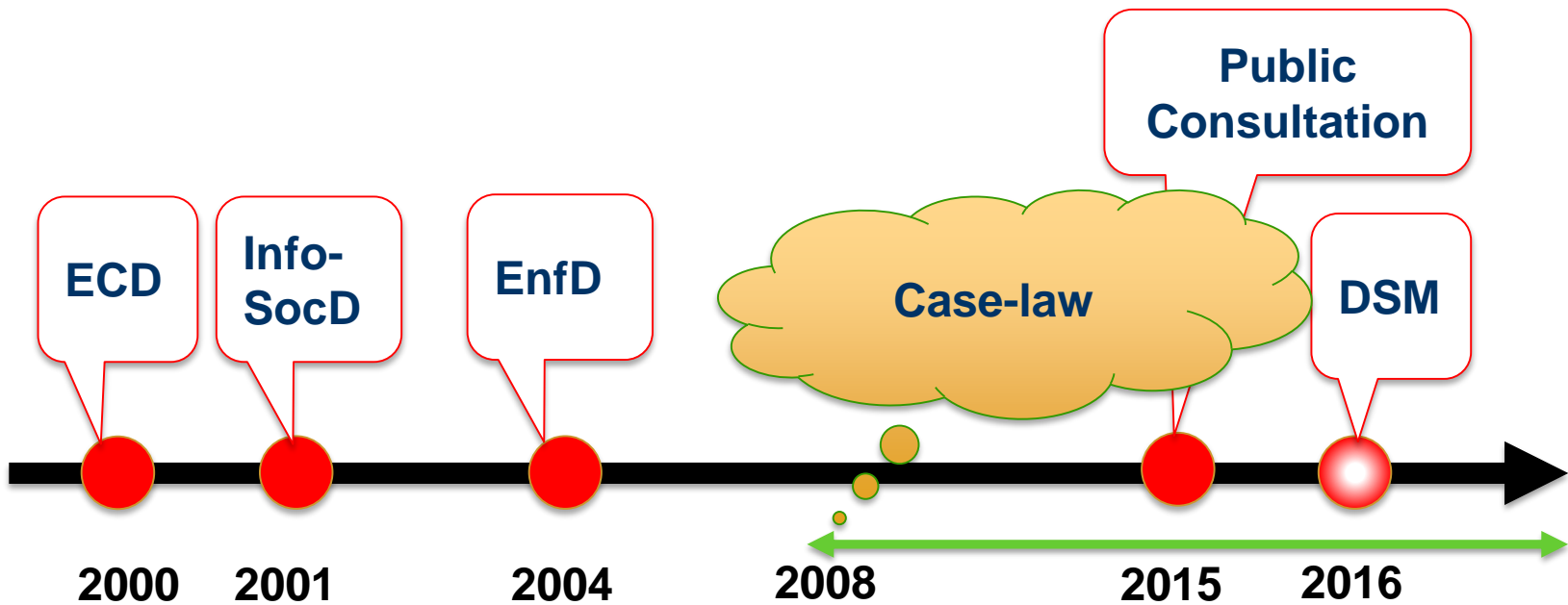
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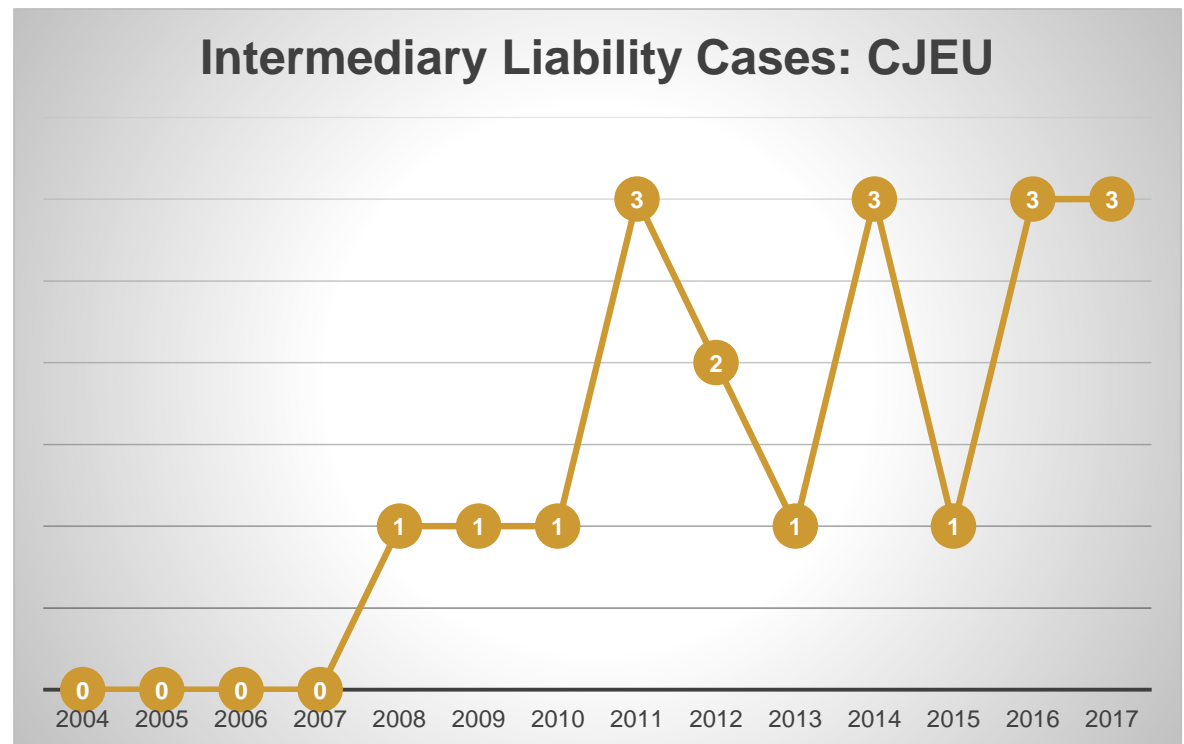
Amsterdam, IViR event, 2017

A Helicopter View

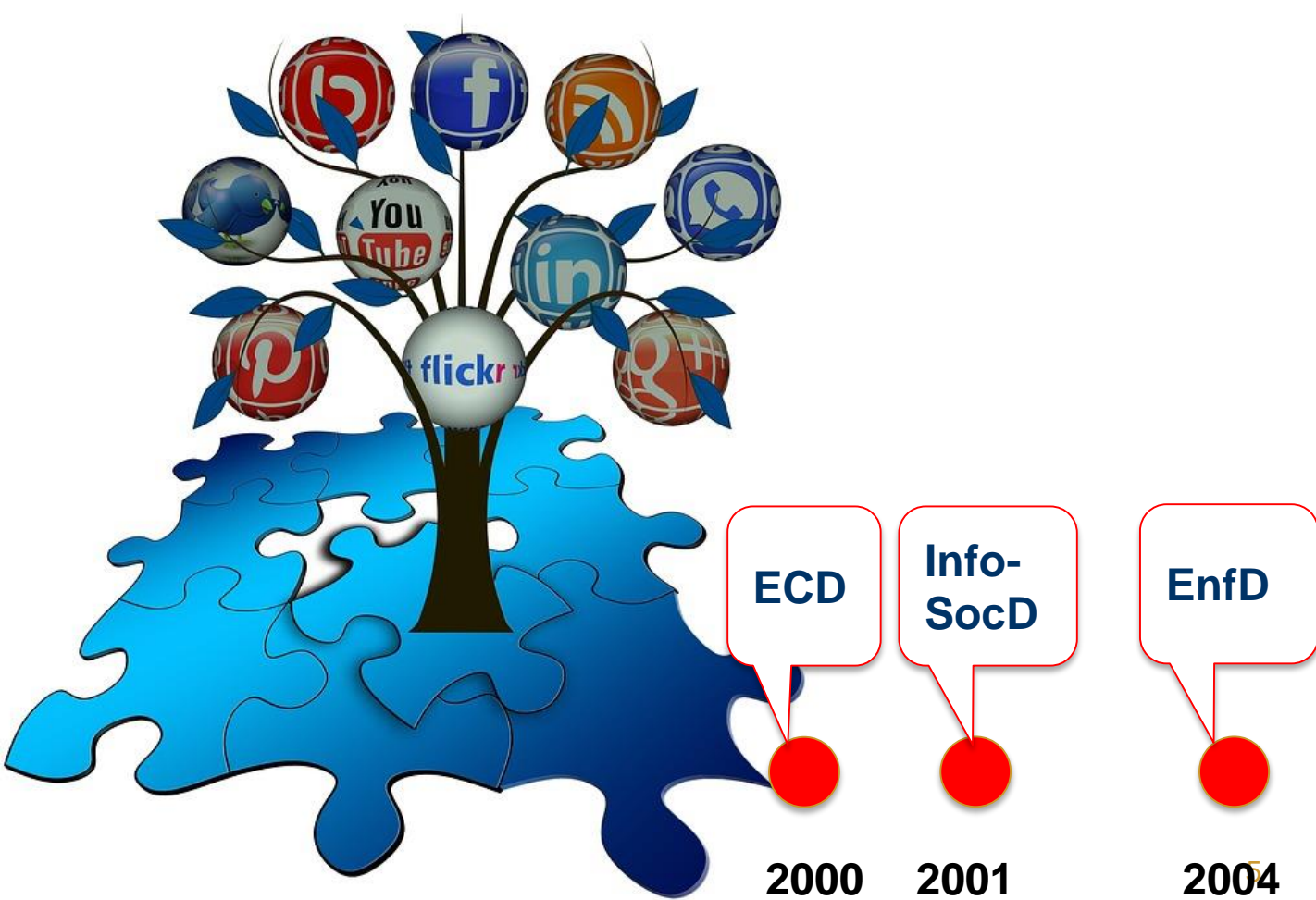




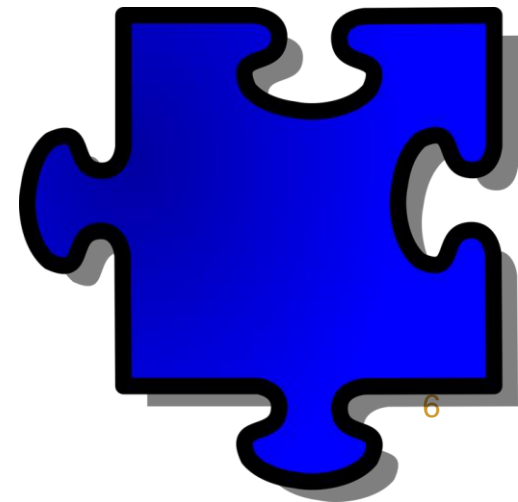
EU Intermediary Liability Picture [1]



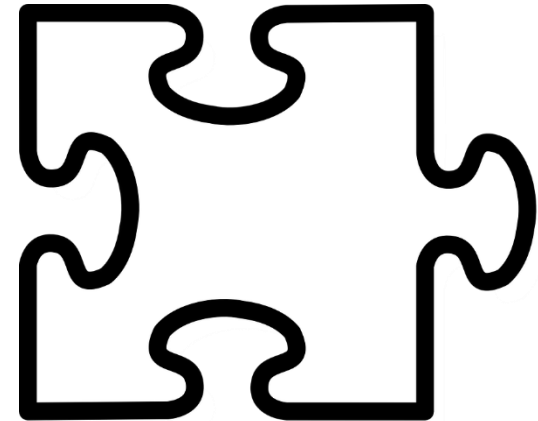
EU Intermediary Liability Picture [2]



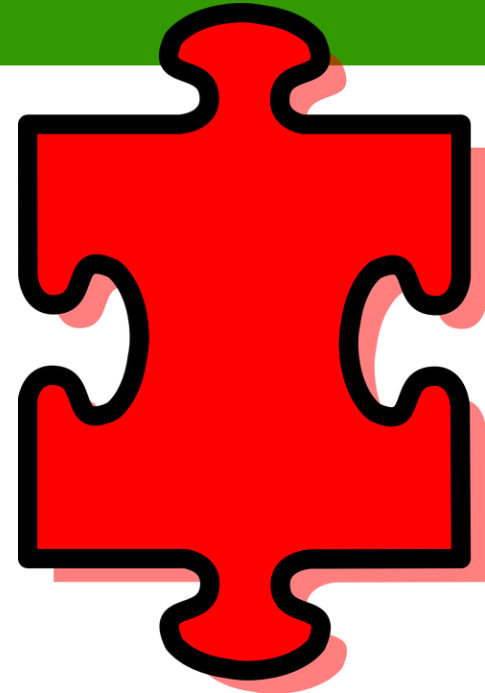
- **E-Commerce Directive**
- Art 12-14 ECD: 3 x safe harbors [hosting, caching, mere conduit]
 - covering direct & secondary INF
 - When providers can not incur **'liability'** over **third party information** in course of selected activities (exclusion-only)
 - Carve-outs for 'the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement'
- Art 15 ECD: prohibition of **general monitoring**;
 - 'obligation to generally monitor or actively to seek facts or circumstances indicating illegal activity'
 - Addressed to:
 - the Member states to limit legislation
 - the courts to limit reach of their measures



- **InfoSoc Directive (& other IP Ds)**
- **Exclusive rights**, e.g communication to the public (Art 3 InfoSoc)
 - what constitutes direct infringement/own copyright relevant acts
- Art 8(3) InfoSoc: **injunctions against intermediaries**



- **Enforcement Directive**
- Art 11(III) EnfD: **injunctions against intermediaries**
- Art 8 EnfR: **third party disclosure**
- **'infringer'** i.s. EnfD, includes 'secondary infringers' >>
- provides the **overall frame** [Art 3]

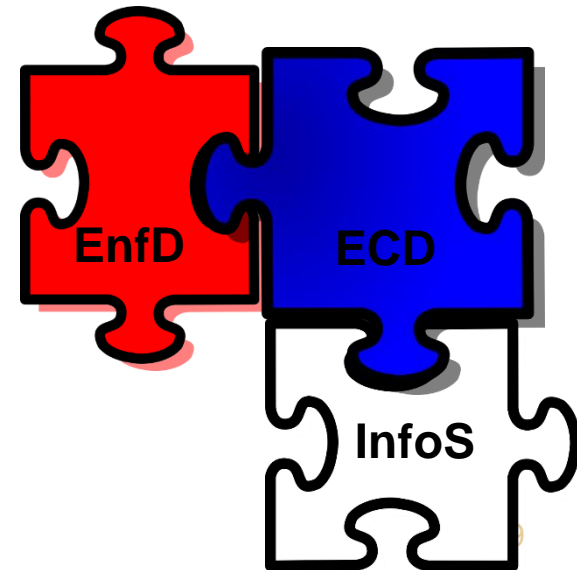


Do Puzzle Pieces **Fit**?

- **'without prejudice'** clause = EU speak for 'pieces should fit'



VS



- **Points of friction/deformation: TOP 3**

1. **Whose infringement?** [third party vs own information]

- Art 12(1)/14(1) ECD vs Union exclusive rights (Art 3 InfoSoc) & domestic doctrines

2. **Which injunctions?** [which injunctions are carved-out from SHs, together with what other remedies?]

- Art 12(2),14(3) ECD vs Art 11(III) EnfD/Art 8(3) InfoSoc / domestic law

3. **What monitoring?** [general monitoring vs injunctions/tortious duties]

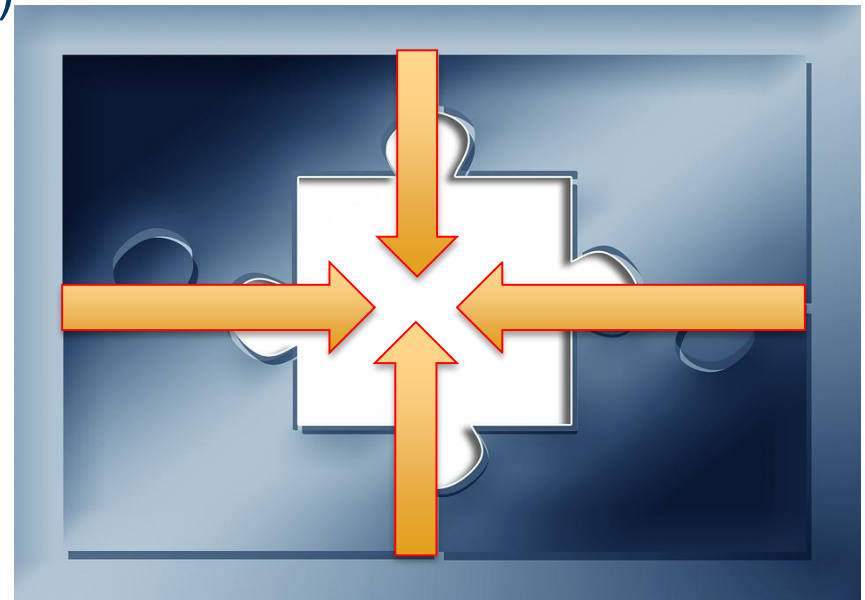
- Art 15 ECD vs Art 11(III) EnfD/Art 8(3) InfoSoc
- Is 'double identity' limitation only type of 'specific monitoring' (BGH-no)

However, even if jigsaw pieces fit, one central piece is missing ...



Realistic Options:

1. EU Legislator (*consultation*) & CJEU (*L'Oreal v eBay*) do nothing
2. CJEU expands existing puzzle pieces
 - Direct infringement (*GS Media*)
 - Invents second INF (*Donner*)
3. EU legislator steps in (*DSM/NAD*)



Unrealistic Option:

1. Academics convince MSs to converge

Thank you for **your attention!**

A forthcoming book with



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