

# Update on the EU Copyright Reform: **Platforms**

Martin Husovec

Assistant Professor at Tilburg Law School

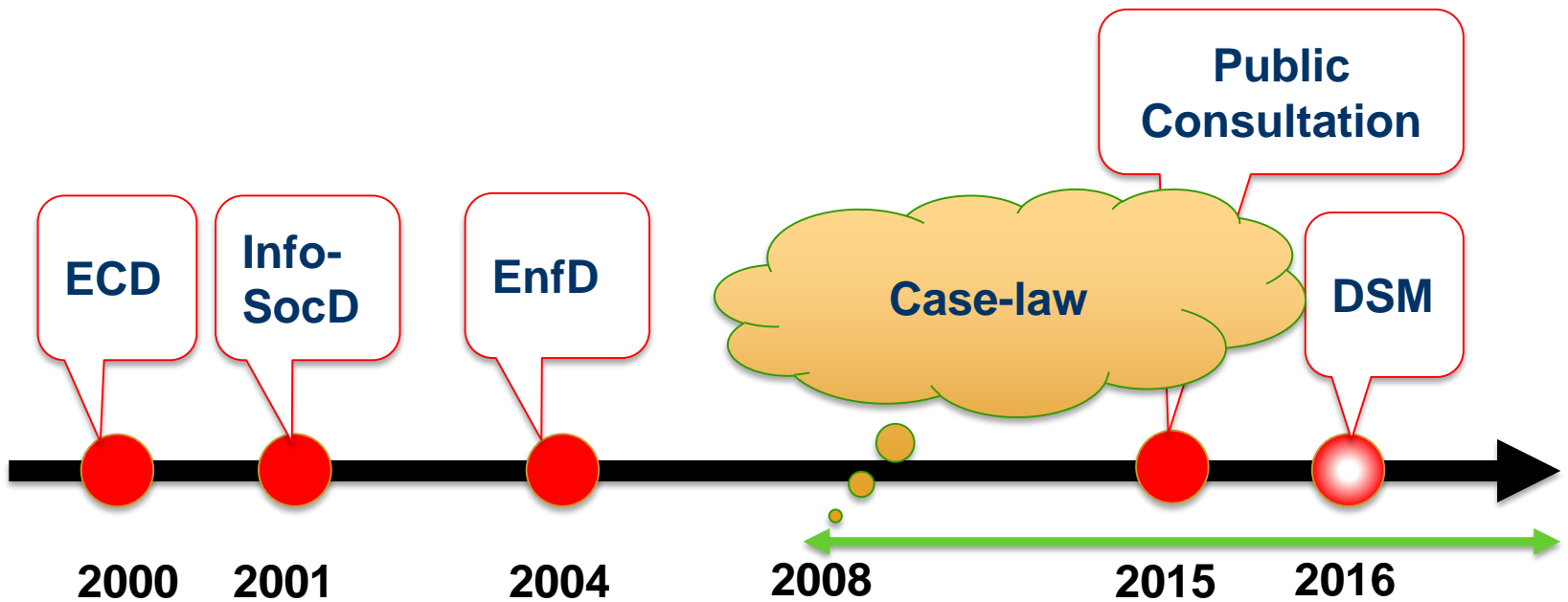
Tilburg Law and Economics Center (TILEC)

Tilburg Institute for Law, Technology and Society (TILT)

*Brussels, September 2017*

## A Helicopter View of State of Affairs



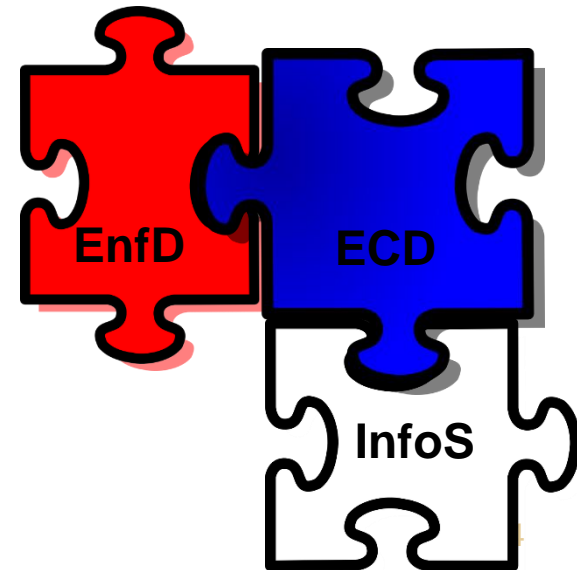


# Do Puzzle Pieces **Fit**?

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



**VS**

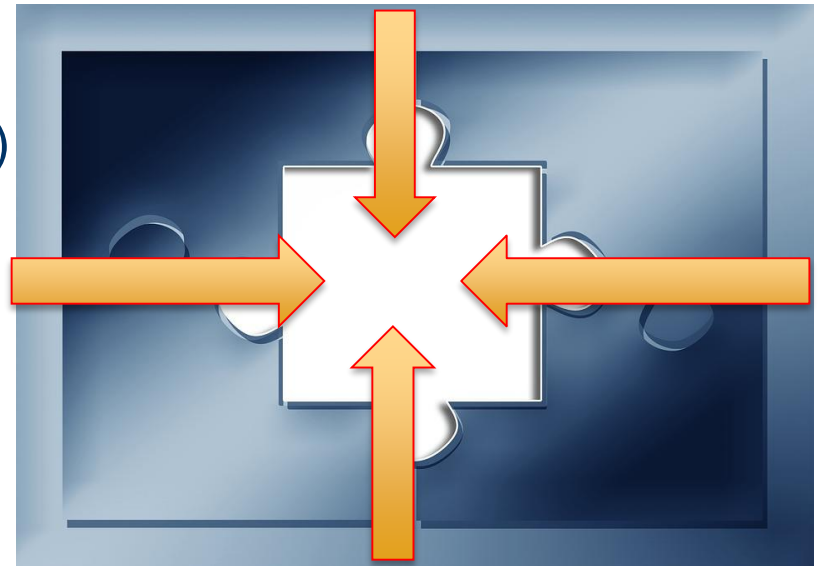


However, even if jigsaw pieces fit, one central piece is missing ...



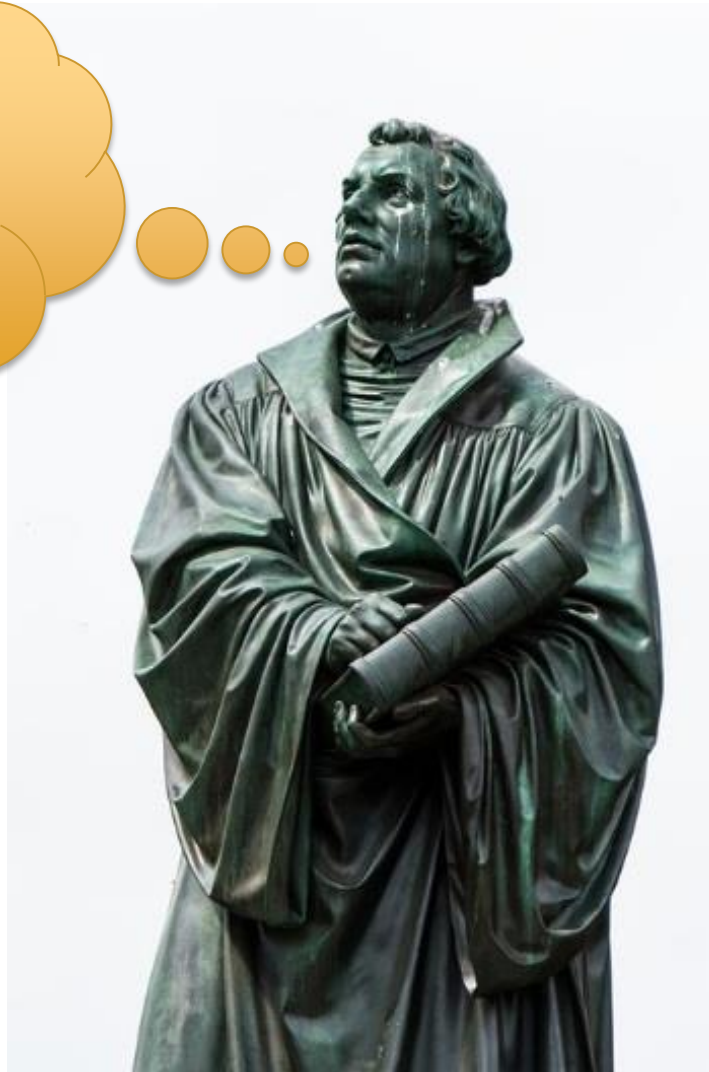
## Realistic Options:

1. EU Legislator & CJEU (*L'Oreal v eBay*) do nothing
2. CJEU expands existing puzzle pieces
  - Direct infringement (*GS Media/TPB*)
  - Invents second INF (*Donner*)
3. EU legislator intervenes (*DSM/NAD*)
  - legislates secondary INF
  - Legislates STH else (e.g. Art 13)



**REFORM**

!



- **EC/Coun propose notice and staydown (NSD)**
  - A market-entry obligation to “prevent the availability on their services of works or other subject-matter identified by rightholders”
  - EC/COM: including by content recognition technologies
- **Nature:**
  - Stand-alone obligation
  - Applicable regardless of Art 12-14 ECD
- **Unclear**
  - Copyright infringement?
  - Country of origin principle?



- **WHO is obliged?**

- a) an 'ISSP',
- b) 'storing and providing access to the public' with
- c) '**significant amount**' [EC] / '**large amounts**' [COM] of protected content
- BUT NOT: if 'mainly' RH-uploaded / authorized content [EC]

'[A] significant amount of content': case-by-case, including

- total number of files of UGC-protected content
- its proportion in the overall content

- **Unclear**

- Cloud providers?
- Neighboring rights?

## European Commission (COM)

- n/a

## Council Proposals (EC)

- '[t]he measures shall be applied (..) at the request of rightholders to specific other subject-matter as identified by [RHs];
- '[t]he measures [...] shall be appropriate and proportionate, taking into account, among others:'
  - the nature of the services,
  - the type of protected subject-matter uploaded
  - the availability and costs of relevant technologies and
  - their effectiveness in light of technological developments

## UNCLEAR scope

To prevent availability, but how?

- similar/same infringements from *the same infringers*?
- similar/same infringements from *any infringers*?

## Today's CJEU-case law

- No general monitoring, only specific [Art 15 ECD + Art 3 EnfD]
- *Tommy Hilfiger* C-494/15 allowed 'avoiding new infringements of the same nature by the same market-trader from taking place' (para 34)

## Post-Art 13 world

- CJEU expands *Tommy Hilfiger* standard to prescribe staydown
- CJEU stick with this and prevents staydown plans

Thank you for **your attention!**

## Contact details

**martin**@husovec.eu

Blog: [www.husovec.eu](http://www.husovec.eu)  
<http://ssrn.com/author=1912670>  
[twitter.com/hutko](https://twitter.com/hutko)

