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(Non-)Regulation of online platforms and internet intermediaries: primary and secondary infringement in German and EU law

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What is an intermediary?

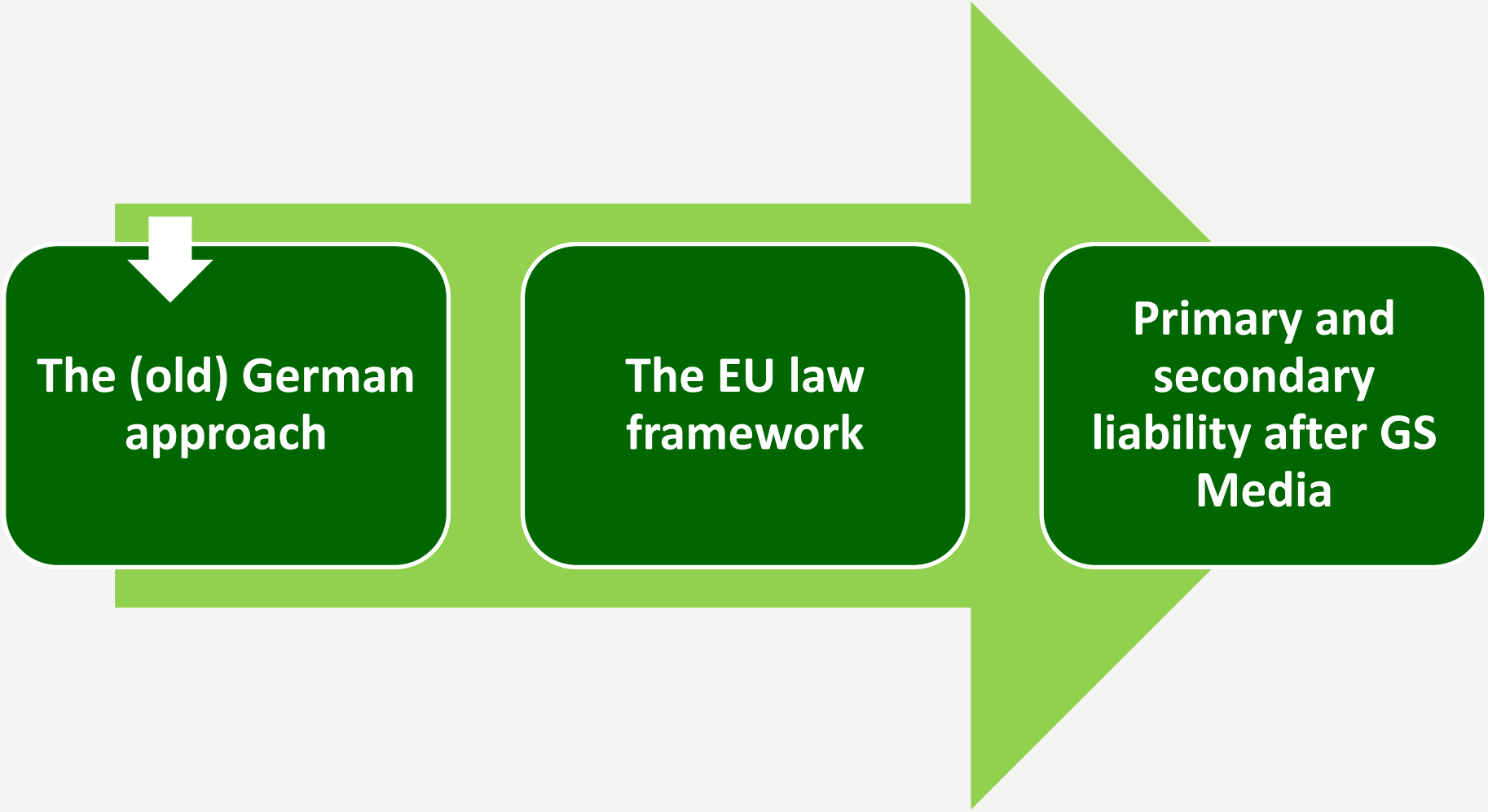
Primary infringement (eg upload)

Right owner

Providing means to infringe

Inter-mediary

Primary (Art 3 InfoSoc) or secondary infringement (Art 8 (3) InfoSoc)?


The (old) German approach
The EU law framework
Primary and secondary liability after GS Media

1. The (old) German approach

**(primary) liability for infringement →
full responibility**

Right owner

Inter-mediary

Störerhaftung (interferer's liability) →
- **only when duty of care violated**
- **no damages, injunctions only**

1. The (old) German approach: primary liability

Primary liability

- Own act of reproduction / distribution / communication
- Making content one‘s own (sich ein Werk “zu eigen machen”)
  - Example: BGH GRUR 2010, 616 – *marions-kochbuch.de / marions-cookbook.de*
- Liability of accessories: aiding and abetting (Anstiftung und Beihilfe)
  - Full tort liability (§ 830 (2) BGB)
  - but “double intent” required → the exception rather than the rule

Interferer‘s liability: the BGH formula

“In the case of an infringement of absolute rights, a person is liable as interferer who – **(1) without being a primary infringer or an accessory** – voluntarily and **(2) in a causal way** contributes to the infringement of the right. As the interferer‘s liability must not be unreasonably extended to third persons, it requires the **(3) violation of a duty to act**, in particular a duty to examine or monitor. The scope of this duty depends on the extent to which the interferer can reasonably be expected to prevent the infringement.“ (BGH GRUR 2015, 485 Rn. 49 – *Kinderhochstühle im Internet III / Children‘s High Chairs on the Internet III*)

Example 1: YouTube (OLG Hamburg GRUR-RS 2015, 14370, OLG München GRUR 2016, 612)

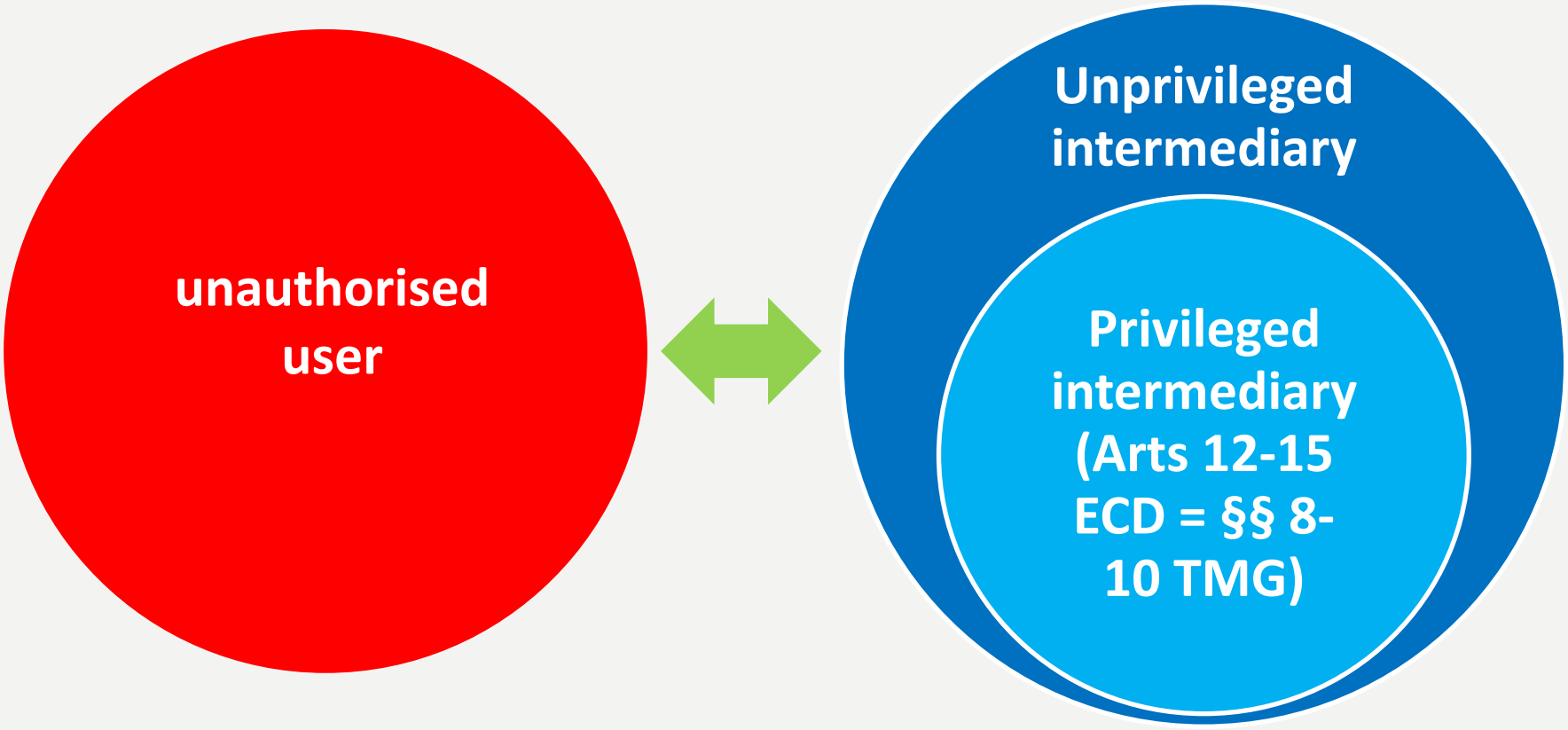
- No primary liability → no claim for damages
- Active intermediary → (§§ 8-10 TMD = Arts 12-15 ECD) do not apply
- Nevertheless no general monitoring obligation, only "notice and action"
- Duty to prevent future infringements of the same kind
  - use of word filters
  - own operation of content ID program
  - institution of dispute resolution mechanism
- But settlement reached two weeks ago!

Example 2: file hosting services

(BGH GRUR 2013, 370 – *Alone in the dark,* BGH GRUR 2013, 1030 – *File-hosting-Dienst / File Hosting Service)*

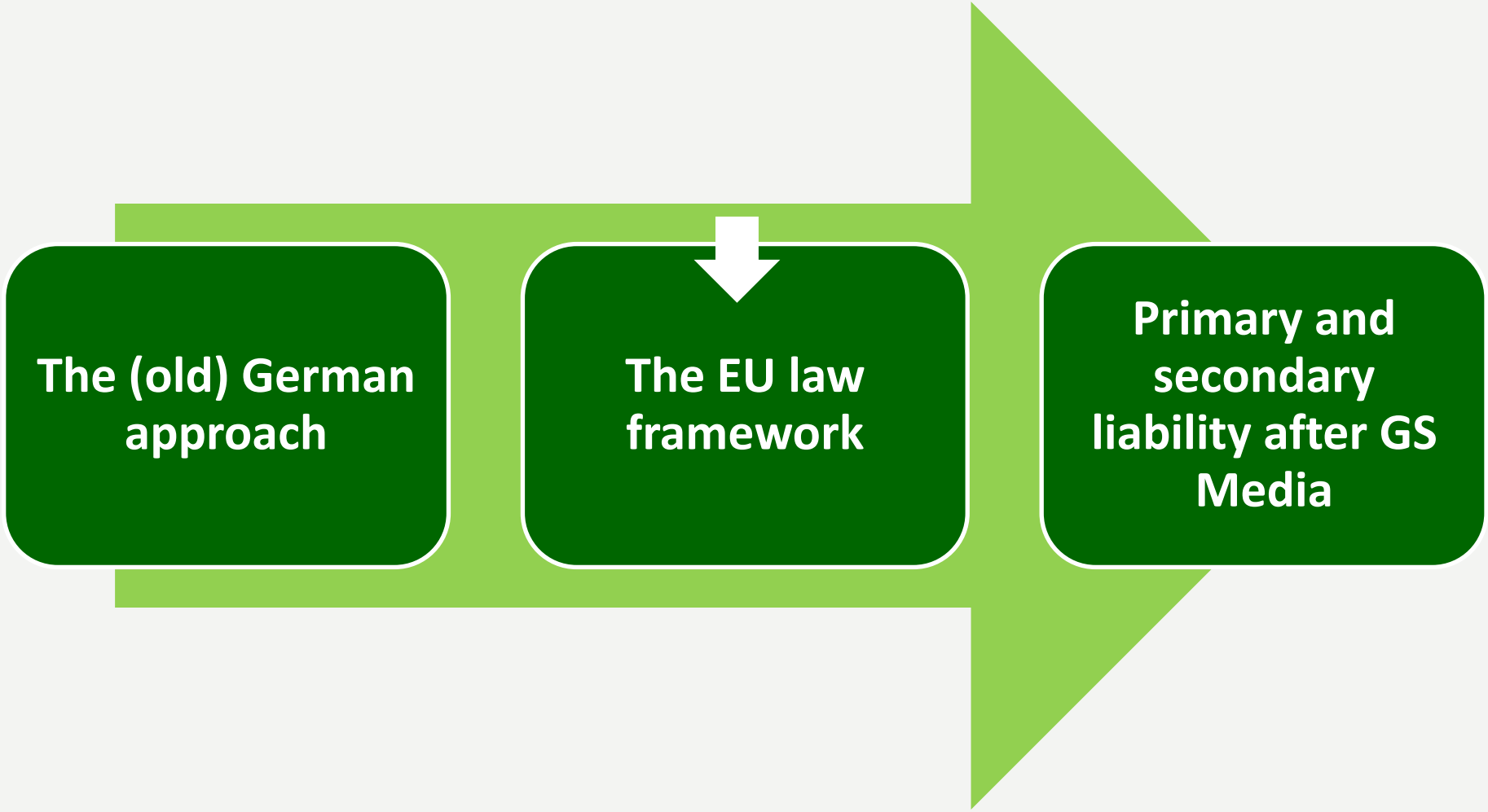
- No primary liability
- No general monitoring obligation, only "notice and action"
  - No application of exception in case of active invitation to infringe (BGH GRUR 2009, 841 – *Cybersky*)
- Duty to prevent future infringements of the same kind
  - Use of word filters
  - Individual monitoring of "link farms"
  - Even in case of notices concerning 4,800 (!) works
- General obligation to monitor (Art 15 ECD)?

1. The (old) German approach: conclusion



Primary infringement (Art 3 InfoSoc = § 15 (2) UrhG

Secondary infringement (Störerhaftung)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EU Charter of Fundamental Rights: Art 17(2) v Arts 16 and 8, 9, 11, 13

Arts 2-4 and 8(3) InfoSocDir

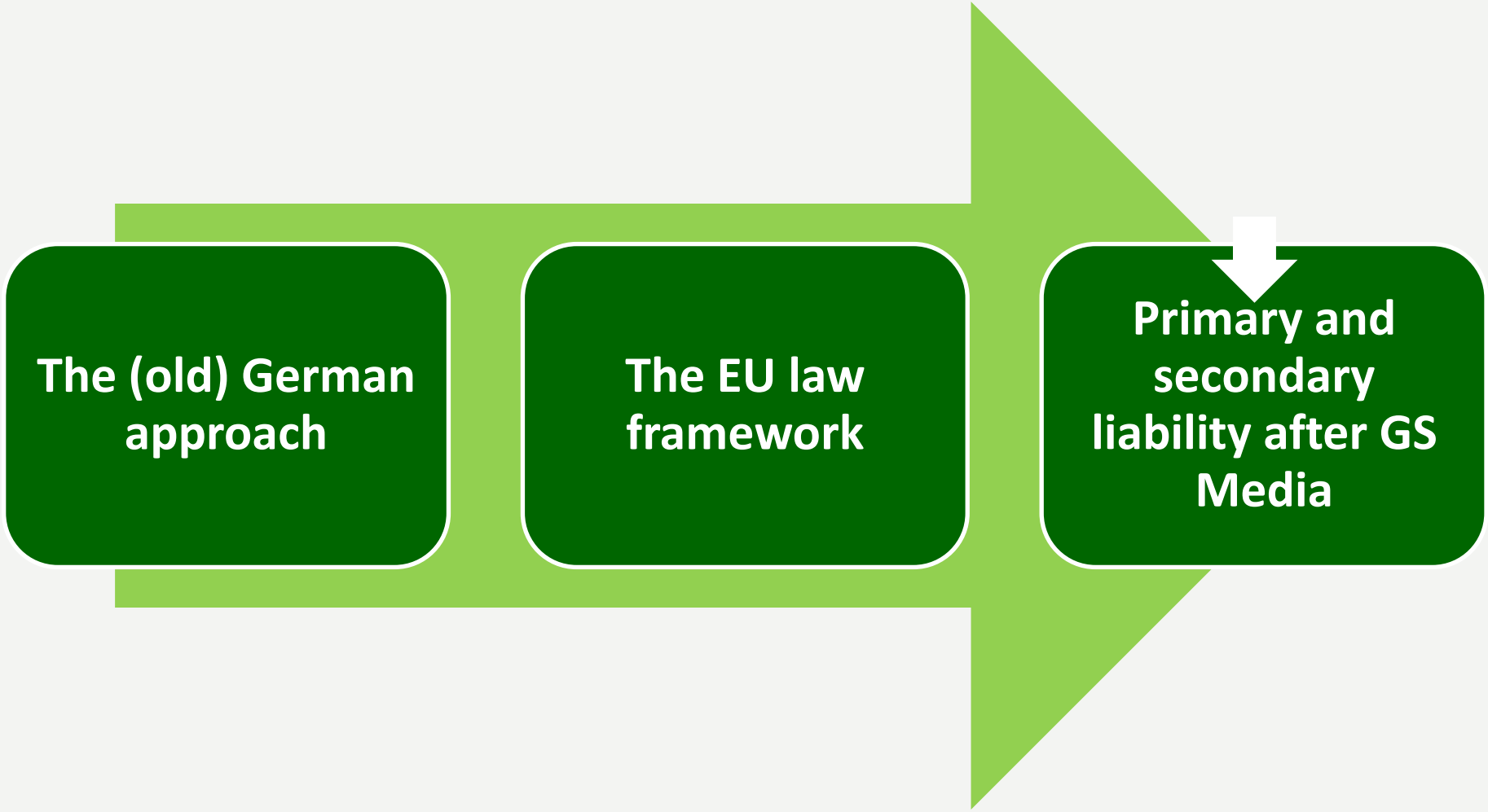
Arts 12-15 ECD

Liability: Arts 2-4 and 8 (3) InfoSoc Dir

- Primary liability: Arts 2-4 InfoSoc, in particular Art 3 InfoSoc
  - Full harmonisation (*Svensson*)
  - Communication to the public = act of communication + public (indeterminate, fairly large number + new public / new technology) (*Svensson, Reha Training*)
- Secondary liability: Art 8 (3) InfoSoc
  - injunction against intermediaries whose services are used by a third party to infringe a copyright or related right
  - conditions and modalities left to member states (Recital 59 (5) InfoSoc)
- Clear distinction (only) in TM law (*Google France, L'Oréal v eBay*)

Exemption: Arts 12-15 ECD

- Most important categories: providing access (Art 12 ECD) and hosting (Art 14 ECD)
- "Negative" conditions → only say when member states can't impose liability, not when they must → no fine-tuning between ECR and InfoSoc
- Only apply to activities "of a mere technical, automatic and passive nature" (Recital 42, Google France)
- How about active intermediaries: full liability or Art 8 (3)?
- Application to injunctive relief? Yes, but…
  - *McFadden*, on Art 12 ECD: damages excluded, termination of infringement can still be required
  - But: proportionality requirement and Art 15 ECD
  - Art 14 ECD might well be different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3. Primary and secondary infringement: the two-step test

(1)

- Communication = any making available (incl linking)

(2)

- Public = indeterminate, rather large group
- New public or new technical means

Activity of intermediaries as "communication to the public"? The situation before GS Media

- Broad concept of communication
  - "any transmission of the protected works, irrespective of the technical means or process used"
  - Includes linking (*Svensson*)
  - criticised as too broad (AG Wathelet, European Copyright Society)
- But no liability if work has already been made fully available by right owner before activity of intermediary
- Who is "communicating" when content is uploaded onto a platform by users?
  - Unclear
  - Two or more persons can "communicate" when they both offer works to an additional public and offer an autonomous service for profit (*Airfield/Sabam*)

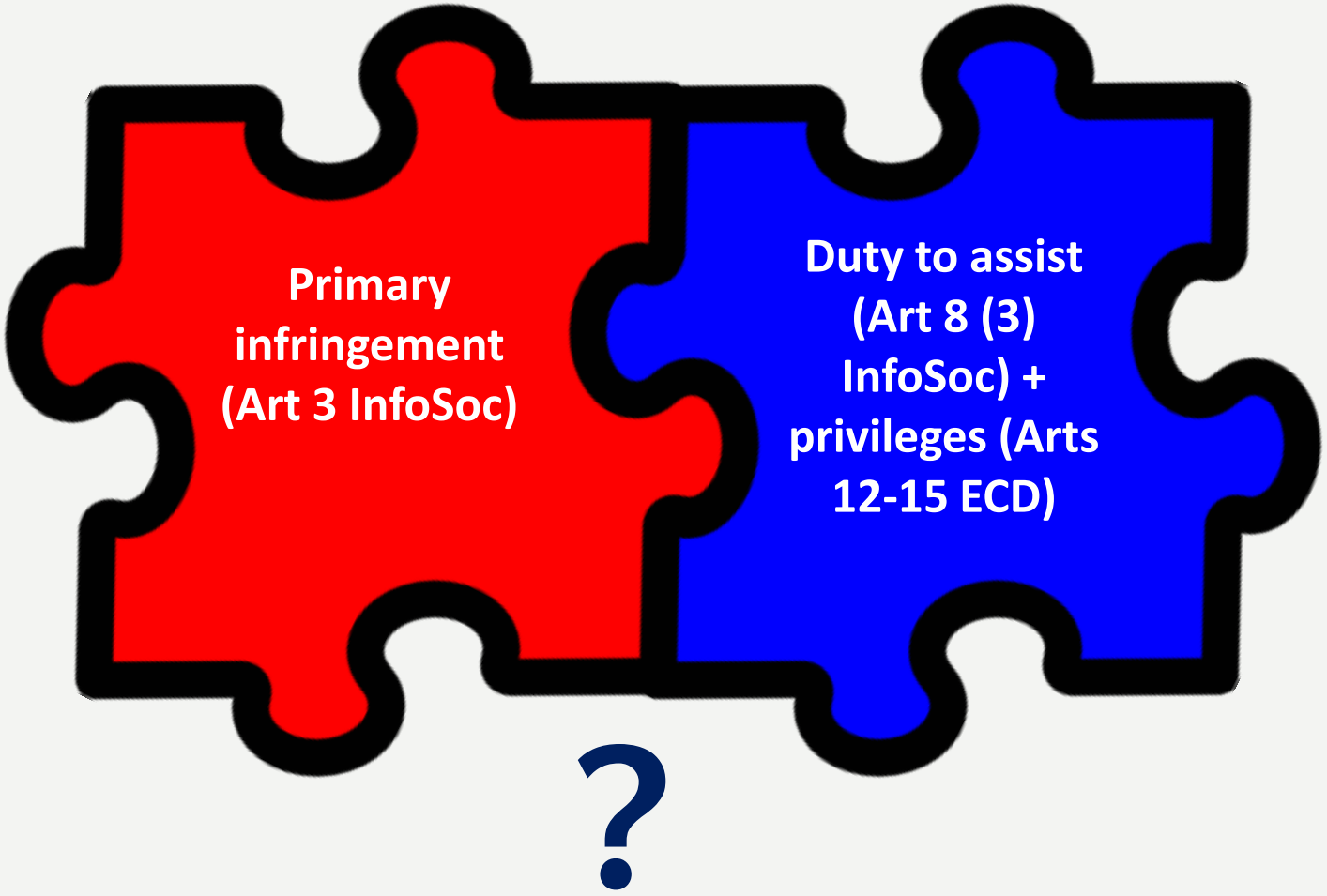
Activity of intermediaries as “communication to the public”? The situation after GS Media

- Rigid two-step test replaced by bouquet of “several complementary criteria”
  - user intervenes in full knowledge of the consequences in order to give full access to its customers
  - public = indeterminate and fairly large number
  - New public or new technical means
  - profit-making nature is relevant
- Criteria for non-profit hyperlinks to illegal works resemble Art 14 ECD and “Störerhaftung” criteria
- But presumption of knowledge in case of commercial services, can be rebutted if it is shown that the “necessary checks” have been carried out

Potential consequences of GS Media

- No distinction primary ↔ secondary infringement
- This is apparently also what the Commission thinks → Recital (38)
  - Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, **thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption** provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council34 .
- Duties of care of intermediaries to be determined on a case by case basis under Art 3 InfoSoc, on the basis of "several complimentary criteria"
- Onus of proof for "unauthorised" nature of content on claimant? Yes, says OLG Munich ZUM 2016, 993 – *Die Realität III*

3. Primary and secondary infringement after GS Media



Why this is dangerous …

- Full harmonisation → competence given to member states under recital 59 (5) InfoSoc severely restricted
- Distinction between act of use and mere facilitation of infringement gets blurred
  - Which may not by itself be a problem, see BGH case-law on personality rights
- But case-by-case determination by CJEU results in legal uncertainty, particularly because
  - the CJEU only hears a limited number of cases
  - and cannot decide on the facts
- The CJEU tends to be influenced by the facts of individual cases and to over-generalise → hard cases make bad law
  - This is evident in GS Media!

The way forward (1): Germany

- Can the distinction between (narrowly defined) primary infringement and "Störerhaftung" be upheld?
- Full harmonisation under Art 3 → at least linking to unauthorised source is primary infringement under GS Media criteria
  - full liability including damages
- In platform cases there may still be room to argue that there is a difference between "own use" and the liability of a non-privileged infringer
  - see *L'Oréal v eBay*
  - But the BGH will have to request a preliminary reference once this comes up.

The way forward (2): EU

- The present situation is unsatisfactory because
  - there is a lack of legal certainty
  - full infringement liability for intermediaries may be inappropriate even when duty of care has been infringed
  - the comparison with TM law suggests a distinction between own use and facilitating someone else's infringement
- So legislation will have to step in, Art 13 Draft directive on © in the single market is inadequate.
- Primary infringement: criteria and exceptions covering certain platform activities, compensation requirement
- Secondary infringement: guidelines for duties of care, appropriate exceptions, eg for search engine operators

Vielen Dank

für Ihre

Aufmerksamkeit!