

Tongji University and
Shanghai International College of Intellectual Property Law

5th Workshop on China-EU Innovation and Competition
Intellectual Property and Competition in the Age of AI+

The new structure of intermediary liability under EU (and German) copyright law

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Three structural developments

1. Europeanization
2. Tightening of liability
3. Differentiation between intermediaries

© and intermediaries

© law liability

CDSMD 2019/790

InfoSocD 2001/29

General platform
regulation

Digital Services Act
(DSA, Reg 2022/2065)

© liability

The new system of © liability (vgl. Peukert, Urheberrecht, 19th ed 2023)

1. Online content sharing service providers (OCSSPs)

- Art. 17 CDSMD ([Ger UrhDaG](#)) regime as lex specialis



What is an OCSSP (Art. 2(6) CDSMD, § 2(1) UrhDaG)?

An information society service that

1. has as its main purpose, exclusively or at least in part, the storage and making available to the public of a large amount of copyright-protected content uploaded by third parties,
2. organises such content
3. advertises such content for the purpose of making a profit, and
4. competes with online content services for the same target groups.

An OCSSP is directly liable for an unauthorized upload



Unless it

- Made best efforts to obtain authorisation +
- Ensured unavailability +
- NTD + staydown

© liability

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1. Online content sharing service providers
(OCSSPs)

- Art. 17 CDSMD ([Ger UrhDaG](#)) regime as lex specialis

2. Other host providers and search engines

- Direct liability according to [CJEU YouTube and Cyando?](#)
- Direct liability of online market places under art. 4 InfoSoc?



Host providers
and search
engines are not
directly liable



unless they
contribute to the
infringement

- Knowingly promoting infringements
- No expeditious NTD
- No appropriate notice and prevent measures in place

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3. Access providers and domain providers

- Subsidiary liability under art. 8(3) InfoSoc



- CJEU UPC Telekabel Wien 2014
 - The term ‘intermediary’ covers any person who carries a third party’s infringement ... in a network.
 - Since ISPs are an inevitable actor in any transmission of an infringement over the internet, they are ‘intermediaries’ and blocking orders have to be available
- Restrictive implementation by BGH I ZR 111/21 - DNS-Sperre
 - Blocking order is a subsidiary remedy of last resort

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4. Indirect liability for other infringements

- German indirect liability principles including *Störerhaftung*

© and intermediaries

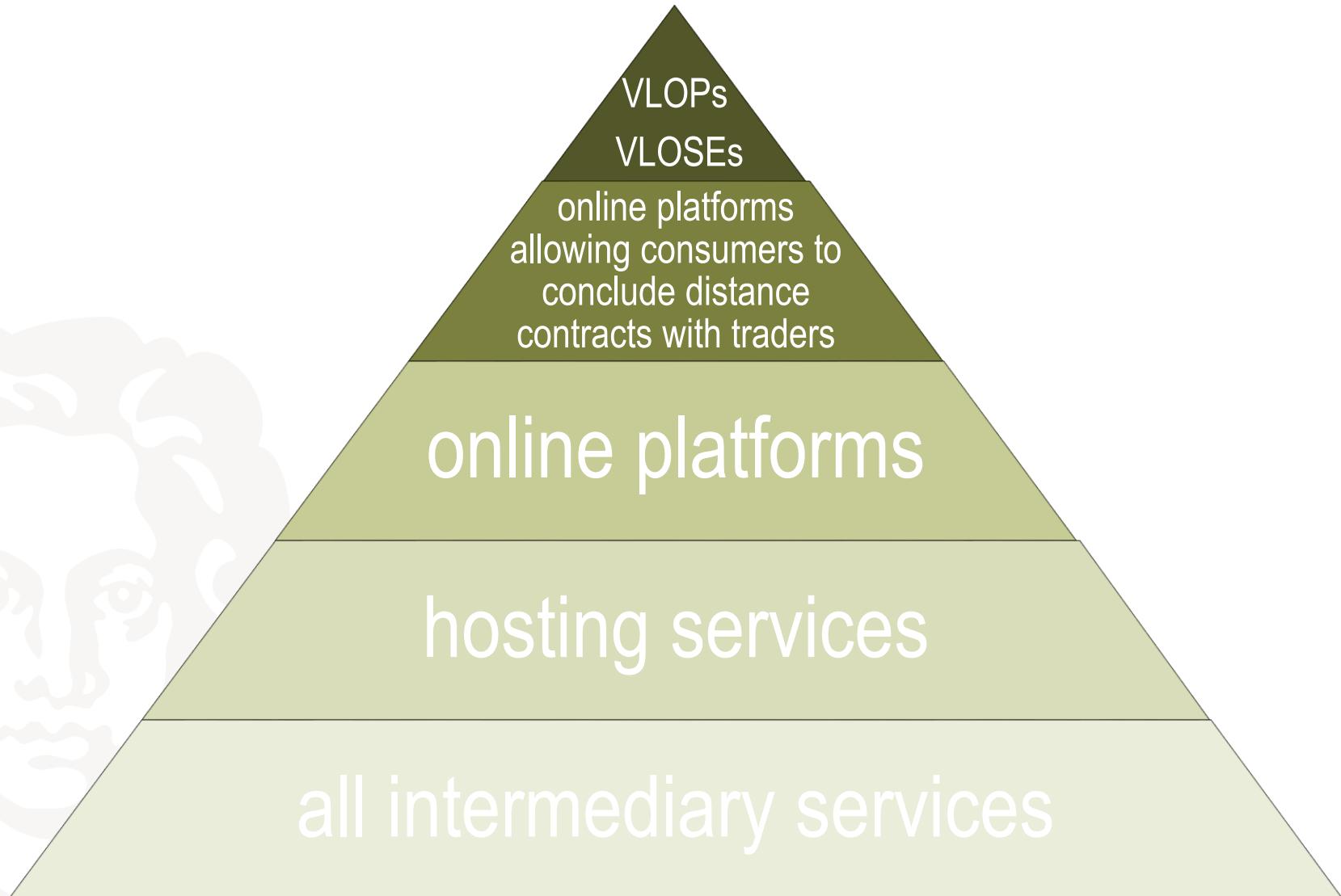
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DSA obligations

- In order to foster a safe, predictable and trusted online environment, the DSA establishes
 - for ‘mere conduit’, ‘caching’, ‘hosting’ services and search engines
 - a framework for the conditional **exemption from liability** (≈ E-Commerce Directive);
 - rules on **specific due diligence obligations**
 - In particular: minimize the dissemination of illegal content online, including copyright infringements

DSA obligations



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Peukert et al, IIC
2022, 358