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# RECENT CJEU CASE LAW AND ITS IMPACT ON EU COPYRIGHT POLICY

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Some data regarding relevant CJEU activity

# The 2015 CJEU Report

- In 2015 CJEU received 22 new IP references
  - 13 in 2014
- Duration of proceedings reduced
  - References for a preliminary ruling: 15 months (16.3 in 2013)
  - Cases decided without AG Opinion: 43%

# Recent CJEU decisions



**Everything.**

- What does originality mean?
- Can you private copy from unlawful sources?
- What is a parody?
- Is transmission of a work required to have an act of communication to the public?
- Do you need permission to link?
- Do you need permission to advertise works for sale?
- Can libraries digitise their collections?
- Can libraries e-lend works?
- Who is an intermediary?

Linking  
GS Media, C-160/15



# Right of communication to the public

Article 3(1) Directive 2001/29 (InfoSoc Directive)

Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

# *Svensson, C-466/12 (2014)*

1. Act of communication: mere possibility to access work suffices (no actual transmission of work required)
2. Must be directed at a new public, *ie* public that was not taken into account by the copyright holders when they authorised the initial communication to the public
  - Not the case if work 'freely accessible' on a website at which hyperlink is directed

So logically any link to content published without rightholder's consent would be potentially infringing?



## Linking after *GS Media*, C-160/15

Accessibility of content	Content published with rightholder's consent	Profit-making intention	Knowledge that content linked to is unlawful	Act of communication to the public	Potential infringement
Freely accessible	Yes	n/a	n/a	No ( <i>Svensson</i> , <i>GS Media</i> )	No
Not freely accessible	Yes	n/a	n/a	Yes ( <i>BestWater</i> , <i>GS Media</i> )	Yes
Freely accessible	No	No	No	No ( <i>GS Media</i> )	No
Freely accessible	No	No	Yes (eg because notified)	Yes ( <i>GS Media</i> )	Yes*
Freely accessible	No	Yes	Presumed (rebuttable presumption)	Yes ( <i>GS Media</i> )	Yes*
Not freely accessible	No	n/a	n/a	Yes	Yes

\*If rightholder notifies link provider (without prior knowledge of unlawfulness) that content linked to is unlawful and he refuses to remove the link, and exceptions in Article 5(3) InfoSoc Directive are inapplicable.

# Conclusion

- Not all links are bad
- A fair balance between different interests must be struck
- To determine what amounts to a 'communication', the notion of 'indispensable intervention' is central

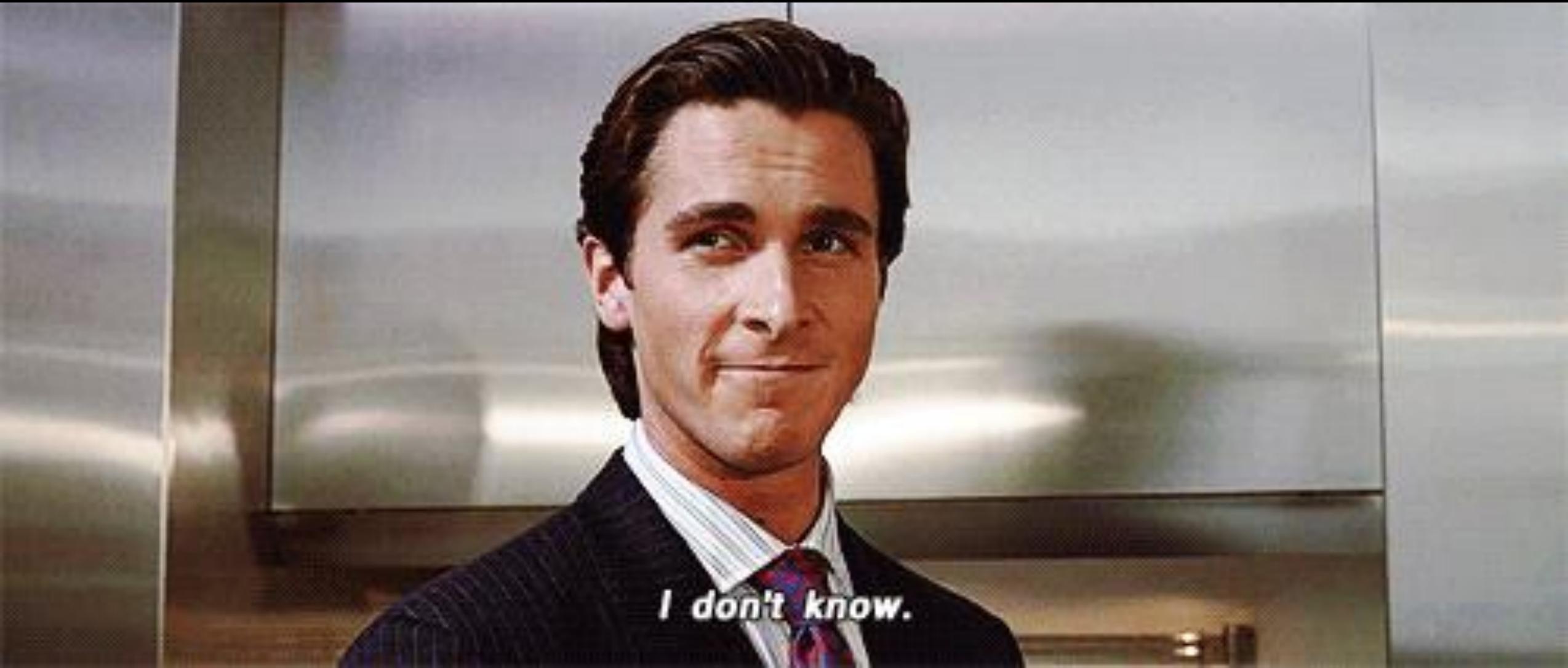
Intermediaries  
*Mc Fadden, C-484/14*



# Conclusion

- Free WiFi provider can be an intermediary
  - No need for contractual relationship
- Can be addressee of injunctions
  - Not to terminate connection
  - But it may be to password-protecting internet connection
    - Does not restrict essence of freedom to conduct business
    - Does not undermine freedom of information
    - May dissuade users from infringement

How are these decisions to be seen  
in the context of EU Commission's policy action?



# Value gap

Recitals 38-39+Article 13 draft Directive on Copyright in the Digital Single Market

- Where ISPs
  - store and provide access to the public to copyright works uploaded by their users
  - thereby performing an act of communication to the public
- They
  - are obliged to conclude licensing agreements with rightholders, unless they are eligible for Ecommerce Directive safe harbour
  - should take appropriate and proportionate measures, such as implementing effective technologies

# Press publishers' right

Article 11 draft Directive on Copyright in the Digital Single Market

- Press publishers will the rights to authorise the reproduction and making available for the digital use of their press publications
- These rights shall expire 20 years after the publication of the press publication

# WiFi4EU

- €120m investment to promote free WiFi access
- Free WiFi to be available in parks, squares, libraries, public buildings to benefit citizens and institutions with a public mission

# Conclusion

- Who's shaping EU copyright?
- Can policy action depart/disregard CJEU jurisprudence?

Thanks for your  
attention!



WHY DON'T I FIND THAT REASSURING?

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