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GS MEDIA AND THE VALUE GAP PROPOSAL: HAPPY AT LAST?

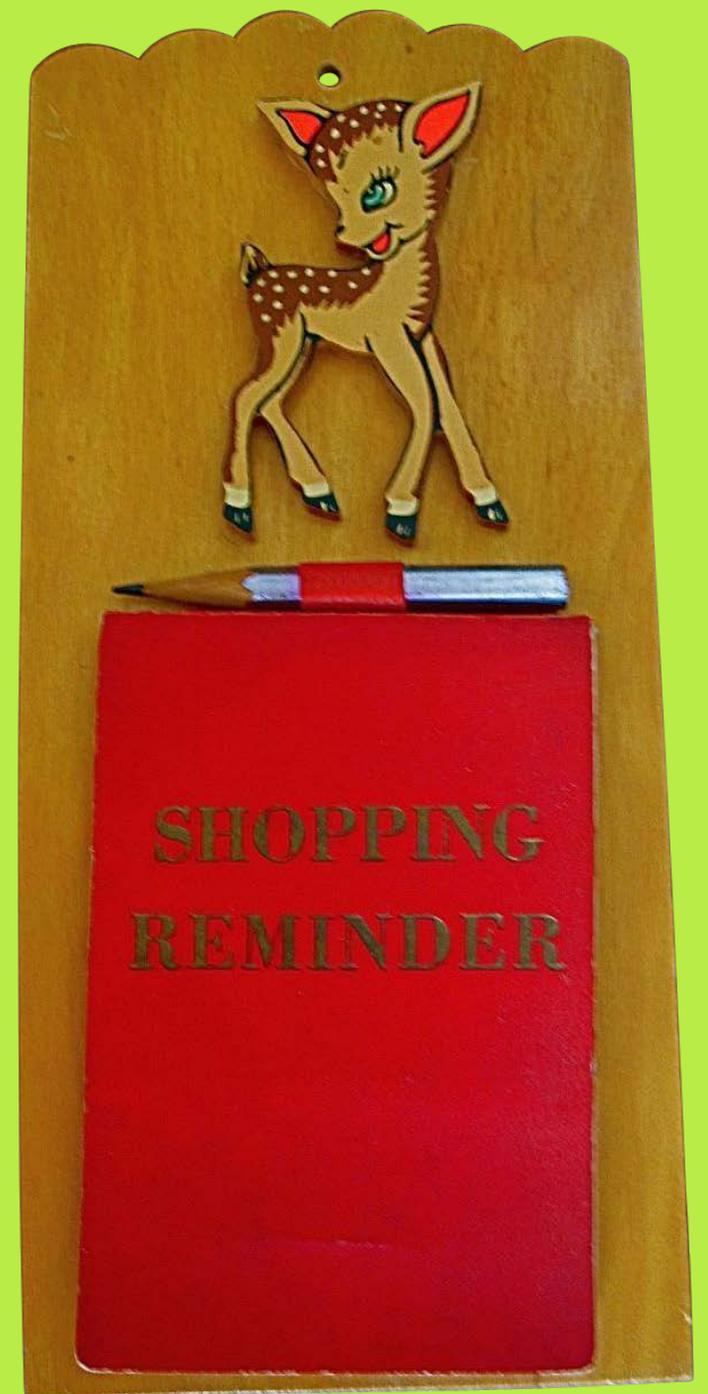
Eleonora Rosati

Vereniging voor Auteursrecht

Amsterdam, 14 October 2016

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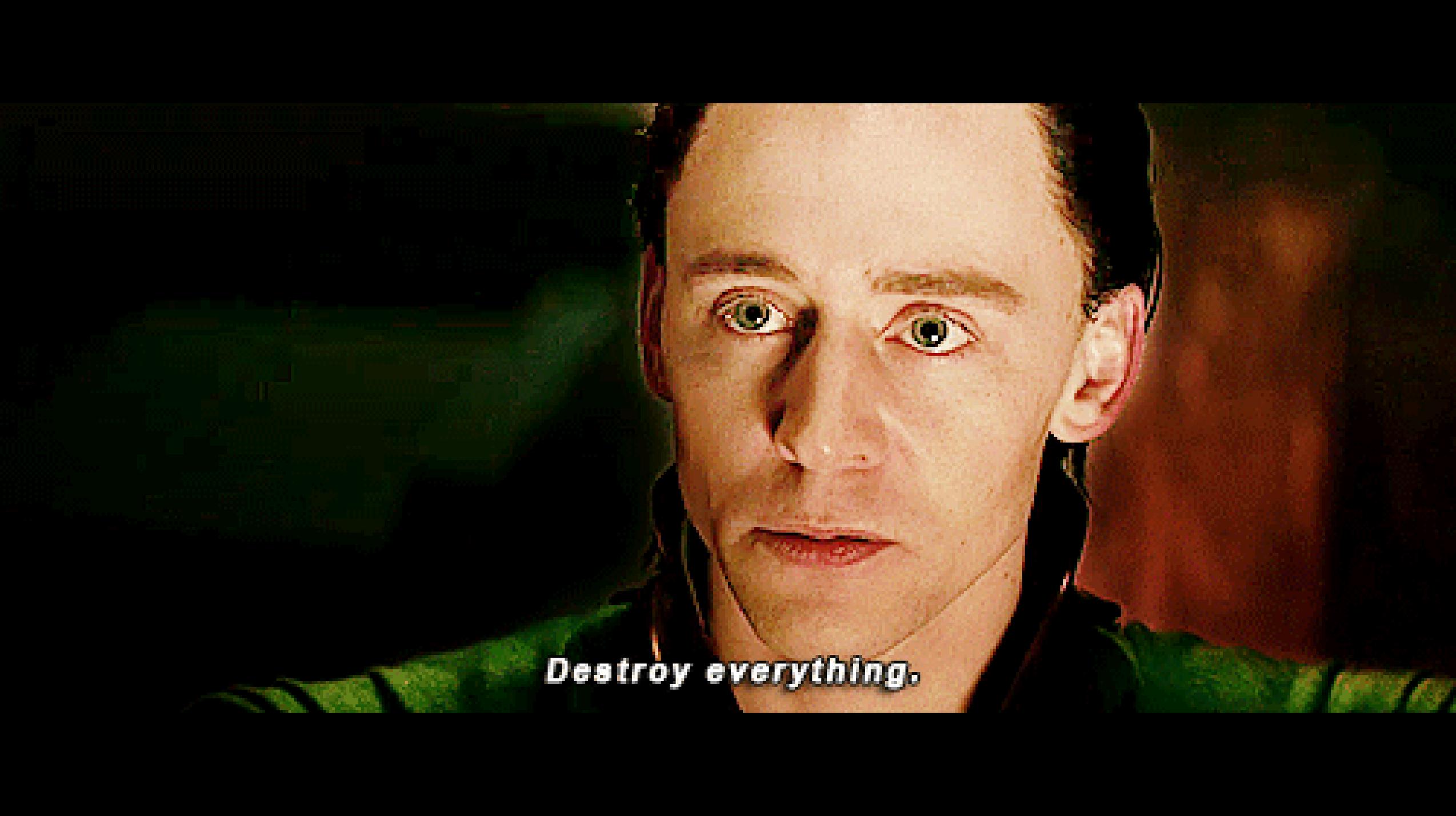


State of the art: CJEU and Commission



Some data regarding relevant CJEU activity: 2015 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%

A close-up shot of a man with light skin and dark hair, looking directly at the camera with a wide-eyed, shocked expression. He is wearing a dark green, textured garment. The background is dark and out of focus, with a vertical wooden post visible on the right side.

Destroy everything.

Meanwhile the Commission ...

My first priority will be to put policies that create growth and jobs ... As a key ingredient for this, we must create a digital single market for consumers and businesses – making use of the great opportunities of digital technologies which know no borders.

To do so, we will need to have the courage to break down national silos in ... copyright ... and in competition law.





Günther H. Oettinger

@GOettingerEU



Modern **#copyright** rules,
#DigitalSingleMarket & **#investEU**
package are the key goals for 2015.
Let's work on them together.

9:05am - 6 Jan 15



Andrus Ansip @Ansip_EU · Mar 19

#copyright rules fit for digital age? I don't think so @lisboncouncil -
#DigitalSingleMarket to support creators & ensure access to content



Andrus Ansip @Ansip_EU · Feb 23

We are reforming & modernising **#copyright** rules to get rid of pointless
barriers on transfer & access to digital content **#AskAnsip**



Andrus Ansip @Ansip_EU · Apr 10

I hear the concerns of European filmmakers, need right balance in **#copyright**
between different interests and preserving cultural diversity.

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, GS Media</i>)	No
Not freely accessible	Yes	n/a	n/a	Yes (<i>BestWater, 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

The proposal (for a directive)



Value gap

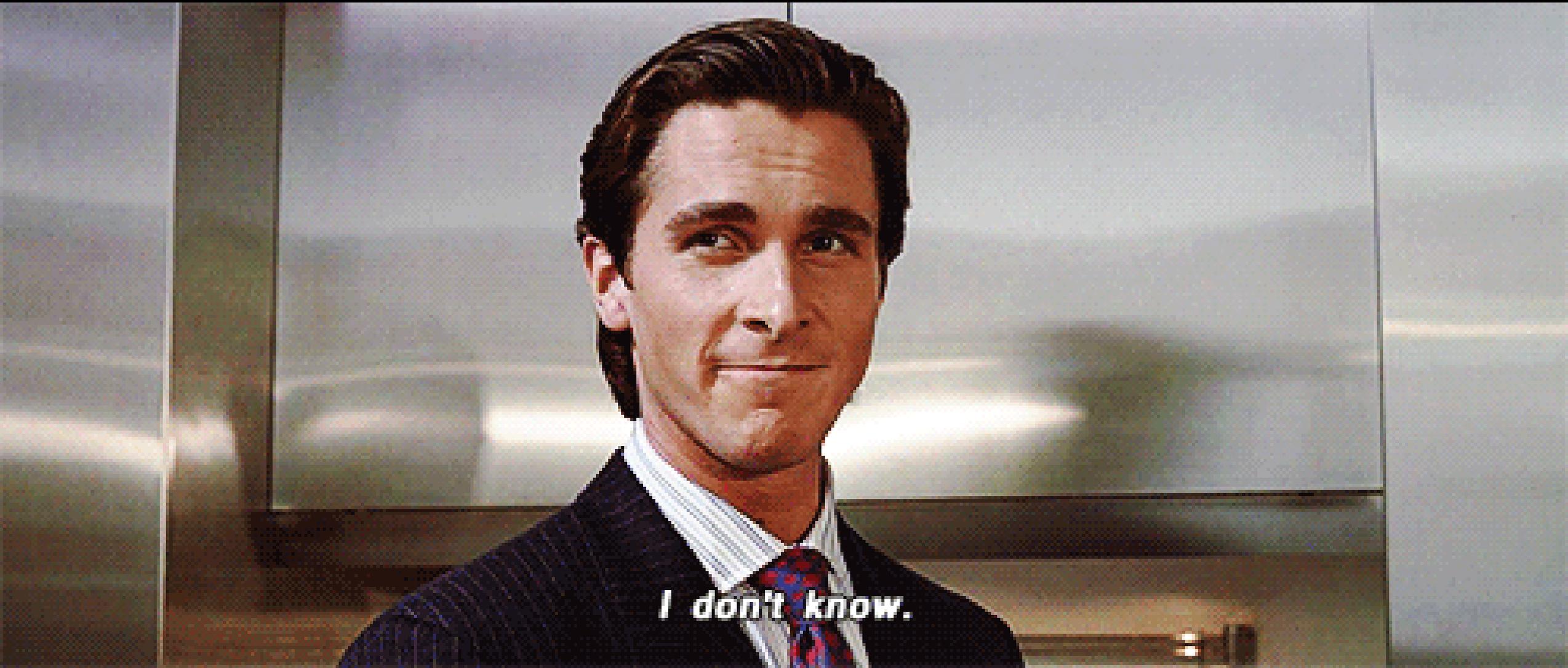
Recitals 38-39+Article 13

- 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 (also where no obligation to conclude licensing agreements)
- What is missing
 - Relationship with Ecommerce Directive: Articles 14 and 15
 - Definition of what amounts to ‘communication to the public’

The indispensable role of the user

“The user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the ... work“ [35]

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



I don't know.

3 points

- Legislative progress: unlikely to be a walk in the park
- Can policy action depart/disregard CJEU jurisprudence?
- All in all ...



**Thanks for your
attention!**



WHY DON'T I FIND THAT REASSURING?

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