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CEPIC's campaign for a better protection of images online

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OLSWANG



Challenges of the image industry

Shortcomings of the existing legal framework

CEPIC's campaign

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Contrast between demand and revenues

In particular: (New) Google Images Search

Unauthorized use of third party content as a new business model

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Contrast Between Demand and Revenues

High demand on images

- 1 trillion photos taken in 2014
- 1.8 billion photos were shared on Flickr, Snapchat, Instagram and Facebook in May 2014
- More photos are consumed than ever before



Low revenues for the image industry

- 85% of images found online by visual search systems online are unlawful copies
- Declining prices for images
- Declining traffic to websites with original images

In particular: (New) Google Images Search (1)

- Google controls more than **90 % of the image search market in the EU**
- Google **Images Search** generates 519 million unique visitors per month = **45% of Google's total search traffic**
- Google **distributes third party content for free**

The image shows a screenshot of a National Geographic article titled "Poison Frogs Make Their Babies Toxic, Too" by Karl Gruber. The article discusses how strawberry poison frogs (Daphnophryne) in Costa Rica give their newborn tadpoles a built-in weapon against predators: alkaloids. A large, vibrant photograph of a red and black spotted poison frog is featured. A yellow box highlights this frog, and a zoomed-in view of the same frog is shown in the foreground, illustrating how Google Images Search displays third-party content for free.

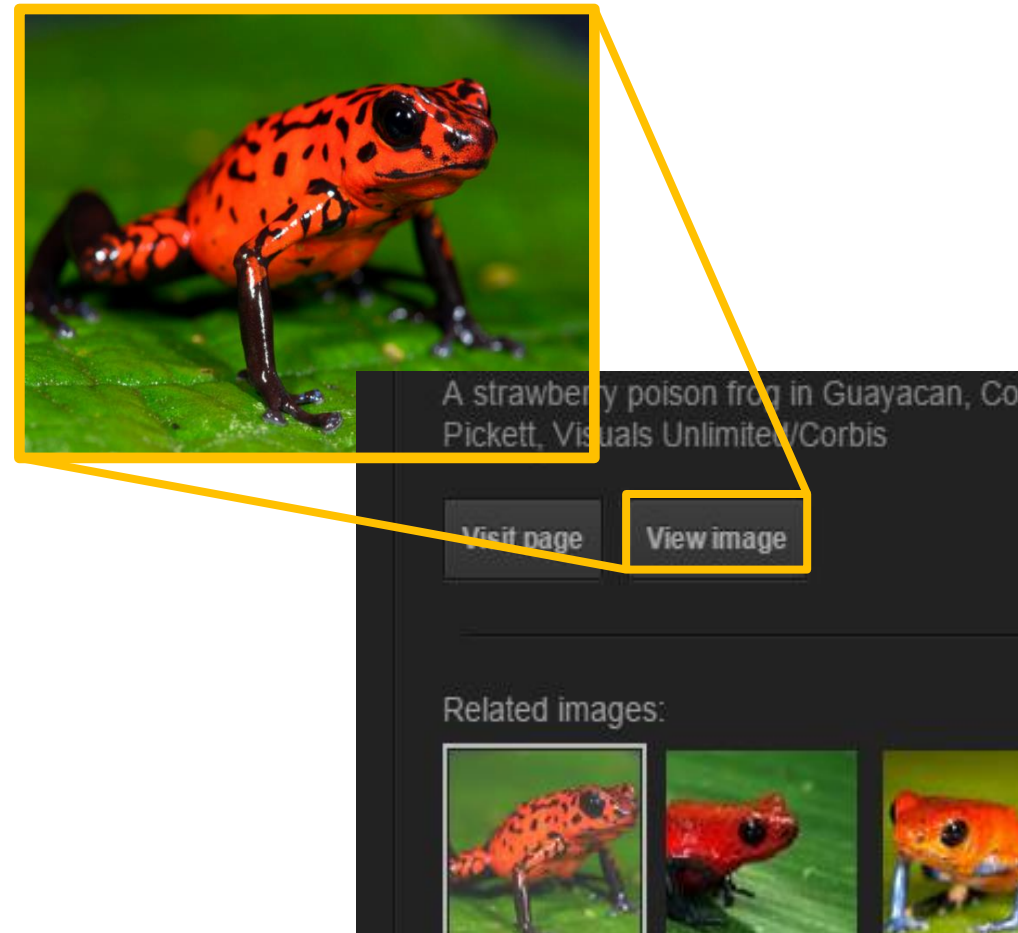
In particular: (New) Google Images Search (2)

Effects of new search design on users:

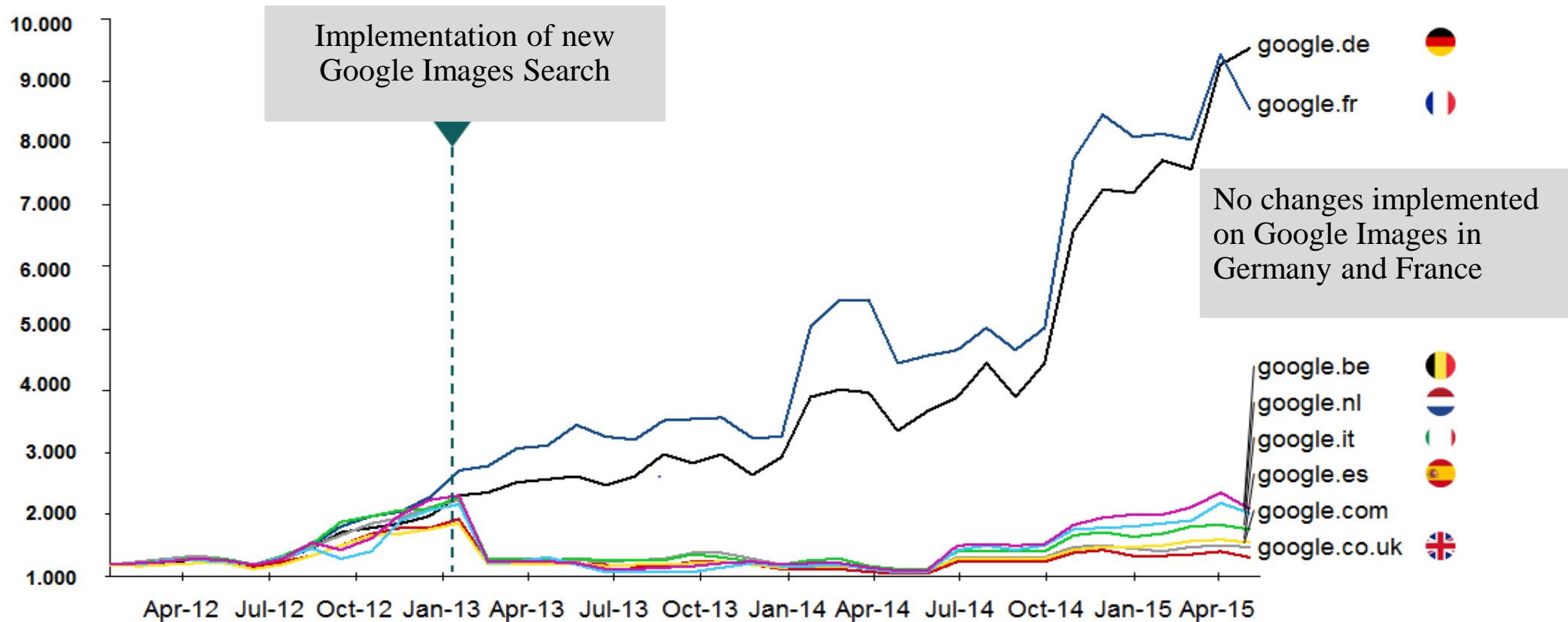
- **more clicks** to get to the final image
- **no correct image descriptions** in lack of display of EXIF-information
- **risk of unconscious copyright infringements**

Effects of new search design on image providers:

- facilitation of **illegal copying**
- **less traffic** and revenue
- omitting the name **deprives authors of the credit** they deserve
- framing increases the **bandwidth use** of hosting site
- images are viewed **out of context**

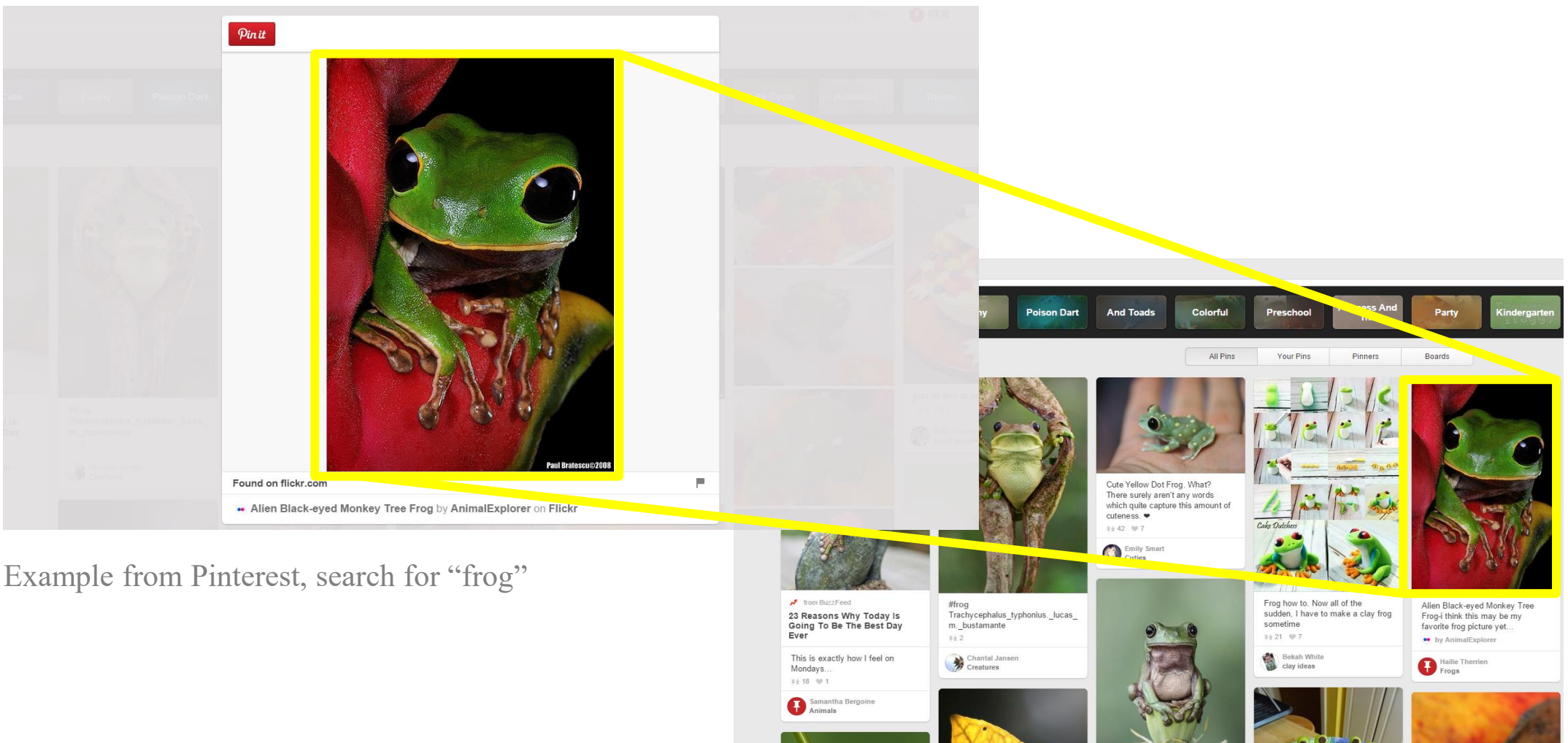


In particular: (New) Google Images Search (3) Development of traffic to sources



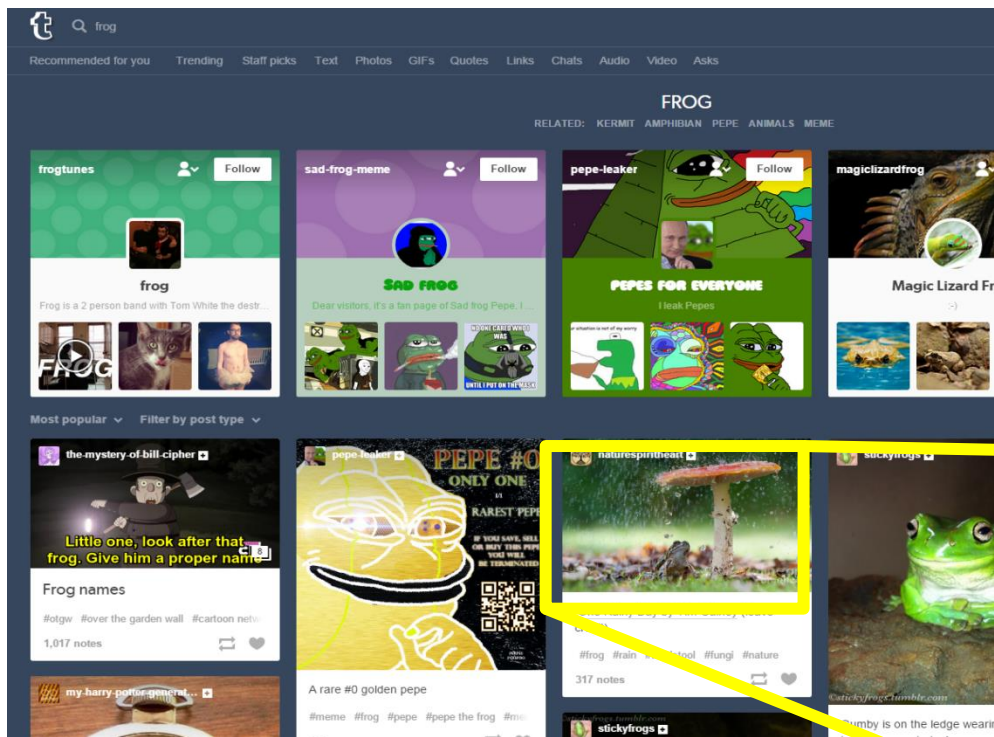
Traffic from Google Image Search to image providers' websites, by referring domain, Jan 2012 - Apr 2015

Unauthorized Use of Third Party Content as a New Business Model (1)

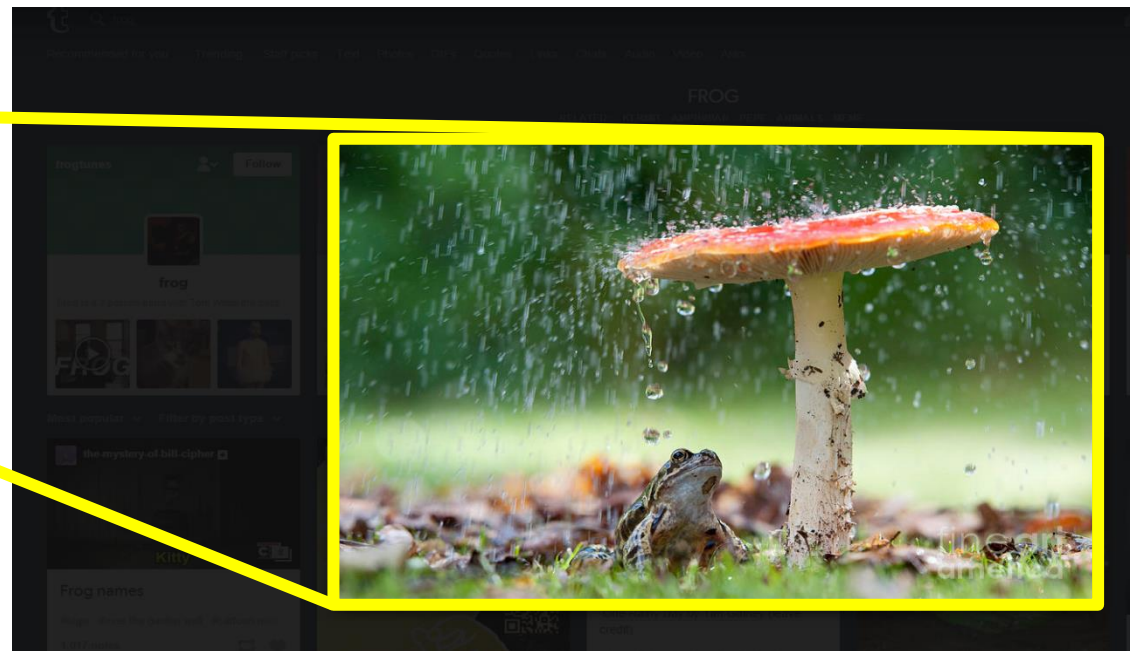


Example from Pinterest, search for “frog”

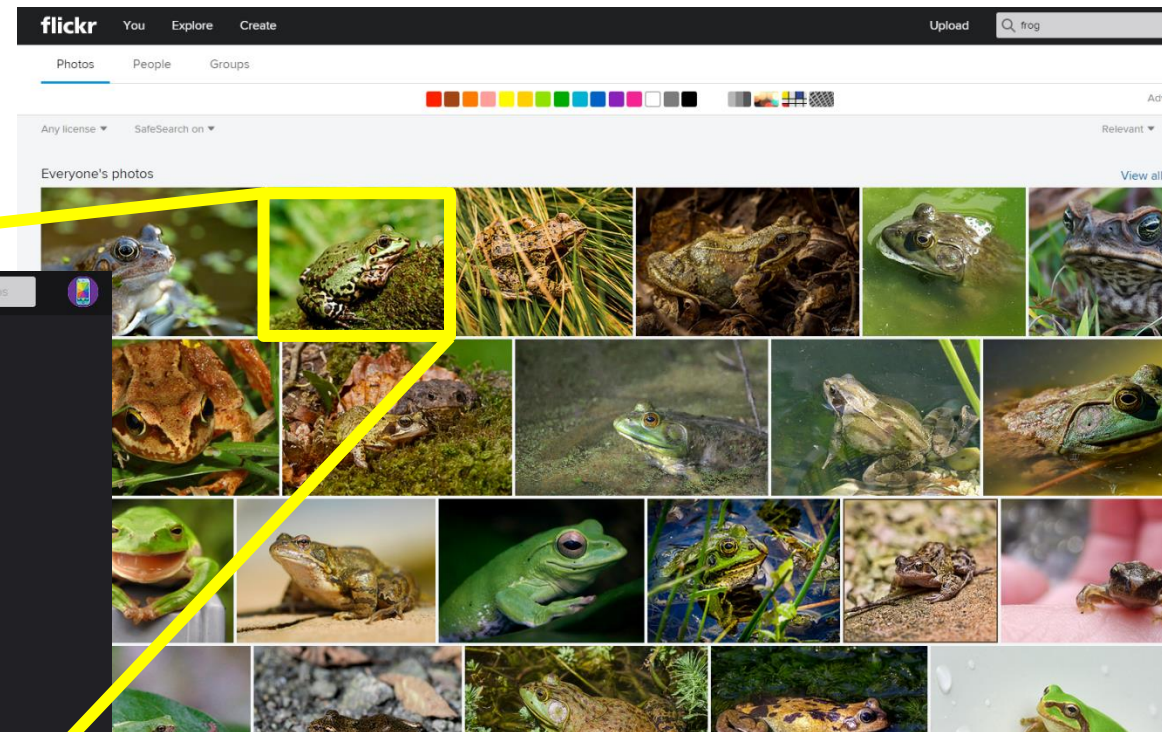
Unauthorized Use of Third Party Content as a New Business Model (2)



Example from Tumblr, search for "frog"



Unauthorized Use of Third Party Content as a New Business Model (3)



Example from Flickr, search for "frog"

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Framing

Host provider privilege

Implied consent

Framing (1)

The authorisation of the copyright holders is not required “were the referring court to find [..] that when Internet users click on the link at issue, the work appears in such a way as to **give the impression** that it is **appearing on the site on which that link is found, whereas in fact that work comes from another site.**”

CJEU, judgment of 13 February 2014, Case C466/12, Svensson, para. 29

Framing (2)

- CJEU draws **no differentiation between hyperlinking and framing**
- A communication is only subject to the right holder's authorization under **Article 3 InfoSoc-Directive** if it is directed to a **“new public”** (= a public that has not been taken into account by the rightholder upon publishing his work online)
- When published online and without access restriction **all internet** users are taken into account
- There is **no room for a “new public”** for works published online
- **Consequence:** Hyperlinking and framing are **no communication to a “new public”** subject to the right holders' authorization

Framing (3)

Questions for right holders:

- Is it appropriate to treat hyperlinks and framing equally?
- What about the **similarities between framing and the uploading of images?**
- Wouldn't the **right to communication to the public be subject to exhaustion** if understood this way?

Host Provider Privilege (1)

- Host providers are platforms that **merely host third party content**
- Most **aggregators** and **social media platforms** rely on this privilege
- Under Article 14 E-Commerce Directive host providers can only be held liable upon **knowledge or awareness**
- Right holders depend on ineffective **notice-and-takedown** procedures to trigger knowledge or awareness
- **Consequence:** it is almost impossible to enforce copyright towards host providers

Host Provider Privilege (2)

Questions for right holders:

- Is it appropriate to privilege providers that **actively participate or intervene** in the organisation or presentation of (illegally uploaded) third party content?
- Are **notice-and-takedown procedures** sufficient to enforce copyrights?
- What about automated **filtering and monitoring tools** readily available to host providers to detect infringing content?

Implied Consent (1)

“Thus, having **uploaded images** of her works onto the internet **without protecting these from being found via search engines**, the Claimant has **agreed to images of her works being depicted as thumbnails** in the Defendant’s search engine.”

From the search engine’s point of view this “could objectively be understood as an agreement for the images of the Claimant’s works to be used to the **extent usual for image searches**.”

German Federal Court of Justice, judgment of 29 April 2010, I ZR 69/08, Vorschaubilder I, para. 36

Implied Consent (2)

- **Inconsistent application** of the concept of implied consent on national level
- German case law:
 - Search services are “**common**” on the internet
 - Right holders have **technical tools** at hand **to prevent the finding and displaying** of their works by search engines
 - Publishing of works without such technical measures can be regarded as **implied consent** (granted to anybody) that copies of the work may be used for search purposes

Implied Consent (3)

Questions for right holders:

- Is communication via **robots.txt** really **sufficient / effective**?
- Which exploitations are “**common**”?
- What about **explicit disapprovals**?
- Doesn't the inconsistent application of the implied consent doctrine on national level trigger **uncertainty** among right holders on **EU level**?

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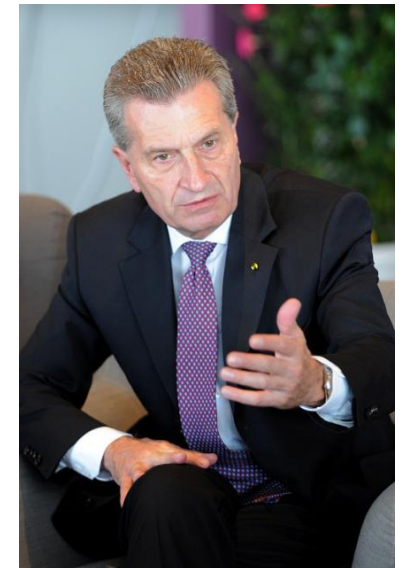
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Unique opportunity for improvement of legal framework

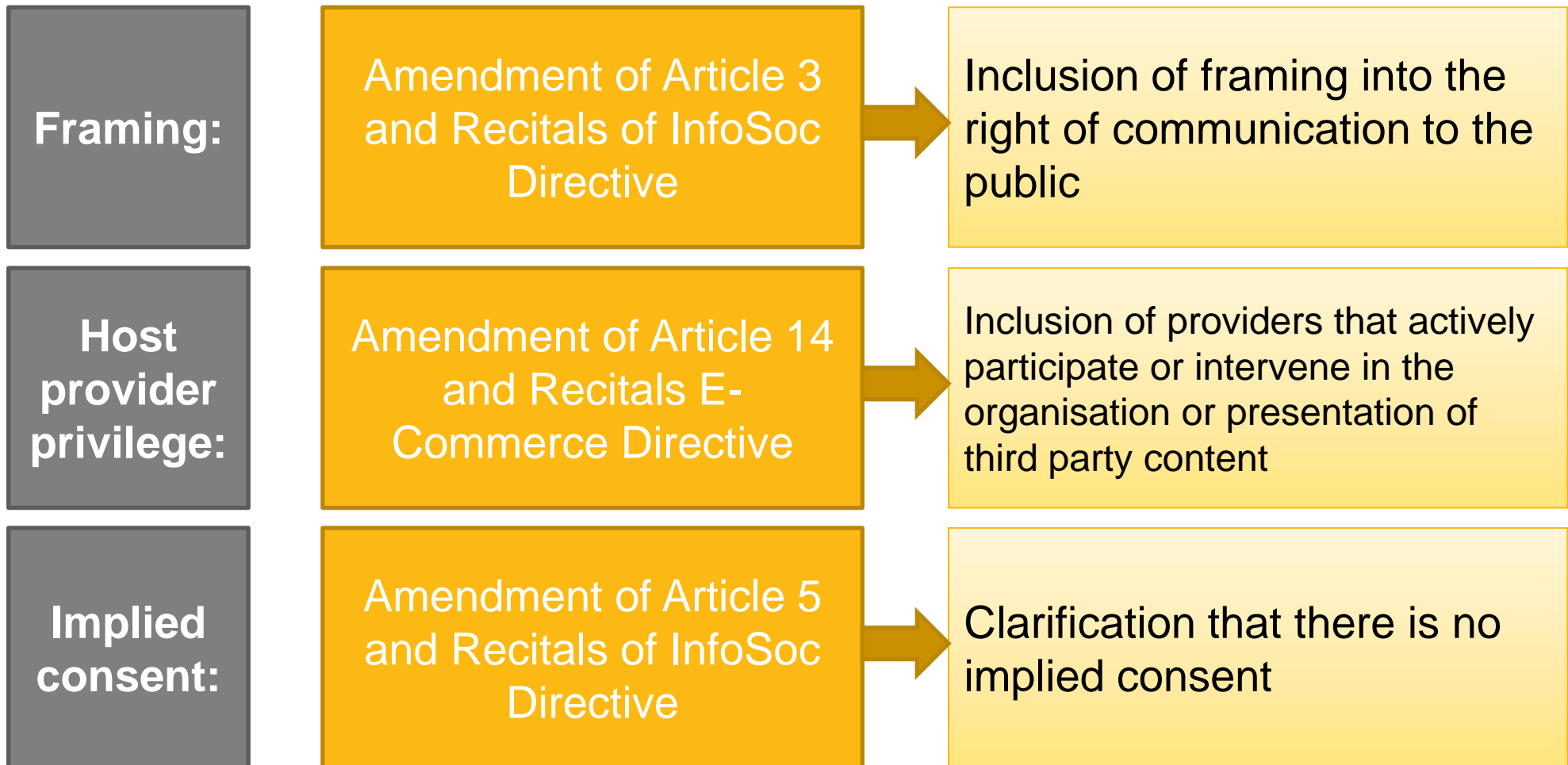
Recommendations to European Legislator

Unique Opportunity for Improvement of Legal Framework

- Several EU institutions are assessing and evaluating EU copyright at the moment:
 - **European Parliament** Legal Affairs Committee will vote on **Julia Reda's report** on the implementation of the InfoSoc Directive on 16 June 2015
 - European Parliament plenary will vote on Julia Reda's report on 8/9 July 2015
 - **Commissioner for Digital Economy & Society Oettinger** is currently working on a reform of copyright on EU level
 - **Commission** has announced the first legislative proposal to be presented by the **end of 2015**



Recommendations to European Legislator



Thank you!

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