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# CEPIC's campaign for a better protection of images online

CEPIC Congress 2015, 4 June 2015, Warsaw  
Thomas Höppner, Berlin

**OLSWANG**



**Challenges of the image industry**

**Shortcomings of the existing legal framework**

**CEPIC's campaign**

**Challenges of the image industry**

**Disparity between demand and revenues for images**

**In particular: (New) Google Image Search**

**Unauthorized use of third party content as a new global business model**

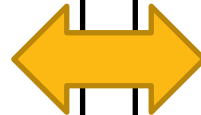
**Shortcomings of the existing legal framework**

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## Disparity Between Demand and Revenues

### **High demand for images..**

- 45% of Google`s search traffic relates to the search for images
- 1.8 billion photos were shared daily on Flickr, Snapchat, Instagram and Facebook in May 2014 (260% annual increase)
- More photos are consumed than ever before

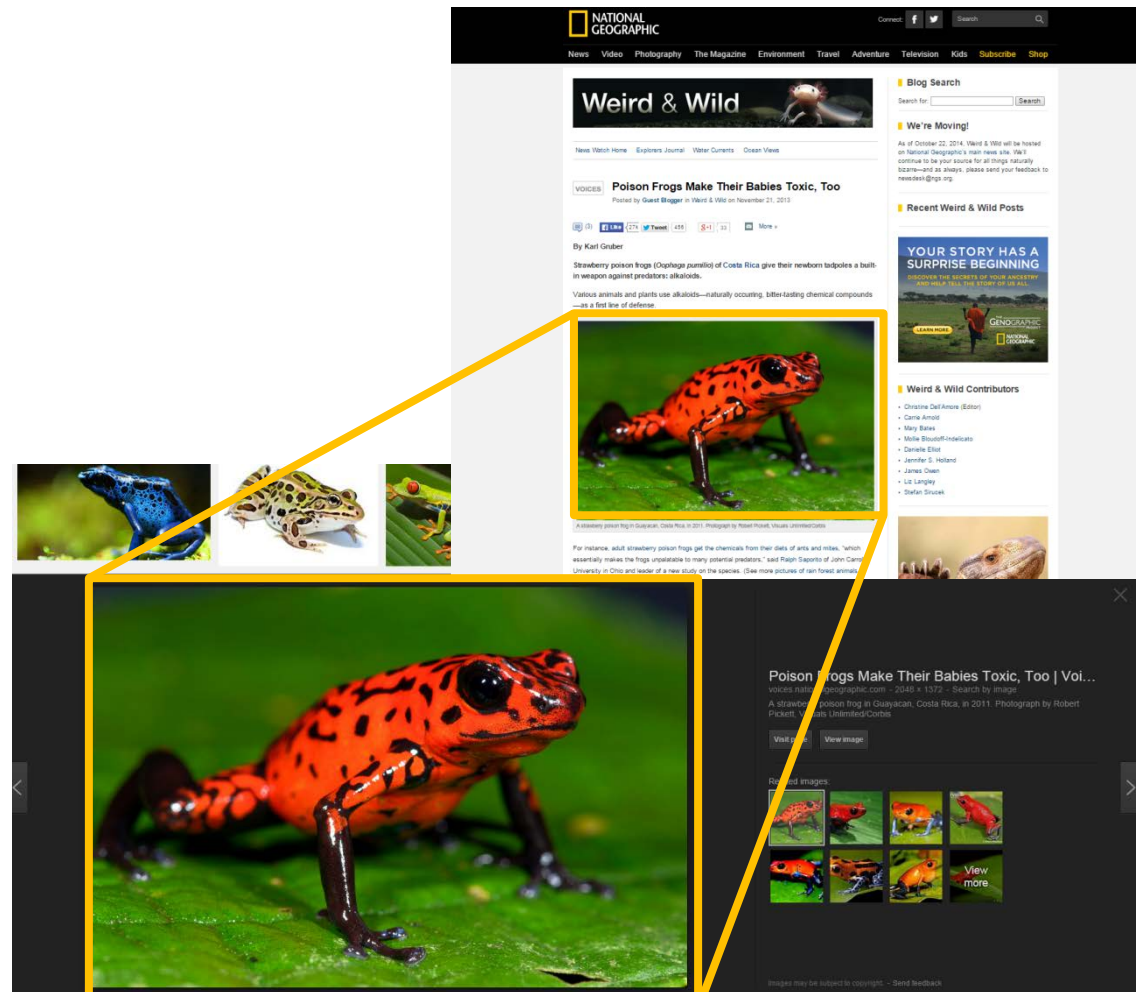


### **..yet declining revenues for the image providers**

- 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 Image Search (1)

- Google controls more than **90 % of the image search market** in the EU
- Google **Images** generates 519 million unique visitors per month
- Google is now the **largest distributor of third party images** (for free)



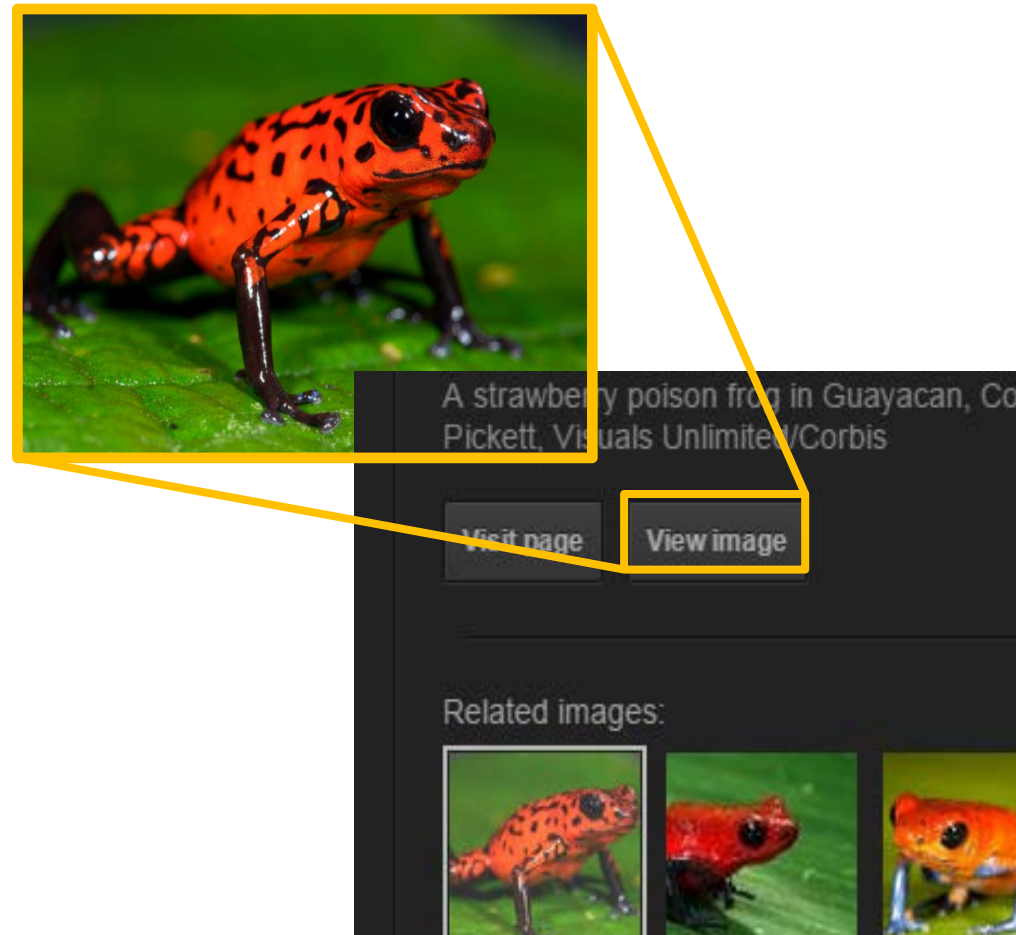
## In particular: (New) Google Image Search (2)

### Effects of new search design on users:

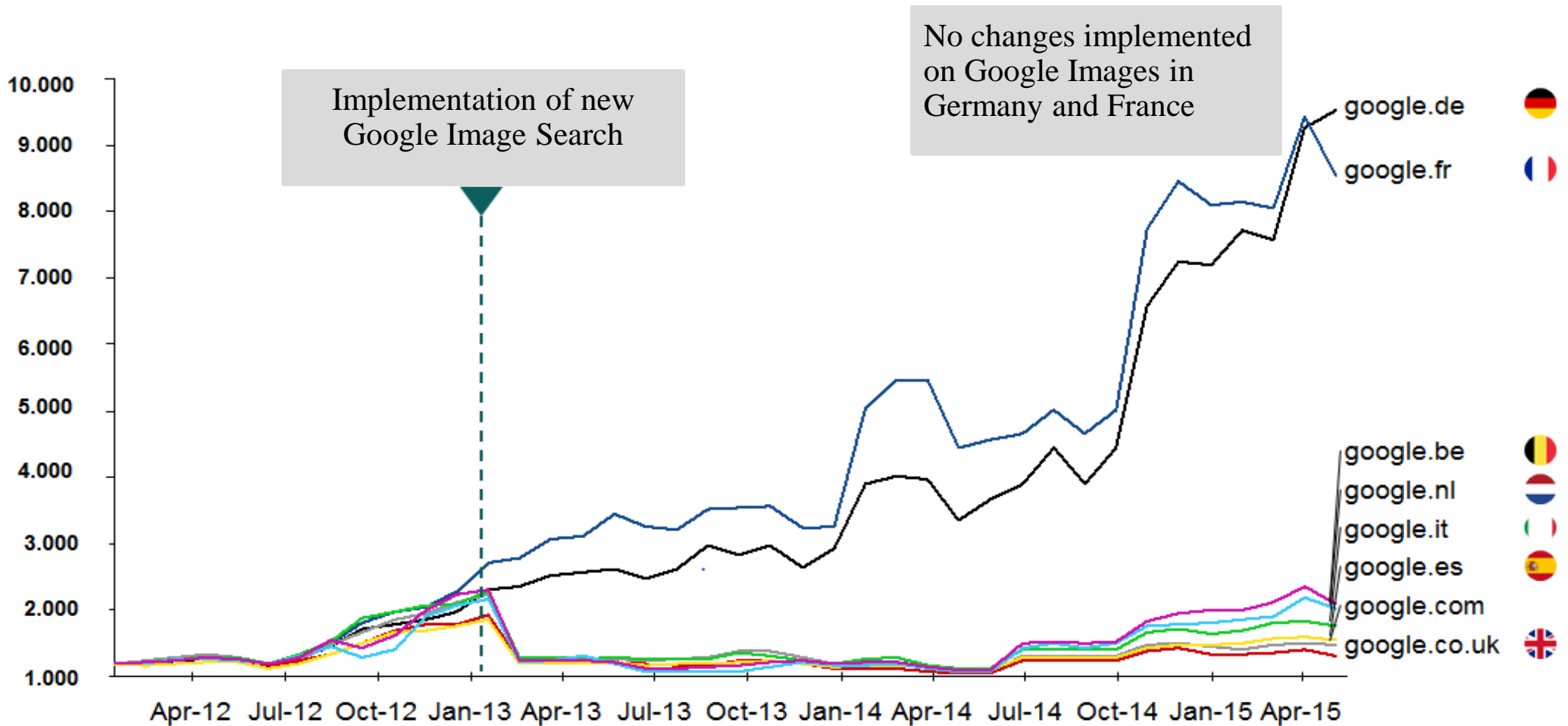
- **more clicks** to get to the final image
- **no correct image descriptions** in lack of display of EXIF-information
- **risk of unconscious copyright infringements**

### 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**



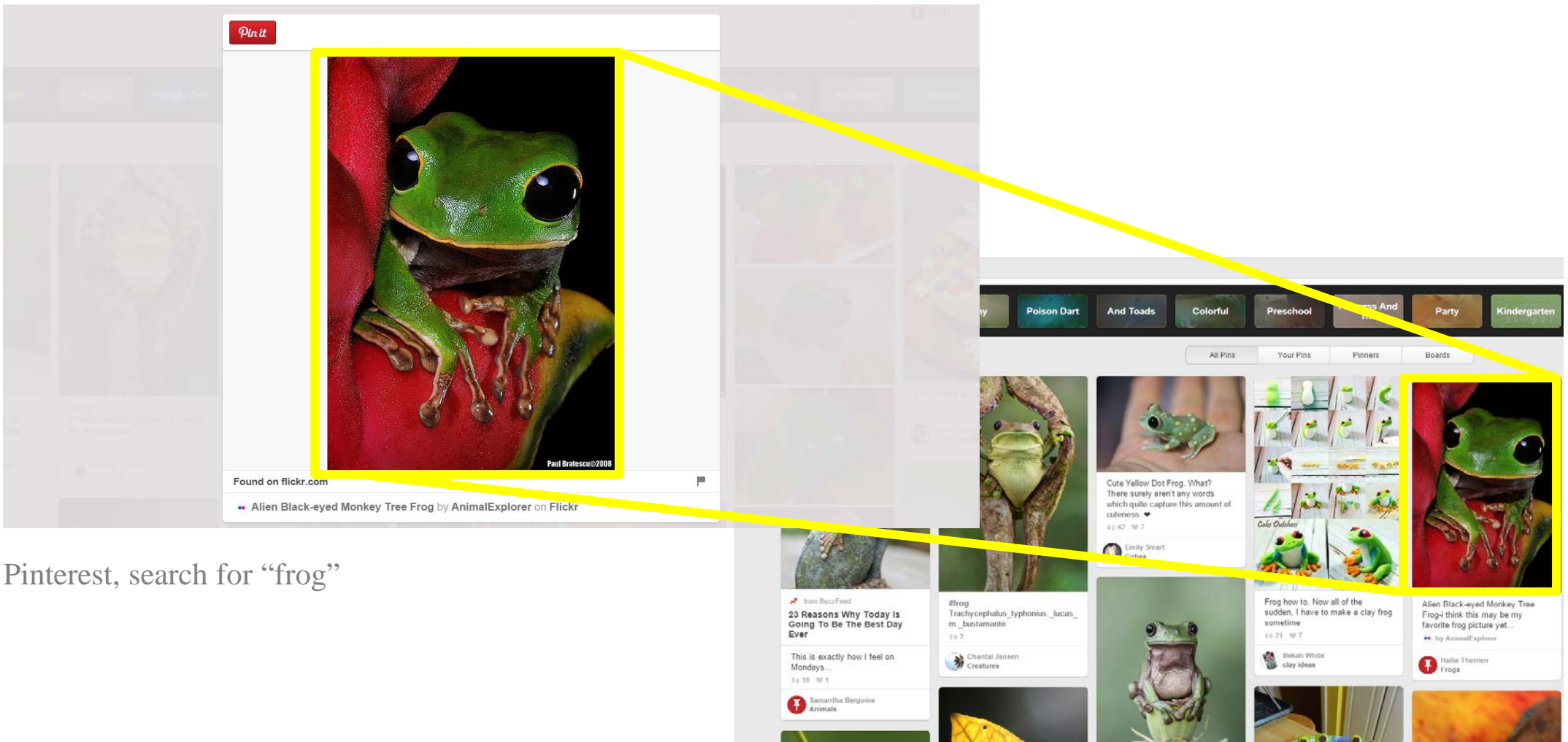
# In particular: (New) Google Image Search (3) Development of traffic to sources



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



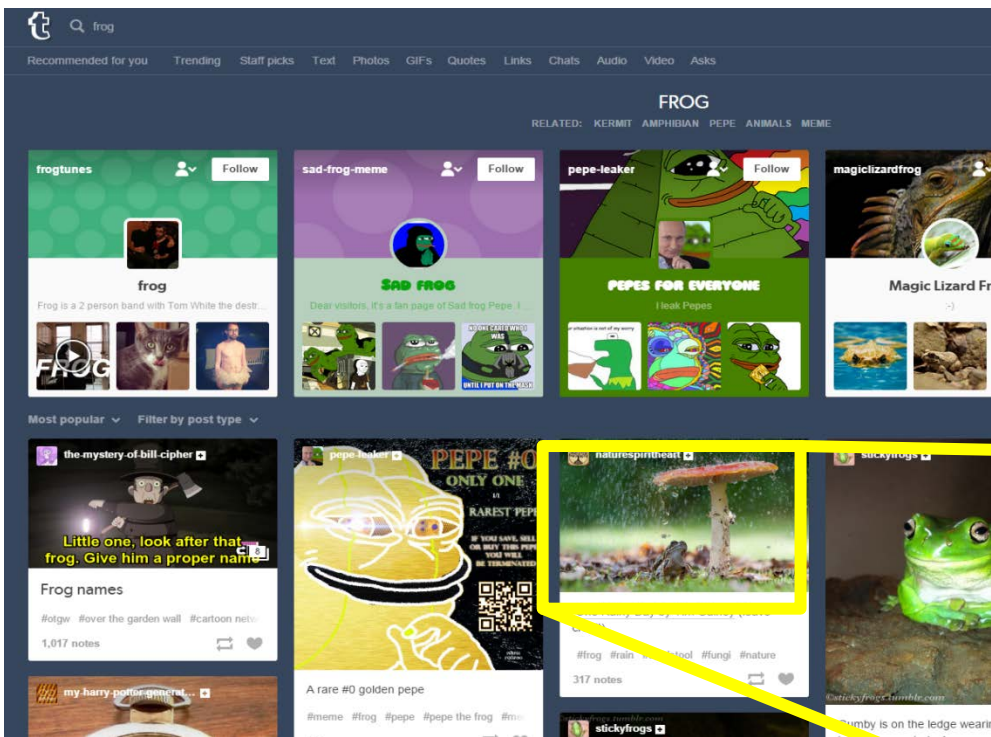
# Unauthorized Use of Third Party Images as a New Business Model (1)



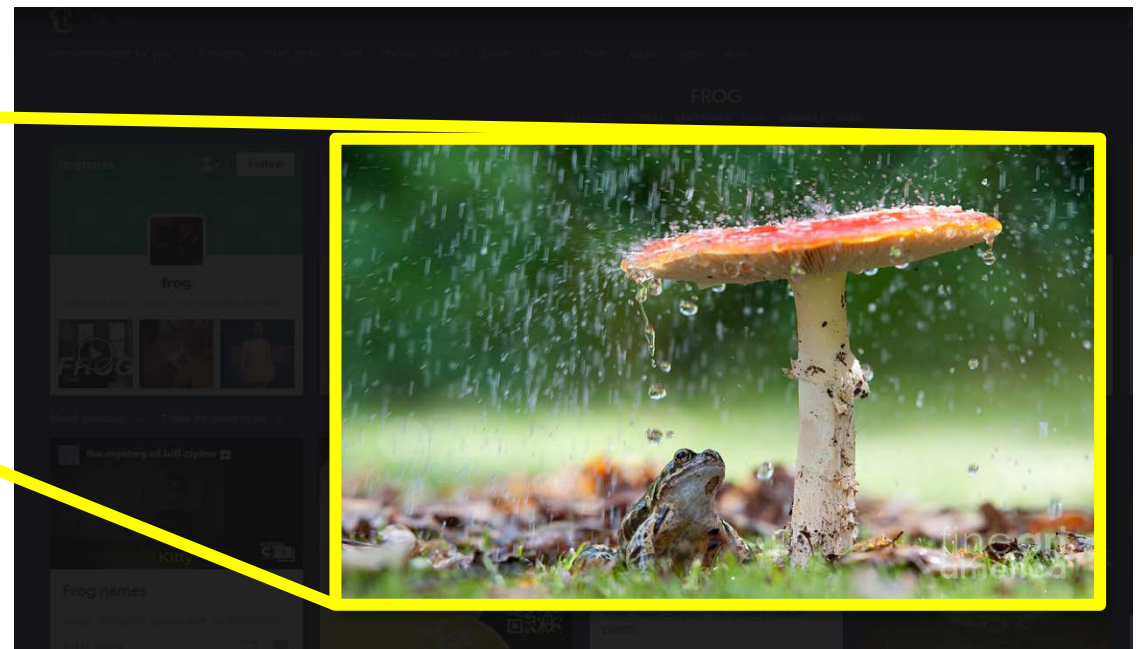
Pinterest, search for “frog”



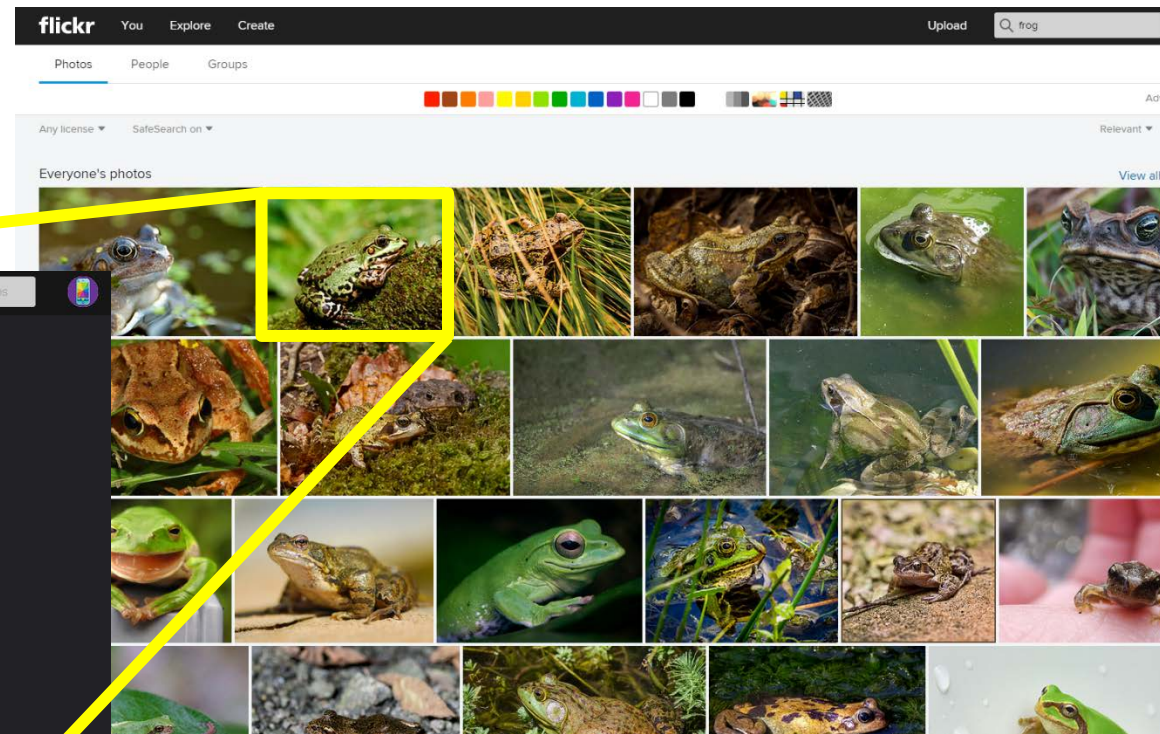
# Unauthorized Use of Third Party Images as a New Business Model (2)



Tumblr, search for "frog"



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



Flickr, search for "frog"

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Framing

Host provider privilege

Implied consent

## Framing (1)

### Position of the European Court of Justice (CJEU):

Hyperlinking and Framing are no communication to a “new public” that is subject to the right holders` consent pursuant to Article 3 Info-Soc-Directive

**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)

### Questions to be asked:

- 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**
- 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
- Most **aggregators** and **social media platforms** rely on this privilege
- **Consequence:** even the worst cases of piracy cannot be effectively fought

## Host Provider Privilege (2)

### Questions to be asked:

- 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)

**“Having uploaded images [..] 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)

### Questions to be asked:

- 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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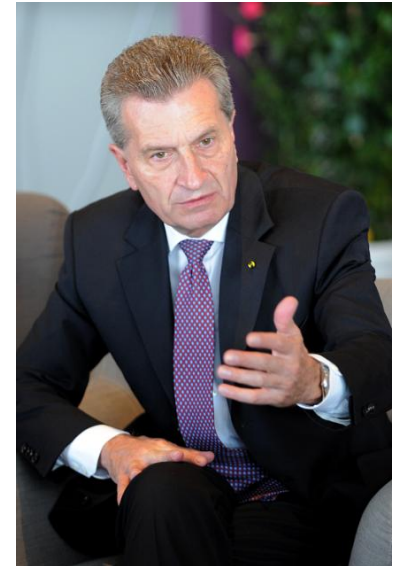
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Unique opportunity for improvement of legal framework

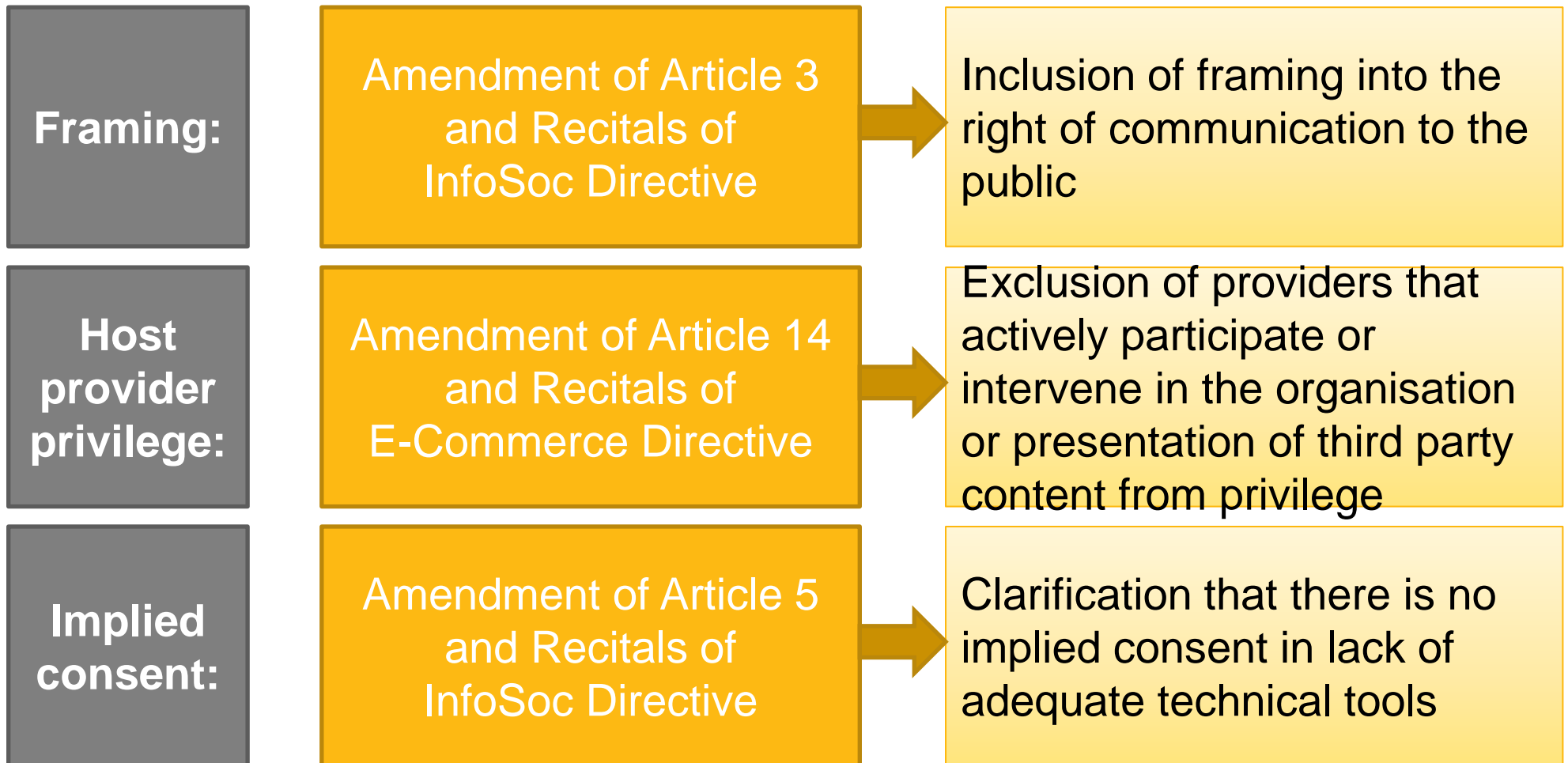
Recommendations to European Legislator

## Unique Opportunity for Improvement of Legal Framework

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



# Recommendations to European Legislator



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Thank you for your attention!

**OLSWANG**

**For more information please contact:**

Dr Thomas Höppner

**Lawyer, Berlin**

**+49 30 700 171-176**

**[thomas.hoppner@olswang.com](mailto:thomas.hoppner@olswang.com)**

