

University of Oslo, 18 October 2016

A related right for press publishers concerning digital uses of press publications - a legal analysis.

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1. The Commission proposal

- The EU © package of 14 September 2016
 - The proposal for a [Directive on “copyright in the Digital Single Market”](#) (CDSM)
- Art. 11 CDSM proposal: “protection of press publications concerning digital uses”
 - (1) Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.
 - (4) The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication.
- Legal analysis of the EU proposal in comparison to the [German \(2013\)](#) and the Spanish (2014) RRPPs
 - Disclaimer

2. What are we talking about: Press publishers online

STELLENMARKT LEBENSWEGE SCHULE   FAZ.NET  F.A.Z. F.A.S. Anmelden Abo Mobil Newsletter Mehr

HERAUSGEGEBEN VON WERNER D'INKA, JÜRGEN KAUBE, BERTHOLD KOHLER, HOLGER STELTZNER

Nobelpreise 2016



Frankfurter Allgemeine

 F.A.Z. PLUS
abonnieren

Freitag, 14. Oktober 2016

VIDEO THEMEN BLOGS ARCHIV



 POLITIK WIRTSCHAFT FINANZEN FEUILLETON SPORT GESELLSCHAFT STIL TECHNIK & MOTOR WISSEN REISE BERUF & CHANCE RHEIN-MAIN

FAZ-LIVE Vor 25 Minuten **Tillich räumt Fehler im Umgang mit Häftling Al-Bakr ein**

Frankfurt 13° 

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Wie das Buch der
Digitalisierung
trotzt >



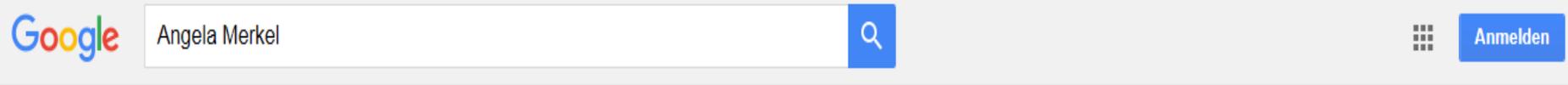
POLITIK
Wie Flüchtlinge
überwacht werden
sollen >



FEUILLETON
Wie Transhumanisten
unsterblich werden
wollen >



2. What are we talking about: News-related search results



Ungefähr 70.500.000 Ergebnisse (0,37 Sekunden)

News-Themen



Stern-RTL-Wahlrend: Merkel gestärkt, Schulz beliebter als Gabriel

t-online.de - vor 2 Tagen

Bundeskanzlerin **Angela Merkel** und die Unionsparteien haben in der aktuellen ...

Besuch von **Angela Merkel**: Ein erträgliches Leben in Afrika

FAZ - Frankfurter Allgemeine Zeitung - vor 3 Tagen

Merkel in Addis Abeba - Eine Bilanz der Afrikareise der Kanzlerin

Deutschlandradio Kultur - vor 3 Tagen

[Weitere Nachrichten für angela merkel](#)

Angela Merkel

<https://www.angela-merkel.de/> ▼

Die persönliche Internetseite der Vorsitzenden der CDU Deutschlands, **Angela Merkel**.

Angela Merkel – Wikipedia

https://de.wikipedia.org/wiki/Angela_Merkel ▼

Angela Dorothea Merkel (* 17. Juli 1954 in Hamburg als **Angela Dorothea Kasner**) ist eine deutsche Politikerin (CDU) und seit dem 22. November 2005



Angela Merkel

Bundeskanzlerin

Angela Dorothea Merkel ist eine deutsche Politikerin und seit dem 22. November 2005 Bundeskanzlerin der Bundesrepublik Deutschland. Merkel ist in der DDR aufgewachsen und war dort als Physikerin wissenschaftlich tätig. Bei der Bundestagswahl am 2. [Wikipedia](#)

Geboren: 17. Juli 1954 (Alter 62), [Hamburg](#)

Größe: 1,65 m

Partei: [Christlich Demokratische Union Deutschlands](#)

2. What are we talking about: The front page of news aggregators

Google

News

Schlagzeilen

- Bob Dylan
- Uwe Böhnhardt
- Toni Kroos
- Tom Hanks
- Tengelmann
- Hertha BSC
- Dario Fo
- Donald Trump
- Tamme Hanken
- Therese Johaug
- Frankfurt am Main, H...
- International
- Deutschland
- Wirtschaft
- Wissen/Technik
- Unterhaltung
- Sport
- Gesundheit

Schlagzeilen

Fall Peggy Knobloch und Uwe Böhnhardt: Die neuen Spuren zum NSU

SPIEGEL ONLINE - vor 56 Minuten

Vor 15 Jahren verschwand die kleine Peggy Knobloch, erst vor kurzem fand man ihre Leiche. Jetzt gibt es eine neue Spur - sie führt zum NSU-Terroristen Uwe Böhnhardt. Von Conny Neumann, München. Fundort der Leiche von Peggy Knobloch. DPA.

Echtzeit-Berichte

Wegen Peggy: Thüringens Ministerpräsident lässt Mord neu prüfen
FAZ - Frankfurter Allgemeine Zeitung

Fall Peggy und NSU: Nach DNA-Treffer: Ermittler sortieren beide Fälle neu
FOCUS Online

Ähnlich [Uwe Böhnhardt »](#)

Häufig zitiert: [Fall Peggy | DNA von NSU-Terrorist bei ihrer Leiche](#) BILD
Meinung: [DNA von NSU-Terrorist Böhnhardt am Fundort von Mordopfer Peggy gefunden](#) Deutsche Welle

EEG - Ökostromumlage steigt auf Rekordwert von 6,88 Cent

Süddeutsche.de - vor 1 Stunde

Die EEG-Umlage steigt für das Jahr 2017 auf 6,88 Cent. Es ist der höchste Wert seit ihrer Einführung im Jahr 2000. Für einen durchschnittlichen Stromkunden entstehen Mehrkosten von knapp 20 Euro. Insgesamt kostet die Umlage einen solchen ...

Eltern: Haben Baby nicht bei Ebay angeboten FR...

Melden Sie sich an, um Nachrichten über Themen zu sehen, die Sie interessieren.
[Weitere Informationen](#)

Neueste Nachrichten

Donald Trump: Den Sponsoren reicht es auch
SPIEGEL ONLINE - vor 37 Minuten

Wetter für Frankfurt am Main, Hessen

Heute	Sa.	So.	Mo.
17° 11°	16° 6°	18° 8°	18° 8°

Frankfurt am Main, He...

Nachhaltigkeitsverein aus Sachsenhausen: "Shout Out Loud" gewinnt Frankfurter ...
Frankfurter Neue Presse - vor 2 Stunden

Frankfurter Oper: Mit Hammer und Amboss

2. What are we talking about: The result list of news aggregators

Google

EU Copyright Reform



All

News

Videos

Images

Shopping

More ▾

Search tools

About 174,000 results (0.68 seconds)



EU digital copyright reform proposals slammed as regressive

TechCrunch - Sep 14, 2016

The Open Rights Group accused the EC of ignoring EU citizens responses to an earlier consultation on the reform, and trying to bring in ...



EU copyright reforms to strip likes of YouTube of legal protection

Financial Times - Sep 14, 2016

EU copyright reforms to strip likes of YouTube of legal protection ... The reforms cut to the heart of a long-running fight between struggling ...

European Commission President Calls Out YouTube, Presents ...

In-Depth - Billboard - Sep 14, 2016

View all



Mozilla releases 'rebellious' selfie app against EU copyright reform

The Stack - Sep 27, 2016

Mozilla argued in a blog post this week that the reforms make ... a selfie in front of European landmarks, which would be technically unlawful to ...

Mozilla trolls EU's 'outdated' copyright reform proposal with memes

Inquirer - Sep 27, 2016

View all

2. What are we talking about: Facebook news feed

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Create Event

PAYMENTS
Payment History

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Afrika sei ein Kontinent, der in Deutschland mehr oder weniger auf politisches Desinteresse stößt, meint Jens Borchers. Daran ändere auch die Reise der Kanzlerin nichts, wenn dem Symbol keine Taten folgen sollten. Konsequente Zusammenarbeit sei nötig, um Fluchtursachen zu bekämpfen.
See Translation

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- Robert De Niro
490K people talking about this
- WikiLeaks
1M people talking about this
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Facebook © 2016

The user **Likes** a News Facebook Site.

The posts of the News site are then presented in user's feed.

Facebook lists popular Articles that are trending.

Three versions of an RRPP



3. Version 1: RRPP in the layout of digital press publications

- E.g. UK Copyright law:
 - exclusive right of publishers to authorise or prohibit “making a facsimile copy” of a “typographical arrangement of a published edition” for a period of 25 years
- The definition of press publication, art. 2(4) CDSMD proposal:
 - ‘press publication’ means a **fixation of a collection** of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitutes an **individual item** within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider.
 - But: online services do not reproduce and make available the concrete digital layout of the press publication
 - Thus, version 1 is ineffective: In the digital world, an RRPP has to abstract from the precise layout of the “original”

4. Version 2: RRPP in journalistic content as such

- The RRPP attaches to the journalistic content comprised in a newspaper/magazine as such
 - What else?
 - Spain: insignificant fragments of “content”
 - Applicability of limitations and exceptions (art. 11(3) CDSMD proposal)
 - Conflict rule of art. 11(2) CDSMD proposal:
 - RRPP “shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in **respect of the works and other subject-matter incorporated in a press publication**. Such rights may not be invoked against these authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.”

4. Version 2: RRPP in journalistic content as such

- Dysfunctionalities of an exclusive right in the generic digital use of journalistic content
 - The missing link between the press publication and digital reproductions of journalistic content
 - Irreconcilable overlaps of independent RRPPs
 - Overlaps of an RRPP with other rights (cf. art. 11(2) CDSMD proposal)
 - The difference between such an RRPP and other related rights of producers

5. Version 3: A right against commercial uses of snippets and links

- How to establish a link between an allegedly infringing use and the product of a particular press publisher?
 - A right tailored to OSPs that provide hyperlinks to press publications
 - Limitation of the RRPP to the making available right
 - German RRPP applies only to “commercial providers of search engines or commercial providers of services which process the content accordingly”
 - Spanish RRPP limited to news aggregators (“prestadores de servicios electrónicos de agregación de contenidos de fragmentos no significativos de contenidos”)
 - The avoidance of irreconcilable overlaps of RRPPs

6. Is there a minimum threshold for an RRPP?

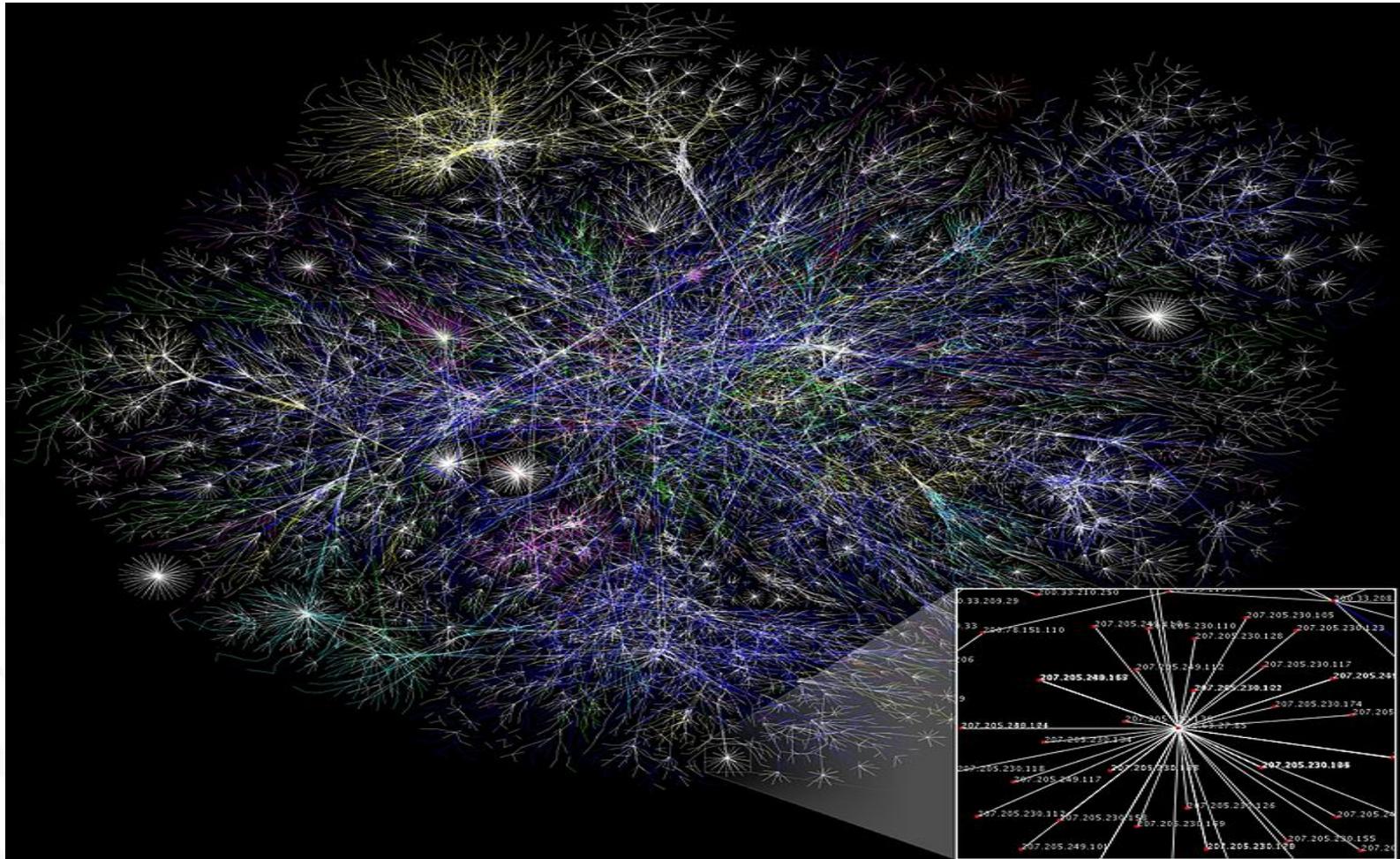
- What constitutes a “part” of a press publication (art. 11(1) CDSMD proposal in connection with art. 2 InfoSoc Directive)?
 - CJEU [Infopaq](#) for copyrightable works
 - No CJEU jurisprudence for phonograms, films, broadcasts
 - Spanish RRPP: insignificant fragments
 - German Bundesgerichtshof 2008/2011: reproduction of the *smallest fragments* encroaches upon producer’s rights because even extremely short parts of the fixation represent the *total* investment of the producer in the production of the first fixation of the *complete* phonogram or film copy
 - Thus limitation of the German RRPP with regard to “individual words or the smallest of text excerpts”
 - But see German Bundesverfassungsgericht [Metall auf Metall](#) 2016: the reproduction and other use of parts of phonograms only amounts to an infringement “if the economic interests of the phonogram producer are substantially prejudiced” by the relevant activity

7. Versions 2 and 3 conflict with fundamental rights

- The prohibition of private news sharing (version 2) is incompatible with the fundamental right to freedom of expression and information (art. 11(1) CFREU/10 ECHR)
- The prohibition of commercial, news-related services of OSPs (versions 2 and 3) is incompatible with the freedom to conduct a media business (Art. 16 and 11(2) CFREU/Art. 10 ECHR)
- Unjustified discrimination against providers of algorithmic press reviews
- Distortion of media pluralism to the detriment of small online news publishers (art. 11(2) CFREU/10 ECHR)

8. Summary and outlook

- The EU is trying to restructure online markets: From highly diverse networks



8. Summary and outlook

- Back to linear value chains of the pre-Internet era:

Rightholder



Licenced platform (Spotify, Netflix, Blendle)



Licenced user

- The vision of a "copyright-based" digital economy