

Protection of Juveniles in Germany – A Report on the New Legislation

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A. Introduction

In April, 2002, a 19 year-old pupil ran amok in a high school in Erfurt, killing several teachers and fellow pupils.¹ The young man was reported to have played computer games, in particular games known as “ego-shooter,” quite excessively.² These tragic events fueled the plans of the German government and the Federal states to reform the law for the protection of children and young persons. The legislative machinery issued new legislation at a rather impressive pace.³ Only one year after the tragedy in Erfurt, on 1 April 2003, two major legal documents entered into force: the *Jugendschutzgesetz* (*JuSchG* – Juvenile Protection Act) of the Federal government⁴ and the *Jugendmedienschutz-Staatsvertrag* (*JMStV* – Agreement of the German Federal States regarding the Protection of Human Dignity and Juveniles in Radio and Televised Media).⁵ This complicated two-fold structure stems from the federal nature of the German state where the competence to legislate is divided between the Federal Government and the individual *Laender* (Federal States). The latter, in order to achieve uniformity among themselves and reaching the breadth

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¹ Compare e.g. <http://www.cnn.com/2002/WORLD/europe/04/27/germany.shooting/> (visited 26 May 2003).

² Video games which show the hand with a weapon on the bottom of the screen and demand the player to destroy human beings out of the player’s own perspective are called “ego-shooter”.

³ Cf. www.bundesregierung.de/dokumente/,-476458/Pressemitteilung.htm (visited 16 May 2003)

⁴ Of 23 July 2002; Bundesgesetzblatt (BGBl.) 2002 Vol. I, p. 2730.

⁵ Bayerisches Gesetz- und Verordnungsblatt (GVBl.) No. 5/2003, p. 147 = Niedersächsisches. GVBl. No. 31/2002, p. 706.

of the Germany territory, must cooperate and legislate in the form of an interstate agreement. The *JuSchG* regulates mainly the protection of juveniles in the public and limits the distribution of items, which have been determined to be dangerous, like printed material, videos, DVDs or CD-Roms. In contrast thereto the *JMSfV* pertains to the protection of juveniles in the radio broadcasting industry and in the so called "Telemedia," in particular the internet. In the following, we will give a short overview of the developments wrought by these new laws.

B. Protection of Juveniles in Public

The regulations of the 2nd part of the *JuSchG*, which provides for the protection of juveniles in public, have only been slightly modified. As did its predecessor, the *Gesetz zum Schutz der Jugend in der Öffentlichkeit* (*JÖSchG* – Protection of the Youth in Public Act),⁶ the new law contains several prohibitions on the distribution of alcohol and tobacco as well as certain bans on minors lingering in pubs, gambling houses or public dances.⁷ It also empowers public authorities to intervene at public places in activities which are harmful to juveniles.⁸ Nevertheless a number of amendments necessitate further clarification.

I. Restrictive Prohibition on the Distribution of Tobacco

The protection of children and juveniles from the negative health consequences of smoking and the use of other forms of tobacco has been enhanced.⁹ Previously, § 9 *JÖSchG* pertained only to smoking in the presence of minors under 16 years.¹⁰ The new § 10 (I) of the *JuSchG*, on the other hand, establishes a general prohibition on the distribution of tobacco in any form, *i.e.* cigarettes, cigars, pipe, tobacco to chew or snuff¹¹ amongst members of this age-group.¹² As a consequence of this general

⁶ Cf. the commentaries to the old law (*JÖSchG*): *Scholz*, *Jugendschutz*, 3rd ed. München 1999, p. 1; *Gernert/Stoffers*, *JÖSchG-Kommentar*, Düsseldorf 1993; *Steindorf* in: *Erbs/Kohlhaas*, *Strafrechtliche Nebengesetze* J 215, München, 1995; *Liesching*, *Das Deutsche Bundesrecht* V G 70, Baden-Baden, 2001.

⁷ §§ 4, 5, 6 of the *JuSchG*; previously § 1, 10 *JÖSchG*.

⁸ §§ 7, 8 *JuSchG*; previously § 1, 10 *JÖSchG*.

⁹ Cf. the statistics reprinted in the *travaux préparatoire*, in *Bundestagsdrucksachen* (hereinafter: *BT-Drs.*) 14/9013, p. 19.

¹⁰ § 9 *JÖSchG* (see above Fn. 6)

¹¹ Compare *Scholz* (Fn. 6), § 9, MN (Marginal Number) 1; *Steindorf* (Fn. 6), § 9 MN 3; *Liesching* (Fn. 6), p. 15.

¹² As did the predecessor law, the new statute entails an order not to allow minors under 16 to smoke in public, which comes into play, when the juvenile is already in possession of tobacco, see *BT-Drs.* 9/1992, p. 15.

ban, § 10 (II) of the *JuSchG* prohibits the sale of tobacco by automatic vending machines, a rather widely used form of marketing cigarettes in Germany. A prohibition on cigarette-machines has often been contemplated but has never been enacted because of constitutional problems, as well as for reasons of public health policy and economic motives.¹³ Although the consequences for the tobacco and marketing industry are enormous – in particular as the prohibition is made more forceful by a fine for violators established by § 28 (I) No 12, 13, (V) of the *JuSchG*.¹⁴ Furthermore the norm contains, in Sentence 2 No 1 und 2, several exceptions in case minors under 16 are effectively excluded from using the cigarette machine. Above all, the prohibition pertains only to vending machines in public. It is not applicable to machines in non-public places like factories or canteens, where they can be found frequently. Finally, distributors which do not equate the security requirements that warrant an exception to the general prohibition – in particular technical devices or permanent surveillance as required by § 10 Abs. 2 No 2 *JuSchG* – need not be renewed until 31 December 2006 (see § 30 Abs. 2 *JuSchG*). As a possible technical solution the *travaux préparatoire* propose a procedure of double-checking ID or credit card together with a Personal Identification Number (PIN). It is also contemplated to develop a specific card system for the purchase of tobacco only.¹⁵ Such a special tobacco-card, which can be understood as an exclusive key for a cigarette-machine, would only be handed out to persons above 16.¹⁶ The downside of this system is that it can easily be abused as it is fairly predictable that such tobacco-cards would sooner or later be traded amongst minors.

Originally, it was also planned to prohibit film-spots advertising tobacco and alcohol for minors under 16 years.¹⁷ This prohibition, which has been in force in many other European states for several years, was thwarted by the resistance of the powerful tobacco industry. The history of the many attempts to implement a ban on tobacco advertising in Germany and the successful counter-strategy of cigarette manufacturers has played an important role on the European level. Germany and the tobacco industry formed an unholy alliance to defeat EC Directive 98/43, which restricted advertisements and sponsorships promoting tobacco products. Upon legal action by Germany against the European Parliament and Council, the Euro-

¹³ See BT-Drs. 10/2546, p. 18.

¹⁴ The norm is probably in conformity with the constitution because the colossal health risks which come within the ambit of Art. 2 (I) *Grundgesetz* (Basic Law) outweigh the economic interests of the industry which are nevertheless protected by Art. 12 and 14 *Grundgesetz*.

¹⁵ See BT-Drs. 14/9013, p. 20.

¹⁶ See BT-Drs. 14/9013, p. 20.

¹⁷ Compare § 14 (I) S. 2 *JuSchG*-Draft, reprinted in BT-Drs. 14/9013, p. 6.

pean Court of Justice declared the said Directive as void.¹⁸ In light of this former policy it is quite revolutionary that now, pursuant to § 11 (V) of the new *JuSchG*, such advertisements can only be shown after 6pm in public theaters.¹⁹

II. Attended Minors

Quite a number of prohibitions to stay at places, which are considered as harmful or threatening to minors (*e.g.* § 4 (I) of the *JuSchG* -- pubs; § 5 (I) of the *JuSchG* -- dances/discos; § 11 (III) of the *JuSchG* -- late shows; and § 13 (I) of the *JuSchG* -- gambling at public electronic videogames) are loosened by the new legislation, if the minor is attended. The general prohibition is neutralized if children or juveniles are accompanied by a person charged with the child's care and custody, in particular the parents, or a person who is commissioned with providing the education of that young person. According to the legal definition in § 1 (I) No. 4 of the *JuSchG* a commission to provide education requires that a person above 18 years has a permanent or temporal agreement with the care-giver and custodian of the child or juvenile.²⁰ This can also be a person who takes care of a minor as a teacher or a person in a similar position in the youth welfare system.²¹ This means that, for example, an older sibling who has reached the age of maturity and who has been asked by his parents to temporarily watch over his minor sibling is permitted by law to attend the juvenile in these harmful or threatening settings.²²

The person commissioned with the education of a minor must be able to prove this authorization. On a case-by-case evaluation one can demand quite a high standard, in particular with young adults in this regard. Above all the explanation given by the alleged caretaker must be free of contradictions.²³ A demand for written proof of this relationship can only be made, however, if such proof is commonly used (*e.g.*

¹⁸ See ECJ, 5 October 2000, C-376/98 (Germany v. European Parliament and Council), reprinted in *Neue Juristische Wochenschrift* (hereinafter: *NJW*) 2000, 3701.

¹⁹ There exists a general prohibition of advertising tobacco on radio and television according to § 22 (I) *Lebensmittel- und Bedarfsgegenstände-gesetzes* (*LMBG*); similarly for „Telemedien“, see § 6 (V) S. 2 *JMSStV*; as concerns „Printmedien“: § 22 (II) *LMBG* and *Bundesgerichtshof* (henceforth: *BGH*), Aktenzeichen (File No.) I ZR 275/91 and 176/91.

²⁰ § 1 (I) No 4 *JuSchG*.

²¹ Cf. *Liesching* (Fn. 6), p. 15.

²² Cf. Bayerisches Oberstes Landesgericht (BayObLG) in: *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport* (NStZ-RR) 1996, 280 = *Gewerbe Archiv* (*GewArch*) 1996, 211; more restricted as to the former law *Scholz* (Fn. 6), § 2 MN. 2b.

²³ Cf. *Liesching* (Fn. 6), p. 12.

ID-card for youth leaders) or if such proof is necessary to erase doubts.²⁴ If the attending adult cannot convince the authorities that he or she has been rightly commissioned, the minor is treated as if he or she were unattended.²⁵ Usually this means that the juvenile is to be denied access to or expelled from the harmful or threatening place.²⁶

C. Youth protection in the media

Compared to the above discussed protection in public, youth protection in the media has been modified to a far greater extent through the *JuSchG* and the *JMSStV*.

I. *Trägermedien, Telemedien and Rundfunk*

Youth protection in the media is based on two separate statutes. The reason for this lies in the complicated separation of legislative competences in the field of media, which stems from the German constitutional system of federalism. The so called *Trägermedien* (portable media), *i.e.* where information is transported on some sort of portable data saving device, like DVD or CD-Rom, falls within the (concurring) legislative competence of the Federal Government according to Art. 74 (I) of the *Grundgesetz* (German Basic Law).²⁷ The so called *Tele- und Rundfunkmedien* (tele- and broadcast media), *i.e.* where information is being broadcast or otherwise transmitted without being reduced to some portable saving device, comes under the competence of the federal states.²⁸ The definitions of *Trägermedien* on the one hand, and *Tele- und Rundfunkmedien* on the other, are fairly complicated. In an overview like this it is impossible to properly discuss the exact distinction, if a clear

²⁴ Cf. *Liesching* (Fn. 6), p. 12.

²⁵ See *Scholz* (Fn.4), § 2 MN. 3.

²⁶ Cf. *Liesching* (Fn. 6), p. 12.

²⁷ To pinpoint the exact provision is not easy. It is either the general competence to legislate in the field of criminal law according to Art. 74 (I) No 1 or it stems from the power to legislate in the field of youth welfare according to Art. 74 (I) No 7 of the *Grundgesetz*. Despite criticism this must be seen as generally accepted as the Federal Constitutional Court has accepted this reading of Art. 74 (I) No. 7 in BVerfGE 31, 113, 117; critical *Degenhart*, in: Sachs (ed.), *Grundgesetz*, 3rd ed. München 2002, Art. 74 MN 33.

²⁸ The competence to legislate in the area of protection of children and young persons is discussed by *Liesching*, *Zur Gesetzgebungskompetenz der Bundesländer für den Bereich „Jugendschutz in Rundfunk und Telemedien“*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2002, 868; *Reinwald*, *Jugendmedienschutz im Telekommunikationsbereich in Bundeskompetenz?*, *ZUM* 2002, 119; *Meyer-Hesemann*, *Kompetenzprobleme beim Jugendschutz im Rundfunk*, *Deutsche Verwaltungsblätter (DVBl)* 1986, 1181; *Ory*, *Jugendschutz in Neuen Medien*, *ZUM* 1986, 123, 126.

line can be drawn between the two at all.²⁹ The new legislative activity has hardly contributed to transparency in the field of the protection of children and young persons in Germany.

1. *The Law as concerns Trägermedien*

As noted above, *Trägermedien* fall within the ambit of the *JuSchG*. These are, according to § 1 (II) of the *JuSchG*, all corporal media transport devices which are apt to reproduce, made to be directly perceptible or built into a reproduction or a gambling set.³⁰ This rather complex definition comprises in particular all kinds of printed and imprinted material, including posters, films, videos, DVDs, CD-Roms or sound carriers. In contrast, local data loggers (non removable disk or computer server) cannot be counted as *Trägermedien*. Hardware in a PC is normally not adaptable to reproduction or direct perception. After all, they are regularly not built into a reproduction or a gambling set. Rather, they are installed in a data or text processing computer. Data that is being transmitted electronically is, on the contrary, to be treated as a *Telemedium* (see below).

2. *The Law concerning Rundfunk und Telemedien*

As noted above, the field of *Rundfunk und Telemedien* is part of the competence of the federal states. A regulation that is uniformly applicable in all 16 federal states has been established in the *JMStV* – an interstate agreement. While the term *Rundfunk* incontestably comprises radio and television (also digital) broadcasting,³¹ the newly found term *Telemedia* requires further consideration. The term refers to data in the form of texts, signs, pictures or tones, that is being transmitted electronically by means of telecommunication.³² It is irrelevant therefore, whether the data is commonly accessible (as on a homepage in the internet) or is only used individually (as via email or on a data bank which can be accessed online). In both cases the requirements for *Telemedia* are fulfilled. Likewise, it is not necessary that the data, which has been transmitted electronically, is being stored on data saving devices. As *Telemedia* one has to include all online-offers that are accessible via the Internet (at www.-sites); offers to use other nets (intranet, closed user groups); offers made through individual communication (telebanking, email-data-exchange); offers of

²⁹ The difficult term „Trägermedien“ is further explained by *Liesching*, *Das neue Jugendschutzgesetz*, NJW 2002, 3281, 3282 f.

³⁰ Cf. § 1 (II) S. 1 *JuSchG*.

³¹ Cf. *Hartstein/Ring/Kreile/Dörr/Stettner*, *RStV-Kommentar*, April 2000, § 2 MN. 5.

³² Compare § 2 *Teledienste-Gesetz (TDG)/Mediendienste-Staatsvertrag (MDStV)*.

goods or services on demand (teleshopping) or in data banks which are electronically accessible (video on demand, video-streaming); offers to use tele-games (online computer-games); offers by video- or tele-text, radio-text or other services of that sort.³³

III. Age Limitation for Computer-games

Pursuant to preceding versions of juvenile protection laws, the films, both shown in theater and sold on video, were evaluated and reliably certified as permissible viewing from a certain age-group onwards. According to the new § 12 of the *JuSchG* video-games must now also undergo a similar procedure of age-appropriate certification and release. The age-groups are identical to those applicable to films. Video-games can be certified as “without age limitation,” “above six years,” “above twelve years,” or “above 16 years.”³⁴ Programmes which are deemed not suitable for minors are given the certification “*Keine Jugendfreigabe*” (no youth release).³⁵

If, in spite of this age-appropriate certification process, a game or video is distributed to a child or a young person who does not fulfill the age requirement, a fine of up to € 50,000 can be imposed.³⁶ Furthermore, films or games that are not certified for release to minors may not be sold and merchandised by mail order (as for the limits imposed on mail order transactions generally, see Section VI below).

The governments of the Federal States have devolved, by law, the decision as to the age limitations to the relevant industry associations.³⁷ The decision regarding the distribution of films (on DVD or video-cassette) is made by the control panel of the *Freiwilligen Selbstkontrolle der Filmwirtschaft* (FSK – Voluntary Self-Regulator of the Film Industry). Computer-games are now being evaluated by the *Unterhaltungssoftware-Selbstkontrolle* (USK – Entertainment Software Industry Self-Regulator). These private societies substitute for the public authority that would usually be

³³ Cf. §§ 2 TDG/MDStV; in further detail *Meier*, § 2 MDStV MN. 49 et subs. and *Spindler*, § 2 TDG MN. 54 et subs., both in: Roßnagel (ed), *Recht der Multimedia-Dienste*, München Nov. 2000; further *Engel-Flehsig/Maennel/Tettenborn*, *IuKDG-Kommentar*, München 2001, § 2 TDG MN. 47 et subs.

³⁴ Cf. § 14 (II) No. 1-4 *JuSchG*.

³⁵ See § 14 (II) No. 5 *JuSchG*; the terminological modifications are explained in the *travaux préparatoire*: BT-Drs. 14/9013, p. 22.

³⁶ Cf. § 28 (I) No 15, (V) *JuSchG*.

³⁷ This is made possible by § 14 (VI) *JuSchG*.

responsible for youth protection. Their decisions have a binding effect, just as a legal norm.³⁸

IV. *Admissibility of video-rental-machines*

Pursuant to the preceding statute, there was an absolute prohibition on access by juveniles to video-rental-machines in § 7 of the *JÖSchG*, which remained not uncontested in the German courts.³⁹ This strict rule was eased by § 12 Abs. 4 of the *JuSchG*. It is now permitted to distribute videos and DVDs under the condition that technical devices guarantee that abuse by minors is effectively excluded.⁴⁰ This exception is not applicable to films that are generally unsuitable for minors, *i.e.* those films bearing the certification: “keine Jugendfreigabe.” According to this norm automatic vending machines are only prohibited when situated in places that are publicly accessible for children and young persons, outside commercially or otherwise professionally used rooms, or in unsupervised entrances and halls, if they contain only material that is permissible for under 16 years olds.⁴¹ Furthermore, it must be ensured by technical safeguards that children and juveniles cannot purchase films which are not appropriate for their age group.⁴² It suffices, however, if this technical barrier, *e.g.* a PIN-code-mechanism, is attached to the entrance of the room where the video-rental-machine is placed and not to the machine itself (so called cinebanks).⁴³

V. *Index of media harmful to juveniles*

1. *Prohibition to sell and advertise*

Just as with the preceding statutes, publicized items can be added to an index of prohibited material. This list is kept with the *Bundesprüfstelle für jugendgefährdende*

³⁸ Cf. Stelkens/Bonk/Sachs, *VwVfG-Kommentar*, 6th ed. München 2001, § 1 MN 231 et subs.

³⁹ See *BayObLG* Jugendmedienschutz-Report (hereinafter: JMS-Report) 1/2003, p. 57; *VGH Mannheim* GewArch 2001, 479; *VG Karlsruhe* JMS-Report 5/2001, 9, 61; *VG Düsseldorf* JMS-Report 1/2002, 8; *VG Ansbach* NVwZ 2002, 352; *LG Stuttgart* JMS-Report 6/2002, 60; *AG Erlangen*, Urt. v. 20. 9. 2001 – 4 Ds 651 Js 48511/00; this is in conformity with the constitution, see *Bundesverfassungsgericht (BVerfG)* GewArch 1988, 369 f.; a different opinion is held by *Meirowitz*, *Gewaltdarstellungen auf Videokassetten*, Berlin 1993, 252.

⁴⁰ Compare § 12 (IV) *JuSchG*.

⁴¹ Compare § 12 (IV) *JuSchG*.

⁴² Compare § 12 (IV) *JuSchG*.

⁴³ Cf. *Liesching*, *Jugendschutzrecht-Kommentar*, München 2003 (forthcoming), § 12 MN 19.

Medien (BPjM— Federal Office for the Monitoring of Media Harmful to Juveniles). The prior institution was called charged with maintaining this list was called the *Bundesprüfstelle für jugendgefährdende Schriften* (BPjS – Federal Office for the Monitoring of Publications Harmful to Juveniles). This Federal Office for Certifying Harmful Media (the prior name referred only to harmful printed material) will usual act upon a complaint by the authorities responsible for the protection of the youth, but can also proceed *ex officio*, § 21 Abs. 4 *JuSchG*, provided that there is information from youth welfare authorities and the chairperson of the Federal Office deems it necessary to proceed in the interests of youth protection.⁴⁴ As soon as it is publicly pronounced that a product has been put onto the list (so called *Indizierung*), the subject product acquires serious sales restrictions.⁴⁵ Material which has been put on the Index must be kept away from children and young persons. Furthermore, a general prohibition on the sale and advertisement of the product is set into force.⁴⁶

2. Individual parts of the index

The main criticism of the old index-system was seen in its incompatibility with practical requirements concerning the Internet.⁴⁷ In particular (foreign) Internet services were freely accessible to all Internet users, even after they were put on the index. As a consequence of this, the publicized list was perverted for use by minors as a guide to finding harmful material in the Internet. Therefore the new law parcels the index-list into several entities.⁴⁸ *Trägermedien* which are liable to corrupt the youth or have criminal content and are not accessible via Internet are still being held in a public list (lists A and B).⁴⁹ *Telemedien*, however, will not be put on a public list if they have been identified for having the potential to corrupt youth (list C) or have criminal content (list D).⁵⁰ The consequences of the non-public index will be

⁴⁴ Compare § 21 (IV) *JuSchG*.

⁴⁵ Compare § 15 (I) *JuSchG*.

⁴⁶ As to the limitations on the distribution, see *Scholz* (Fn. 6), Comments to §§ 3-5 *GjSM*; *Steindorf* (Fn. 6), Comments to §§ 3-5 *GjSM*; *Gödel* in: *Löffler* (ed), *Presserecht*, 4th ed. München 1997, *JSchutz* BT Comments to §§ 3-5; *Liesching*, *Jugendmedienschutz in Deutschland und Europa*, 2002, 130 et subs.

⁴⁷ Cf. BT-Drs. 14/9013, p. 16, 25.

⁴⁸ This is expressed in a rather complicated way in § 18 (II) *JuSchG*.

⁴⁹ § 18 (II) No 1, 2 *JuSchG*.

⁵⁰ § 18 (II) No 3, 4 *JuSchG*.

discussed below. The restrictions on sale and advertising laid out by § 15 of the *JuSchG* pertain only to the publicized parts of the list.⁵¹

3. *The index of "Telemedien"*

Films that have been placed on the index by the Federal Monitoring Office (*BPjM*), cannot be shown on television.⁵² Even if particularly harmful scenes have been edited out of the film, this general prohibition pertains, unless the TV station asks for special permission from the *BPjM*.⁵³ These strict rules also apply when films, which are on the list, are being offered as data on the Internet (in particular as video on demand).⁵⁴ Nevertheless, material possessing the potential to corrupt youth can be offered via Internet as long as the provider guarantees that minors cannot access this service, *e.g.* by employing closed user groups.⁵⁵

VI. *The limited prohibition of mail order business*

Trägermedien, *i.e.* videos, DVDs, CD-Roms, which contain harmful or threatening material and are thus certified "*keine Jugendfreigabe*" or have been put on the index, cannot be traded by mail order.⁵⁶ The reason for this categorical prohibition lies in the risks that stem from the anonymity that is inherently connected with this kind of merchandising. By its very nature this form of trade is almost impossible to effectively regulate by age. In accordance with prior case law, the definition of mail order business in § 1 (IV) of the *JuSchG* contains the following requirements: the trade must be against payment; order and transmission of the good or service must be by conventional or electronic mail; and the entire business must be transacted without any personal contact between the parties.⁵⁷ It is thus not only classical catalogue-shopping that comes within the ambit of the prohibition but also online-

⁵¹ § 15 (I) *JuSchG*.

⁵² § 4 (I) S. 1 No. 11, (II) S. 1 No. 2 *JMStV*.

⁵³ See § 4 (III) *JMStV*; critical in this regard is *Bornemann*, *Der Jugendmedienschutz-Staatsvertrag der Länder*, *NJW* 2003, 787, 789.

⁵⁴ Cf. § 4 (I) S. 1 No 11, (II) S. 1 No 2 *JMStV*.

⁵⁵ For further elaboration see below 8; the discrimination between radio and „Telemedia“ is criticised as unjustified by *Kreile/Diesbach*, *Der neue Jugendmedienschutz-Staatsvertrag – was ändert sich für den Rundfunk?*, *ZUM* 2002, 849, 850.

⁵⁶ §§ 12 (III) No. 2, 15 (I) No. 3 *JuSchG*.

⁵⁷ See *OLG Düsseldorf NJW* 1984, 1977; *BVerfG NJW* 1982, 1512; more detailed: *Eckstein*, *Pornographie und Versandhandel*, *wistra* 1997, 47.

shopping including Internet-auctions and other forms of mail order business via internet.⁵⁸ The definition of § 1 (IV) of the *JuSchG* does not extend to order-systems which can guarantee, through technical or other safeguards, that a transmission of harmful goods or services to children or other young persons is excluded.⁵⁹ In this respect the former absolute prohibition on mail order business has been liberalized dramatically.⁶⁰ The norm has therefore to be interpreted in such a way that as long as minors can be kept away from material possessing the potential for corruption, mailing is permitted. The German Mail Service (Deutsche Post AG) offers a so-called PostIdent-procedure, which permits employees of the German Mail Service to deliver the item to the addressee in person so that they can control for his or her age at the time of delivery and face-to-face. This service is believed to meet the requirements of the Youth Protection Act.⁶¹

VII. *New Absolute Prohibitions*

The distribution of certain media that is harmful or threatening both in an obvious way and to a high degree was prohibited irrespective of its appearance on the index.⁶² This absolute prohibition, in an interlocutory status, entered into force even before the new legislation as a whole entered into force. The new law contains further explicit prohibitions on merchandising and distributing harmful content, which are set into force without the necessity of a prior procedure of putting the specific content on the index.⁶³ These prohibitions pertain only to *Trägermedien* as defined above.⁶⁴ In the field of radio and televised media there are equivalent norms which prohibit broadcasting or electronic distribution.⁶⁵

1. *Glorification of War*

The prohibition on distribution pertains not only to media with criminal content, including exposure to violence, agitation of the people and pornography, but also

⁵⁸ See *Liesching* (Fn. 16), NJW 2002, 3281, 3284.

⁵⁹ § 1 (IV) *JuSchG*, see also § 4 (II) S. 2 *JMStV*.

⁶⁰ Compare § 7 *JÖSchG* and § 4 (I) No 3 *GjSM*.

⁶¹ See below Section 8. and *Liesching* (Fn. 16), NJW 2002, 3281, 3284.

⁶² § 15 (II) No 1-5 *JuSchG*.

⁶³ §§ 15 (II) and 15 (I) *JuSchG*.

⁶⁴ Compare § 1 (II) 1 *JuSchG*.

⁶⁵ Cf. § 4 (I) and (II) *JMStV*.

to the glorification of war.⁶⁶ Media which glorify war may generally not be distributed to minors.⁶⁷ Placement on the index by the *BPjM* is no longer necessary for material containing this kind of content. An absolute prohibition on distribution of material glorifying war also applies to radio and telemedia.⁶⁸ The interpretation of the term *Kriegsverherrlichung* (“glorification of war”) has always been rather extensive.⁶⁹ The abolition of the index-requirement is not expected to alter this general policy.⁷⁰ Otherwise, the prohibition could only apply to unrestricted praise of war. Presentations of war which are blind towards its cruelty would be ignored and not fall within the general ban.⁷¹ Therefore, glorification means not only a “positive” description of the war. Ignoring or rendering the threats of war and the suffering of unsaid victims as banal, can also mean glorification, if it nourishes a positive attitude in the juvenile consumers towards warfare.⁷² This can be the case, *e.g.*, with computer-games that simulate war. The recent decision of the *BPjS* to put the latest version of the strategic computer game “Command&Conquer-Generals” on the index as glorifying war seems too restrictive in this regard.⁷³

2. Images of suffering or dying persons

The limitations on distribution set out by § 15 (I) of the *JuSchG* also pertain to extremely graphic images of human beings who are dying or who are or were exposed to serious physical or psychological suffering, amounting to a violation of human dignity. The scope of this prohibition extends to the display of any real event containing such images without there being a preponderance of interest in reporting the event in exactly this manner.⁷⁴ An identical absolute prohibition on the dissemination of this content by radio and telemedia is contained in § 4 (I) S. 1

⁶⁶ § 15 (II) No 2 *JuSchG*.

⁶⁷ § 15 (II) No 2 *JuSchG*.

⁶⁸ § 4 (I) S. 1 No 7 *JMStV*.

⁶⁹ Compare Bundesverwaltungsgericht in: *BVerwGE* 23 112, 115; 28, 61

⁷⁰ See *Liesching* (Fn. 16), *NJW* 2002, 3281, 3285.

⁷¹ Compare Bundesverwaltungsgericht in: *BVerwGE* 23 112, 115; 28, 61; and *Scholz* (Fn. 6), § 1 *GjSM MN*. 5 e.

⁷² *BVerwGE* 23, 112, 115; *BPjS-Entsch.* No. 714a of 6 May 1960, *RdJ* 1960, 253, 254; *BPjS-Entsch.* No. 4489 of 18 May 1995; see also *Steindorf* (Fn. 6), § 1 *GjSM MN*. 27; *Gödel* (Fn. 22) *JSchutz BT*, § 1 *MN*. 79.

⁷³ *BPjS-Entsch.* No. VA 1/03 of 25 February 2003 and No. 5172 of 6 March 2003 – „Command&Conquer - Generals”.

⁷⁴ § 15 (II) No 3 *JuSchG*.

No. 8 *JMStV*. As an example of this kind of content, the films of the series “Faces of Death” have, since 1982, regularly been placed on the index. Their content is reduced to the presentation of loud executions, accidents and criminal activities, thereby emphasizing the suffering of the human beings involved.⁷⁵

3. Sex related Presentation of Minors

The presentation of children and juveniles in a sex orientated, unnatural posture has often been used to undermine the general prohibition of child pornography. Therefore § 15 (II) No. 4 of the *JuSchG* imposes a genuine ban on these images.⁷⁶ It pertains to certain erotographic content falling short of the threshold for pornography laid down in § 184 of the *Strafgesetzbuch* (*StGB* – German Criminal Code).⁷⁷ The prohibition does not require that the child is naked or partly undressed. It suffices that the posture or pose of the child refers to an emphasis on sex in an unnatural way (e.g. legs spread wide apart).⁷⁸ The rationale of the norm suggests that pictures of children or juveniles wearing sexy underwear or other provocative clothes, or excessive make-up, fall within the ambit of the prohibition as well – whether or not the courts will follow this interpretation remains at present unclear.

VIII. Technical Devices in the Internet

1. Closed User Groups

Material that has been put on the index or that is obviously harmful to juveniles can, according to § 4 (II) S. 2 of the *JMStV*, only be offered via Internet in so called closed user groups. It must be guaranteed that children or young persons cannot access these sites and that only adults can succeed in taking advantage of the offers. The technical solution that can secure the exclusion of minors is called an age-verification-system (AVS). These systems must meet certain conditions.

A possible and sufficient means is the so called “face-to-face-control.” The participation of children is thereby hampered in a way that comes close to the sale of pornographic or seriously harmful material in “above 18 video stores” or in erotic-

⁷⁵ Cf. BPjS-Entsch. No. 1348 (V) of 4 November 1982; and BPjS-Entsch. No. 4335 (V) of 20 July 1992.

⁷⁶ An equivalent absolute prohibition exists for radio and Telemedia according to § 4 (I) S. 1 No. 9 *JMStV*; a detailed discussion can be found in the *travaux* at BT-Drs. 14/9013, p. 24.

⁷⁷ See *Liesching* (Fn. 16), NJW 2002, 3281, 3286; *Bornemann* (Fn. 24), NJW 2003, 787, 788.

⁷⁸ The opinion of *Hartstein/Ring/Kreile/Dörr/Stettner*, *JMStV-Kommentar*, April 2003, § 4 MN. 45 seems too restrictive in this regard.

shops. In practice the use of certain harmful sites can require the purchase of an access-CD in a credit-card format (X-Card), which demands the presentation of an ID-card for purchase. The Internet-site is only accessible, when the access-CD is in the computer and when an additional PIN is used. Face-to-face control is also guaranteed by the PostIdent-Procedure, which was mentioned above.

On the contrary, with a view to the technical requirements it does not suffice, if the provider asks the user to disclose his or her age on the homepage, or verifies the ID-card or a credit card number.⁷⁹ A security system of this kind falls well short of ensuring that children and juveniles have no access to the Internet offers. They are too easily tampered with, e.g. simply by using an adult's ID- or credit-card.⁸⁰ It is even not sufficient to double-check the credit-card and the current account book because credit-cards are now also being made available to minors.

2. Youth Protection Programs

Less harmful Internet-offers or other telemedia, which still contain threats to the normal development of certain age groups, also need to provide protections against unauthorized access by minors.⁸¹ The requirements in this case are, however, not as severe as for the age-verification-systems. It is necessary but also sufficient, if the access of minors is seriously impeded.⁸² To this degree, youth protection programs are sufficient. These programs must, nevertheless, be accepted by the Commission for Youth Protection in the Media.⁸³

In this regard, user-site programs come into question, mainly so called rating- or page-labelling-systems. These systems are based on PICS-systems (Platform of Internet Content Selection). Each site is characterized according to its content, which is summarized in a specific label. This characterization is done either by the provider himself or by an independent third person. The user is then in a position to choose amongst the different labels and filter out those sites which are potentially corrupting and/or sex orientated. Certainly, the risk of abuse and circumven-

⁷⁹ Compare *AG Neuss* JMS-Report 5/2002, 62 = *MultiMedia und Recht* (MMR) 2002, 837 commented by *Gercke*; *LG Mainz* JMS-Report 6/2000, 60; the decision of *LG Düsseldorf*, of 31 January 2003 – XXXI 34/02 cannot be accepted as correct.

⁸⁰ Cf. *AG Neuss* JMS-Report 5/2002 = MMR 2002, 837 commented by *Gercke*; *Sulzbacher*, *Kinderpornographie im Internet*, JMS-Report 5/2002, 2, 5.

⁸¹ §§ 5 and 11 JMStV.

⁸² § 4 (II) 2 JMStV.

⁸³ §§ 11 and 14 JMStV.

tion (by misleading labeling as well) remains. However, the individual provider can, if only his labeling is honest, guarantee that the access is effectively limited on the side of the user, as long as the rating-filter of the browser is activated. This procedure was regarded by the German parliament as an adequate protection system. It is nevertheless necessary that the rating-system comply with the differentiation according to the age groups as foreseen in § 14 (II) of the *JuSchG*. Only in this case will the competent authority accept the Youth protection program.⁸⁴

Special filter systems that are based on the principle of site-blocking or keyword-blocking do not meet the requirements of §§ 11, 5 (III) No. 1 of the *JMStV*, and cannot, therefore, be accepted as youth protection programs. These programs do not pose a serious impediment to efforts by minors to access an Internet-site.⁸⁵ Even if the user has installed software of this kind, the system is only capable of effectively extracting a fraction of all existing sites containing potentially corrupting material. Because the sieve is rather limited (index, forbidden words), those systems are not reliable in digging out dangerous sites from the almost unlimited total "hits" in the World Wide Web. Above all, the provider can, as it were, easily trick the site-blocking-system by slightly modifying the domain name. The content of the site is thereby passing by the blocking system and is freely accessible. Keyword-blocking is similarly ineffective. Uncommented visual and acoustical material, which dominates pornographic or erotographic sites, will slip through the net as there are no words for the keyword-blocker to lock on to.

IX. Enhancing self-control-mechanisms

The new statutes buttress the importance of establishing voluntary self-control-mechanisms. First, the decision of the *Unterhaltungssoftware-Selbstkontrolle* for computer-games as concerns age limits is no longer a mere suggestion but is accepted as having legally binding effect.⁸⁶ Secondly, the decisions of self-regulating industry-based associations in the field of radio and telemedia are now, at least in part, vested with legally binding consequences as concerns the public media control authority.⁸⁷ Certainly, this applies only to decisions of self-regulating industry-based associations which have been officially accepted, and only insofar as the

⁸⁴ A critical analysis of the special rating-system ICRA (Internet Content Rating Association) has been given by *Schindler*, Kann man Kinder mit dem ICRA-Filter wirklich unbesorgt ins Netz lassen?, tv-diskurs 24/2003, 66 et subs.

⁸⁵ See *Schindler*, Rating und Filtering, tv-diskurs 11/2000, 56; *Sieber*, Verantwortlichkeit im Internet, München 1999, MN. 556.

⁸⁶ Cf. §§ 12 (I), 14 (VI) *JuSchG*.

⁸⁷ Cf. §§ 8, 9, 20 (III) and (V) *JMStV*.

norm provides for a real margin of appreciation.⁸⁸ The advantages of the new concept for Internet-providers are obvious. If consultation with an officially accepted self-regulating industry-based association is undertaken to obtain an evaluation of an Internet provider's offers, the provider need not fear further administrative interference unless there is a case of grave misjudgement.⁸⁹ Furthermore the provider can rely on the evaluation of the industry-based association, which provides at least some amount of legal certainty in a field which is after all still a misty thicket of norms.

X. Representative for Youth Protection

Providers of Internet-sites and broadcasting-institutions are principally obliged to nominate a representative for youth protection according.⁹⁰ This representative should serve as a contact person for visitors and users as well as a general counsel for the provider in all questions concerning youth protection.⁹¹ The duty to nominate arises only in such a case, where the content offered constitutes a threat to young persons. The threshold must by all means be strict. Even in a case where a provider offers the opportunity to others to place material on this site in the form of Internet-fora or chat rooms, and where this opportunity was used repeatedly to publish harmful material or such use is to be expected by the general theme of the homepage, one has to acknowledge the obligation to appoint a representative.⁹² Providers with less the 50 employees or reportedly less the ten million visits per month are allowed to entrust a self-regulating industry-based association to exercise the duties of a representative of youth protection.⁹³

D. Future Developments

The new legislation concerning the protection of children and young persons brings several ameliorations. In the field of the media in particular, parliament tried to

⁸⁸ Cf. § 20 (III) and (V) JMStV.

⁸⁹ Compare § 20 (III), (V) JMStV.

⁹⁰ § 7 JMStV.

⁹¹ § 7 (I) and (III) JMStV.

⁹² A more detailed analysis of the duty to nominate a representative and of the responsibilities of this person, see: *Liesching*, Die Bedeutung des Jugendschutzbeauftragten für Informations- und Kommunikationsdienste, Computer und Recht (CR) 2001, 845; for radio-broadcasting institutions in particular: *Mohr/Landmann*: Jugendschutz bei ARD und ZDF – Bericht der Jugendschutzbeauftragten des öffentlich-rechtlichen Rundfunks, München 2003.

⁹³ § 7 (II) JMStV.

take heed to new developments in progressive media-technology. In certain parts the regulations have become more strict, as with cigarette-machines and specific prohibitions to merchandise; other parts, on the contrary, have been liberalized considerably, like video-rental-machines, or mail-order-sales.

The attempt of the legislator to simplify the legal system concerning the protection of juveniles must be deemed a failure. Due to the complicated system of a split, two-level competence to legislate, which reveals itself in particular in the field of youth protection in the media, a regime requiring regulation from a federal law on the one hand and from an interstate agreement on the other, the set of rules as a whole remains confusing and, not always free of contradictions. Therefore, the law concerning the protection of juveniles will not succeed over the long-term. At least in parts it will be necessary to insert indispensable amendments at an early stage and to react to difficulties that arise in the practical use of the law.