The Legal Framework for Computer Games and Child Protection in Germany[1]

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The German legal framework for protecting minors against harmful media is considered one of the most restrictive in the Western world. Current provisions encompass all types of electronic media including computer games; technical measures and parental control software are systematic measures put down in laws, and a state body can classify media content as harmful, resulting in far-reaching advertising and sales restrictions. The following contribution gives a short overview of the German regulatory framework regarding the protection of minors in the media, the underlying constitutional and societal concerns, its regulatory concepts and obligations for media outlets, game publishers and providers. While there is no game-specific legal framework – as all forms of media fall within the scope of the existing provisions – there are some computer game-specific considerations that the text will focus on, where necessary.

YOUTH PROTECTION IN GERMANY: A CONSTITUTIONAL MATTER OF CONCERN

In Germany, the lawmaker is not free to decide on how to shape legal means to ensure youth protection in the media – or whether to establish any legal framework at all: There are constitutional warranties in place that oblige the legislator to provide a legal framework in this area. The following chapter describes the guidelines of this constitutional framework.

1 This text is partly based on Dreyer (2013). Parts of the text have been translated, tailored to computer games specifically and updated where appropriate.

Constitutional Protection of Unimpeded Personality Development

In the German constitution (*Grundgesetz* [GG]), the only specific references to the protection of minors can be found in GG art. 5, sec. 2 (media freedoms) and – less specific – in GG art. 6 (parental rights). According to GG, the only limitations to the provisions concerning freedoms of communication and the media are to be found "in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour" (art. 5, sec. 2). Thus, the legislator is allowed – but not obliged – to intervene in the fundamental rights of developers, producers and providers for the purpose of youth protection. Further, GG art. 6, sec. 2 also explicitly mentions children, stating that it is the parents' natural right to educate their children, while it is the state's duty to watch over the parent's implementation.

Based on constitutional case law, though, GG art. 2, sec. 1 (general freedom of action) in connection with GG art. 1, sec. 1 (human dignity) is interpreted by the Federal Constitutional Court (*Bundesverfassungsgericht* [BVerfG]) as a positive obligation for the legislator to establish a legal framework aiming at youth protection. The concerns this interpretation is based on are potential situations that impair the universal right of personal development *(Persönlichkeitsentwicklungs- und -entfaltungsrecht,* cf. Engels [1997]) in a free and undisturbed way. Discerning such a positive state obligation out of human rights is a rather rare concept in constitutional theory, but rather common in German constitutional law. With regard to minors, the obligation to protection is interpreted in such a way that the state *must* establish a regulatory framework that aims at enabling minors to become self-determined and responsible people within the social community. This includes the requirement to set up rules helping minors to develop in media environments with as little negative impact from unsuitable media content as possible. Thus, the legal framework has to react to concerns based on potential negative influences that could lead to significant development impairments that are difficult or impossible to remediate (see BVerfGE 30, 336 [347]). Therefore, such constitutional concerns result in the general aim of youth protection in the media *to effectively reduce media-induced development risks*.

The basic objective of these constitutional provisions is to ensure that every child is able to develop under conditions of equal opportunity and according to his/her individual needs and abilities (see BVerfGE 24, 119 [144]; 57, 361 [383]; 99, 145 [p. 156]). Here, the constitution does not dictate more specific ideals or desirable individual character traits other than becoming a self-determined and responsible individual within the social community. In view of the agreed insights

of media effects research, the legislator cannot rely on clear, causal findings for many potentially detrimental media contents. However, since the constitutional matter of concern is aimed at retaining an unimpaired development phase, the legislator is not obliged to wait for evidence-based proof concerning actual media effects to regulate. He rather is empowered to act on behalf of his constitutional duty already in cases of weak assumptions or first hints of impairing media effects. A limitation of legislative action in this field would only be reached if there is agreed evidence that specific media content does *not* have any negative effects on the development of a personality in the above-mentioned sense. Within this rather risk-oriented constitutional concern the legislator has quite a scope of action when it comes to develop the regulatory approach, to shape the legislative provisions and to choose specific legal instruments, as long as they seem adequate to reach the given goals. This scope of action – the so-called *Einschätzungsprärogative* (leeway in decision-making) – is, however, subject to limitations that arise mainly from the following conflicting fundamental rights. The constitutional concern about impairing media content here encounters constitutional matters of concern with regard to the following, potentially conflicting fundamental freedoms.

Parenting Rights and the State's Guardianship

A first limitation arises from the primacy of parental rights: According to GG art. 6, sec. 2, parents are authorized and obliged to bring up and take care of their children. Based on the assumption that minors need protection and assistance to become responsible members of a social community, the constitution assigns this task primarily to the parents (Schulz, 2012, rec. 14). This is done under the impression that "in most cases, the parents will be more concerned about their child's wellbeing than any other person or institution" (see BVerfGE 59, 360 [376]; 61, 358 [371], my translation).

Here, the Federal Constitutional Court draws attention to a special aspect of parents' rights, according to GG art. 6, sec. 2: Unlike other constitutional freedoms, it is not the parents who actually hold the right to educate, in the sense of pursuing their *own* interests. By practicing their parental rights, the parents rather act *on behalf of the children* and pursuing *their* interests, meaning that they are in fact trusted with protecting the rights of their children (see BVerfGE 24, 119 [124]; 59, 360 [376]). Thus, it is clear that the matters of concern of both the constitutional protection against harmful media content and the objectives of the entrusted parents' rights overlap to a great degree. The difference is that the parents' rights clearly define that it is the *parents* who are obliged in the first place to keep their children safe from harm by negative (media) influences as far as possible,

ensuring an unimpaired personality development. And it is the responsibility of the *parents* to decide how they want to fulfil this obligation in detail. According to GG art. 6, sec. 2, parents are also free to follow different concepts or forms of nursing and education.

However, in cases where parents fail in fulfilling their duties the state's guardianship duty comes into effect: In such occasions, the state can – and must, as the right to unimpeded personality development is considered a constitutional obligation – intervene, overruling the parental authority with statutory measures. Such interventions are first and foremost supposed to support the parents in putting their educational concepts into practice (again). The state cannot take over the parents' privileges completely unless they are simply unable to cope themselves or unless there are clear cases of parental misconduct, e.g. in the sense that they fail to act on behalf of their children and to protect their development. With regard to media use, parents will usually not be able to exert extensive control, at least not at all times, especially due to mobile end devices. In everyday life, parents thus have to rely on a *basic level* of protection to ensure that children and adolescents are able to grow up without media-related impairments.

Conflicting Fundamental Rights of Third Parties

The legislators' constitutional duties regarding the protection of minors also have to consider the fundamental rights of third parties (especially media professionals, content producers, distributors and providers), as well as other adult media users in general. The state is obliged to ensure that the state's youth protection measures do not lead to disproportionate interferences with these parties' rights and freedoms, e.g. their freedom of expression and freedom of information, media freedoms, freedom of the arts, ownership rights or occupational freedoms (GG art. 5, 12; 14). Here, the legislator has to carefully balance the conflicting rights of the two sides (see BVerfGE 30, 336 [348]).

If youth protection regulations interfere with media operations, the legislator has to consider the essence of GG art. 19, sec. 2, according to which the core aspects of the freedom rights are inviolable. While restrictions of media freedoms are generally possible with regard to GG art. 5, sec. 2, the lawmaker has to ensure that the youth protection measures do not lead to unreasonable impediments for adults – and partially, with growing age, also for adolescents – regarding their access to unrestricted media content.

The Prohibition of Censorship

In the context of balancing conflicting fundamental rights – be it legislation or administrative measures – the prohibition of censorship in GG art. 5, sec. 1, cl. 3 is a distinct limitation, prohibiting any provisions or decisions that require communication content to be *systematically* approved of *before* it is published *by a state institution* (Hopf, 2000, p. 741).

In German public debates, youth protection measures are at times seen as equivalent to censorship. In constitutional terms, however, many of the cases discussed do not meet the requirements mentioned above and hence cannot be seen as illegal censorship in a constitutional sense: In current legislation media content is usually either banned by a state institution *after* its publication (e.g. put on the *Index* by the Federal Review Board for Media Harmful to Minors [*Bundesprüfstelle für jugendgefährdende Medien*, BPjM] or banned by the state media authorities, see below), it is age classified by a *non-regulatory body* (e.g. examination by a self-regulatory body), or it is held back by a state agency, but *not systematically* – for example based on a statutory obligation to have specific contents authorized (Erdemir, 2015a, rec. 19). Before this background, the constitutional prohibition of censorship sets another concern-based limitation for shaping youth media protection.

Interim Findings: Constitutional Concerns in Youth Media Protection Regulation

The constitutional concern to protect minors conflicts with several fundamental rights, resulting in a paradoxical situation for the legislator: On the one hand, the lawmaker has to ensure that minors are protected from harmful media content in an effective manner. On the other hand, these legal provisions must interfere with the conflicting fundamental rights as little as possible. Altogether, this obliges the legislator to find a balance between these conflicting concerns. The aim, therefore, is not to create the most effective youth protection framework that one can think of, but rather to regularly reassess possible improvements regarding the balancing of these conflicting concerns, i.e. to check whether it is possible to reduce interventions with fundamental rights of third parties without risking problems regarding an unimpaired personality development.

To take measures against the constitutional concern about impairing media content, the state can rely on (negative) statutory instruments such as bans, obligations to reduce contact risks, publication restrictions as well as accompanying

measures of supervision on the one hand. On the other hand, legislators can establish preventive media protection initiatives, for example by means to strengthen media-competence and self-protection, by promoting child-specific content or by encouraging transparency regarding potentially impairing content, e.g. by age labels or content descriptors.

The duty to minimise contact risks with harmful media content is determined by the privilege of *parental primacy*, meaning that the legislator has to give preference to such statutory measures that allow parents to follow the respective individual concepts of (media) education (see Erdemir, 2015a, rec. 22). A conflicting constitutional concern is to respect third parties' rights to freedom of information, which implies that youth protection measures have to aim at reducing media-related contact risks *for minors* specifically. In fact, legislators have to balance antagonistic constitutional concerns when shaping youth media protection regulations.

Last but not least, legislators must respect general legislative principles such as the principle of legal certainty: According to GG art. 20, sec. 3 laws must be as specific as possible "with regard to the nature of the area of life and to the purpose of the law" (see BVerfGE 49, 168 [181], my translation).

ADDRESSING LEGAL CONCERNS ABOUT HARMFUL MEDIA CONTENT: TWO LAWS AND MANY TYPES OF MEDIA

Unsurprisingly, legislation in Germany has taken over the task to reacting to the explained constitutional concerns. However, implementing constitutional media protection obligations is complicated by the fact that the constitutionally granted legislative powers, i.e. the question *which* legislator in a federal republic is entitled to pass sector-specific legislation are far from clear in the field of youth media protection. Generally, it is the individual *Länder* (the 16 states' parliaments) that are responsible to adopt laws, unless there is a constitutional assignment according to which the legislative powers reside in the federal state, i.e. the federal parliament (*Bundestag*).

In the context of child protection and harmful media, though, there are aspects of concurrent legislation that suggest a competence of federal legislation: According to GG art. 72, sec. 2, the federal state is responsible for the areas of commercial law and public welfare (at least to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary).

The position of the federal government before the background of these conflicting competencies now is that it has the right to regulate in this context, while the *Länder* claim to be solely responsible for measures of youth *media* protection, as this is deemed an ancillary competence to their legislative powers in the areas of broadcasting and mass media (Langenfeld, 2003, p. 305; Schulz & Held, 2012, rec. 39). In current practice, the different interpretations have led to legislative activities on *both* levels – laws concerning the protection of minors against harmful media can be found on *Länder* level as well as on federal state level. These respective laws of the federal government and of the *Länder* aim at the same goals: Both laws set rules to keep youths from getting in contact with harmful media content. Regarding the regulatory implementation of this objective, both laws follow quite different concepts. Partly due to the different types of media and the respective distribution channels (online vs offline media) and partly due to the differences in the regulatory paths of federal and state law. Ultimately, however, they also follow different political intentions.

Protection of Young Persons Act: Retail Computer Games and Movies

The German Protection of Young Persons Act (*Jugendschutzgesetz* [JuSchG]) primarily focuses on content that is not to be classified as electronically distributed media. Thus, it is primarily tailored to film screenings and movie DVDs/Blu-Rays, arcade games, computer games, as well as other media content distributed via retail on solid *data media or data storages*. According to Protection of Young Persons Act a data medium is a physical medium that "carr[ies] text, pictures or sound [that are either] suitable for transfer or direct perception or [that are] built into projectors or game machines" (§ 1, sec 2, cl. 1). Back when the act was drafted (2002), the legislator clearly focused on common media at that time, especially movie and video tapes and disks. Apart from that, the Protection of Young Persons Act also lists other specific types of carrier media, namely "data media" (§ 12, sec. 1) and "films as well as film and play programmes" (§ 14, sec. 1).

The act relies on admission control and on restrictions regarding sales and distribution. As the Protection of Young Persons Act focuses on solid media carriers and on public presentations, it is reasonable to implement provisions obliging the publishers as well as those who provide individual access to the contents, such as cashiers in cinemas, video stores and retail outlets. Regarding relevant media content, the Protection of Young Persons Act distinguishes between impairing content (media that might impair the minors' development) and harmful content (media

that are harmful for minors), leading to graduated legal restrictions and requirements: For content that is rated as possibly impairing to the free development of personality, the act requires measures to ensure that this kind of media – movies in cinemas, computer game equipment as well as data carriers with videos or game software – may only be accessible to adults, unless the publisher makes use of the voluntary possibility to have it age-classified by a self-regulatory body (Protection of Young Persons Act, § 12, sec. 3). After examining the content, the self-regulatory body might come to the conclusion that it is also safe for younger age groups and thus decide on an according age rating. Possible age ratings in Germany are "without age restriction", released for audiences as of six, twelve or sixteen years of age, as well as restricted to adults ("no clearance for minors") (Protection of Young Persons Act, § 14, sec. 2). In other words: All unrated products are deemed adults-only and publishers have to opt-in into age classification procedures to get an age label. The system is supposed to ensure that unlabelled films and carrier media will only be made available to adults.

As a consequence of the applied age labels, age restricted content is not to be made available to persons who have not yet reached the appropriate age group. Movie theatre personnel are not allowed to let minors below this age into the respective showrooms, retail personnel are not allowed to sell such products to respective youngsters. However, providers are allowed to label harmless films or movie/gaming software that are intended for purposes of information, instruction and teaching as "Information" or "Education", meaning that no age restrictions apply (Protection of Young Persons Act, § 14, sec. 7; § 12, sec. 1).

The JuSchG is not specific about who is responsible for the actual age rating in the case that a publisher wants to acquire an age label. This can be done by the competent *Länder* authorities, tasked with the implementation of the Protection of Young Persons Act, or an organisation of voluntary self-control (Protection of Young Persons Act, § 12, sec. 2). Co-operations between the authorities and organisations of voluntary self-control are possible as well, given that the *Länder* authorities adapt the self-control organisation's decision as their own (Protection of Young Persons Act, § 14, sec. 6). In current practice, the latter possibility serves as a basis for co-operations between the *Länder* and the film industry (*Freiwillige Kontrolle der Filmwirtschaft* [FSK]) and the entertainment software industry (*Unterhaltungssoftware-Selbstkontrolle* [USK]). In both cases the distributor/publisher voluntarily requests an age rating from the respective self-regulatory body before publication; a representative of the competent *Länder* authorities will then endorse this decision and issue a respective official age label. This is the reason why virtually all computer games in German retail carry an USK age label; how-

ever, since most game publishers market their German game versions also in Austria and Switzerland, many game boxes show the PEGI label in parallel. At times, when the age labels by USK and by PEGI differ from each other, parents deem this contradictory.

Concerning *adult content* – in the sense of legal media content that is considered as harmful for minors – the Protection of Young Persons Act provides for stricter measures to prevent children and adolescents from getting into contact with such contents: On the one hand, the *Bundesprüfstelle für jugendgefährdende Medien* (BPjM) adds impairing media to its list of harmful media, the so-called *Index*. Listed contents are subject to far-reaching restrictions concerning access, presentation, sale, distribution and advertising (Protection of Young Persons Act, § 15, sec. 1). Apart from carrier media, the agency can also add so-called *telemedia*, i.e. URL-based content, to the list, provided that the competent *Länder* authority (KJM, see below) issues an according statement.

In cooperation with the FSM, a self-regulatory body in the field of online media, the BPjM also provides the so-called *BPjM-Module*, an encrypted list of domains and URLs concerning banned foreign *telemedia*. Providers of parental control or filter software can implement this list as a (additional) blacklist into their products to block the respective URLs. Currently, the *BPjM-Module* is also used by German search engines providers as a means to filter search results for all their users. People or companies affected by a BPjM decision are free to initiate administrative and legal proceedings against such decisions, inter alia, right to be heard, objection, action for annulment. The same restrictions that apply to harmful media content hold true for carrier media content that is *severely harmful* to minors (*schwer jugendgefährdend*). Restrictions for such obviously offending content apply before (and without) any formal decision of the BPjM (Protection of Young Persons Act, § 15, sec. 2). This includes, inter alia, carrier media that are to be seen as violations of certain criminal law provisions – including incitement to hatred (*Volksverhetzung*), extremely realistic, cruel and sensational presentations of violence, pornography, content that glorifies war, that is to be seen as a violation of the right to human dignity, that depict minors in unnatural or sexually explicit postures, or, as a subsidiary provision, is likely to "have a severely damaging impact on the development and education of *Children* and *Adolescents* to responsible personalities in society" (Protection of Young Persons Act, § 15, sec. 2, pt. 5, emphasis in original). Here the publisher has to assess the media content beforehand to exclude that the product to be published contains respective depictions.

The general municipal public order offices (*Ordnungsämter*) are responsible for monitoring the implementation of the Protection of Young Persons Act. Violations can be punished with prison sentences and fines of up to 50,000 €; however, the fines are usually lower especially for smaller or one-time offences.

Interstate Treaty on the Protection of Minors: Electronically Transmitted Media

In the field of *Länder* legislation, the parliaments of the 16 *Länder* operate on the basis of an interstate treaty: All prime ministers of the *Länder* sign a treaty that provides for final arrangements which serve as a basis for laws that are then ratified by the respective *Länder* parliaments. As a result, the provisions of the Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia (short: Interstate Treaty on the Protection of Minors [*Jugendmedienschutz-Staatsvertrag* (JMStV)]) have become valid laws in all *Länder*, resulting in nationwide applicable rules for electronically distributed/transmitted media services. Other than the JuSchG, which focuses on media content on data carriers, the JMStV is therefore primarily aimed at broadcasting services and *telemedia*, i.e. content provided via online services. In practice, the scope of *telemedia* covers just about all electronic online media, including private and commercial websites, e-mail services, shopping and video-on-demand portals, app stores and downloadable apps, social networking platforms, browser games and content provided by file sharing services (cf. Erdemir, 2015b, rec. 9).

The Interstate Treaty on the Protection of Minors uses access and distribution restrictions to prevent children and adolescents from getting in contact with same kind of problematic contents as the Protection of Young Persons Act. Regarding the instruments, however, the law draws on other concepts – partly due to the fact that the Interstate Treaty on the Protection of Minors focuses on offers that are based on electronic transmission and partly because of the vast range of offers, especially on the Internet.

Just as the Protection of Young Persons Act, the Interstate Treaty on the Protection of Minors distinguishes different categories of content relevant to youth protection, linked to graduated restrictions: The JMStV categorises content that always is illegal, content that is legal only under specific circumstances (and implementing protection measures) and content that is 'only' impairing children's development:

- According to Interstate Treaty on the Protection of Minors art. 4, sec. 1, content is defined as *absolutely illegal* if it contains propaganda and symbols of unconstitutional organisations or racism, if it incites hatred, glorifies war or violates human dignity. Furthermore, content is absolutely illegal if it presents children or adolescents in unnatural or sexually explicit poses, contains hard pornographic images – especially involving violence, child abuse or animal pornography – as well as content that is wholly or largely identical with any work on the BPjM's Index of harmful media. Content that is to be seen as absolutely illegal can never be made available legally, not even in case of technological protection measures.
- Interstate Treaty on the Protection of Minors, art. 4, sec. 2 refers to *relatively illegal* content: Although basically not permitted, content with e.g. depictions of pornography or violence can, as an exception, be made available by online services, given that the provider is able to ensure that only adults will have access. Here, the provider must establish a so-called *restricted user group* by maintaining a strict age verification routine (see Liesching [2008]). Relatively illegal content can be pornographic content, content that is listed on the *Index*, as well as content that is "evidently suited to seriously impair the development of children and adolescents or their education into self-responsible and socially competent personalities, 'taking into account the specific effect of the media via which the content is provided" (Interstate Treaty on the Protection of Minors, art. 4, sec. 2). In broadcasting, such content is absolutely prohibited.
- The third category of relevant content within the scope of the Interstate Treaty on the Protection of Minors concerns *development-impairing content*: Here, the *Länder* legislators assume – similar to the *Bundestag* in the scope of the Protection of Young Persons Act regarding media that might affect the development of young people that such content is 'merely' suited to impair personality development, in contrast to a presumed serious impairment. Thus, according to Interstate Treaty on the Protection of Minors, art. 5, sec. 1, providers must ensure that problematic pieces of media are only made available to children and adolescents that have reached the appropriate minimum age. For this purpose, Interstate Treaty on the Protection of Minors, art. 5, sec. 3 lists so-called technical measures to meet the obligation – applying an electronic label that matches approved parental control software (Dreyer & Hajok, 2012), implement identity card-based or other age verification checks or deploy time-based watersheds.

Content that, based on the Protection of Young Persons Act has already been rated for certain age groups is, mutatis mutandis, automatically deemed as impairing for the respective age groups – the ratings of the FSK and the USK are applied in the

scope of the Interstate Treaty on the Protection of Minors accordingly. Furthermore, the provider is obliged to display these age classifications, e.g. in online shops or within catalogues of video on demand services (Interstate Treaty on the Protection of Minors, art. 12; Protection of Young Persons Act, § 12, sec. 2, cl. 3.). If, however, a certain work has not been rated based on the Protection of Young Persons Act, the Interstate Treaty on the Protection of Minors refers to the principle of self-regulation: The provider can decide on her own on an appropriate age-rating (possibly with the help of a competent state authority) or join an approved voluntary self-regulation body – which are the *Freiwillige Selbstkontrolle Fernsehen* (FSF), the *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter* (FSM) as well as the FSK and the USK, who are also officially approved within the Interstate Treaty on the Protection of Minors framework.

The Interstate Treaty on the Protection of Minors features a rather new concept of governance – that of *regulated self-regulation* or *co-regulation* (Schulz & Held, 2012, rec. 21). If a content provider joins a voluntary self-regulation body and if this body decides that some specific TV or *telemedia* content is suitable for a certain age group, it is not possible for the state supervisory body to initiate any regulatory actions against the provider, as long as the voluntary self-regulation body decided within its scope for decision-making (see Rossen-Stadtfeld [2008]). For the provider, joining a self-regulatory body or having content age-rated by such an organization works as a 'protective shield' against supervisory measures by the competent state bodies. The Interstate Treaty on the Protection of Minors lists requirements according to which the self-regulatory bodies have to be formally approved in advance. Further, the legislator has provided a severe sanction against self-regulation bodies: The withdrawal of their formal approval.

The provisions of the Interstate Treaty on the Protection of Minors affect broadcasters and providers of *telemedia* contents. Broadcasters and content providers are obliged to take precautions in terms of youth protection – or they have to refrain from keeping inappropriate content available. It is the media authorities of the *Länder* (*Landesmedienanstalten*) that are responsible for monitoring the protection of minors in broadcasting and *telemedia* as well as regarding the activities of the self-regulatory bodies. To this end, the Interstate Treaty on the Protection of Minors provides for a central institution to carry out audits and make decisions on behalf of the respective media authority: The Commission for the Protection of Minors in the Media (*Kommission für Jugendmedienschutz* [KJM]). The state media authorities can file objections against content violating the Interstate Treaty on the Protection of Minors – and force broadcasters and content providers to delete the respective content. Apart from that, the KJM can impose prison sen-

tences and fines of up to 500,000 € (again, fines are usually a lot smaller in practice). In case a violation is to be regarded as a criminal offense, a public prosecutor will take over the investigation.

Excursion: Media-related Criminal Law

In addition to the legal framework of youth media protection, the general criminal code (*Strafgesetzbuch* [StGB]) also contains media content-related provisions that are enforced by penalty – especially regarding the publication of Nazi propaganda, depictions of stark violence and certain forms of pornography (involving children/adolescents or violence). Also, there are further penal provisions that can be connected to the scope of media publications, such as the protection of honour (insults, defamation, slander) and the protection of certain areas of personal life and secrecy (violations of the privacy of the spoken or written word, violations of intimate privacy by taking pictures, data espionage).

However, these media content-related criminal laws do not only originate from attempts to react to minors-related concerns but are aimed to pursue additional objectives, such as the protection of honour (violations of honour), the protection of public order (propaganda offenses), sexual self-determination as well as human dignity. Thus, criminal law provisions go beyond the scope of merely protecting children and minors; their purpose also lies in the *protection of adults* (Erdemir, 2015a, rec. 16).

Convergence of the Media – Convergence of the Law?

Comparing the two legal frameworks in Germany reacting to media-specific concerns as regards potentially detrimental effects for minors, it must be noted that – to some extent – the *Länder* parliaments and the state legislator draw on different regulatory approaches, requirements and practical implementation principles. Comparing the systems with regard to general governance concepts, age-rating procedures as well as the setup of self-regulatory bodies, the following statements about differences between the two approaches can be made:

- For films, video games and computer games in retail, the system based on the Protection of Young Persons Act provides for voluntary prior assessment by self-regulatory bodies, any self-assessment would result in significant access restrictions. State authorities are involved in the process of age-ratings of the self-regulatory bodies and state agencies have influence on the committees that issue final decisions concerning appeals against decisions. Due to these spheres

of influence, the regulatory concept of the Protection of Young Persons Act does not have to focus on means to monitor the self-regulatory bodies. Regarding age classified products (in particular in cinemas, video rentals, mail orders and retail), it is the local public order offices or commercial supervisory authorities that are responsible for monitoring, for enforcing compliance with the access- and sales-related restrictions and for punishing violations – backed by the law enforcement authorities in severe cases. The 'incentive' of having carrier media assessed by voluntary self-regulatory bodies is that unlabelled products ought to be made available only to adults.

- In contrast, self-regulatory bodies within the scope of the Interstate Treaty on the Protection of Minors have to be officially approved. After approval, it can act autonomously and without further state intervention or participation. The state (in this case the KJM, as an organ of the media authorities of the *Länder*) is responsible for checking whether – or to what extent – the decisions of the self-regulatory bodies are in accordance with the Interstate Treaty on the Protection of Minors. Based on the Interstate Treaty, the *Länder* can only take restrictive actions against certain media content *after* its publication; either against the self-regulatory body in cases of transgressions of competences (withdrawal of recognition) or against the provider (general supervisory instruments in the scope of media law: complaints, cease-and-desist-orders, fines, etc.). If a certain content was legitimately cleared by a self-regulatory body, the state has no further possibility to intervene, while in the area of the Protection of Young Persons Act, the *Länder* representative endorses and executes the age rating during the procedure. In contrast, the age-related assessment of content within the scope of the Interstate Treaty on the Protection of Minors is based on the principle of self-assessment by the provider (or its youth protection representative) and, if necessary, the deployment of adequate measures of protection.

In addition to the governance concepts, there are particularly dynamic developments in the fields of electronic information and communication, e.g. regarding the involved providers, the variety in content itself, as well as the patterns of media usage: The overall number and structure of providers as well as their respective content is subject to changes in the underlying technology – some of them quite profound – that pose fundamental challenges to (not only) the legal concepts. This is where traditional regulatory approaches currently are challenged to meet the expectations towards an up-to-date youth protection framework. For example, it is not always possible to differentiate whether it is the provisions of the Protection of Young Persons Act or the Interstate Treaty on the Protection of Minors that apply, as in individual cases where it is difficult to decide whether the subject

matter is about a data carrier medium or a *telemedium*, e.g. computer games sold on discs but played online or with additional online-functionalities (Baumann & Hofmann, 2010).

In addition to the duality of the legislative texts and the possible contextual overlaps, there are different takes on regulatory instruments, as well as differently configured self-regulatory bodies and corresponding decision-making procedures. Thus, content producers have to cope with increasing complexity – and legal uncertainty. There have been slight improvements for cross-media publishers of movies and games, due to the fact that the FSK and the USK can issue age classifications within both legal contexts, offering their members age-rating services with regard to both the Protection of Young Persons Act and the Interstate Treaty on the Protection of Minors: the FSK for movies that are available on online services (only) and the USK for e.g. browser games and online games.

A first major amendment for the Interstate Treaty on the Protection of Minors (which ultimately failed) was presented in 2010, as an attempt to harmonise interfaces and interconnection points of the laws (Braml & Hopf, 2010). More recently, a smaller update of the Interstate Treaty on the Protection of Minors became effective in October 2016, providing for mutual recognition of the respective age classifications of the two legal frameworks. Basically, regulations like such are suitable to resolve the duality of the German youth protection laws to a certain extent, or at least to harmonise the provisions to make them more practicable for the affected providers. However, the latest amendments will not lead to a substantially improved delineation or even to a successful integration of the different standards of protection into one convergent, cross-media framework (Dreyer & Schulz, 2015).

YOUTH PROTECTION GOVERNANCE AS PLAYING VABANQUE: BALANCING CONFLICTING INTERESTS OF PROVIDERS, PARENTS, ADULTS AND CHILDREN

German youth protection laws are considered very restrictive compared to the rest of the Western world (Naumann, 2009, p. 44). The duality of the two different legal frameworks – the Protection of Young Persons Act and the Interstate Treaty on the Protection of Minors – and the respective processes and procedures have led to a complex system with many institutional bodies and even more stakeholders, or affected/interested parties in the broader sense. If there are public hearings or discussions concerning this field of regulation, there are often more than 100 institutions on the list of participants, sometimes with quite contradictory interests.

Impairing computer game content has been one of the central points in the policy debate between 2002 and 2012; since then the public discourse broadened and currently rather focusses on aspects like addiction and excessive usage, bullying and hate speech, as well as consumer protection issues in view of micropayments and freemium games.

Due to the cacophony of interests and strategies in Germany, youth protection issues play an important role in political and public debates – reflecting the diversity of the underlying constitutional obligations and relevant protected freedom rights that form a scope of action for legislation concerning the field of youth protection in the media. In practice, the advantage of the public discourse is that the discussions, debates and arguments regarding the protection of minors lead to increased reflections about the underlying social values. The latter aspect is especially important, because value shifts that take place over years or decades might otherwise not be taken into account in the scope of youth protection legislation – or at least not early enough.

Due to the fact that the different legal requirements towards the statutory means of youth protection and the aspect of conflicting interest of third parties are focused on a more theoretical concept of control, the legislator has to initiate specific regulatory measures to safeguard the balancing of the protective duties and freedom rights within this 'gamble' and within a technically and socially highly dynamic field, based on modern legislative resources such as impact assessment, continuous monitoring of the respective real-life sphere and its development, evaluations, risk management initiatives as well as enforcement control (Ladeur & Wehsack, 2009). Due to the mentioned obligation to optimisation and the legislator's duty to carry out recurring adaptions, youth media protection governance is highly demanding as it has to encompass dynamic market changes as well as legal flexibility, reversibility and reflexivity.

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