



Crianças e Redes Sociais: aspectos legais

PUC Rio de Janeiro
19.04.2013

Prof. Dr. Thomas Wilmer
Instituto de Direito da
Informação
Universidade de Ciências Aplicadas
de Darmstadt

Children and Social Media

Topics



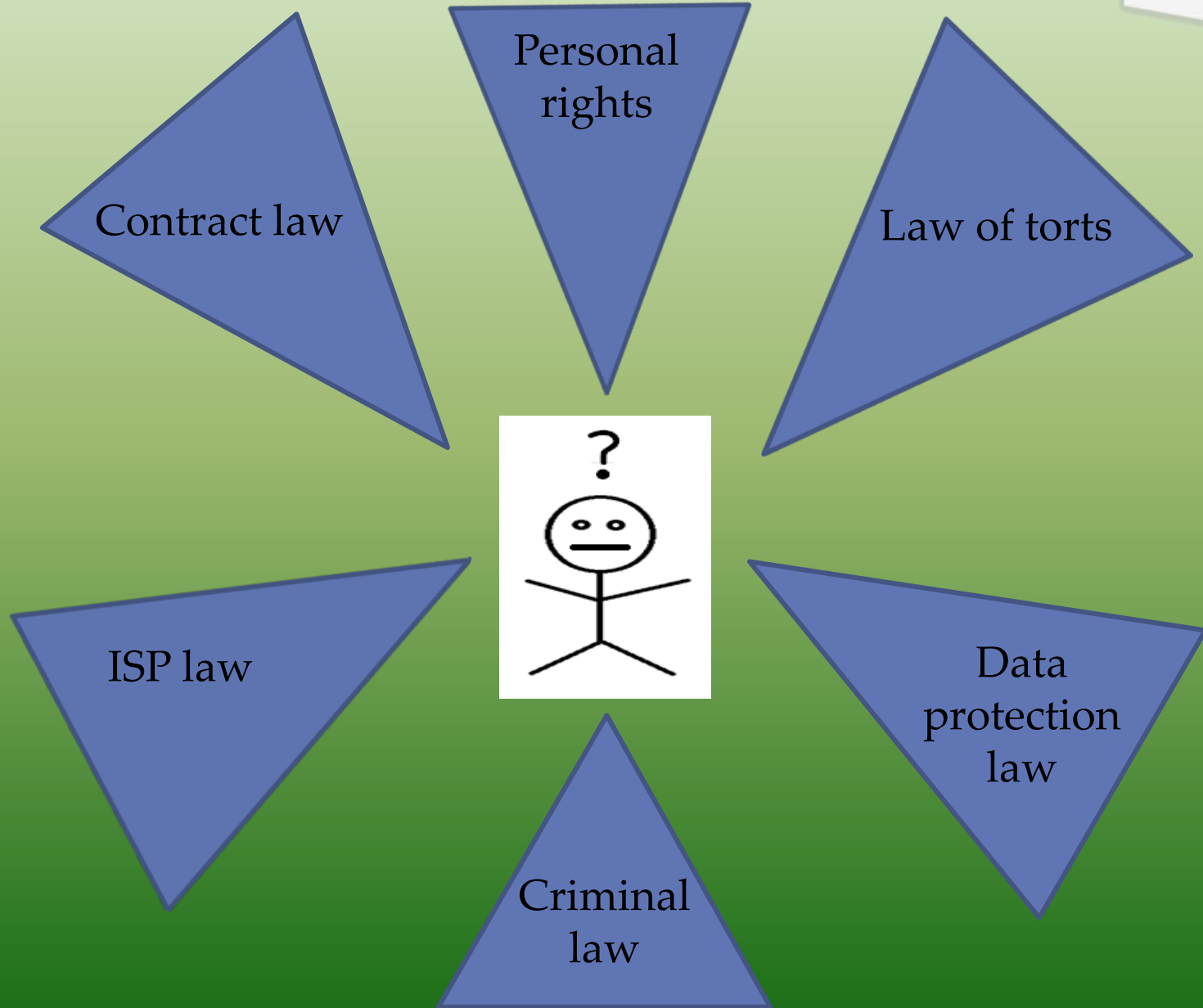
- Children and Social Media Use
- Legal Challenges?
- What do children do on the internet?
- Contracting
- Liability
- Data Protection
- Perspectives

Why are children a special information law topic?

- Children are wonderful people
- Children do have rights
- Parents do have responsibility
- The related internet access problems are symptomatic for ISP topics, typical providers and employer providers, too

Children and Social Media

Why are children a special information law topic?



Contract law

Personal
rights

Law of torts

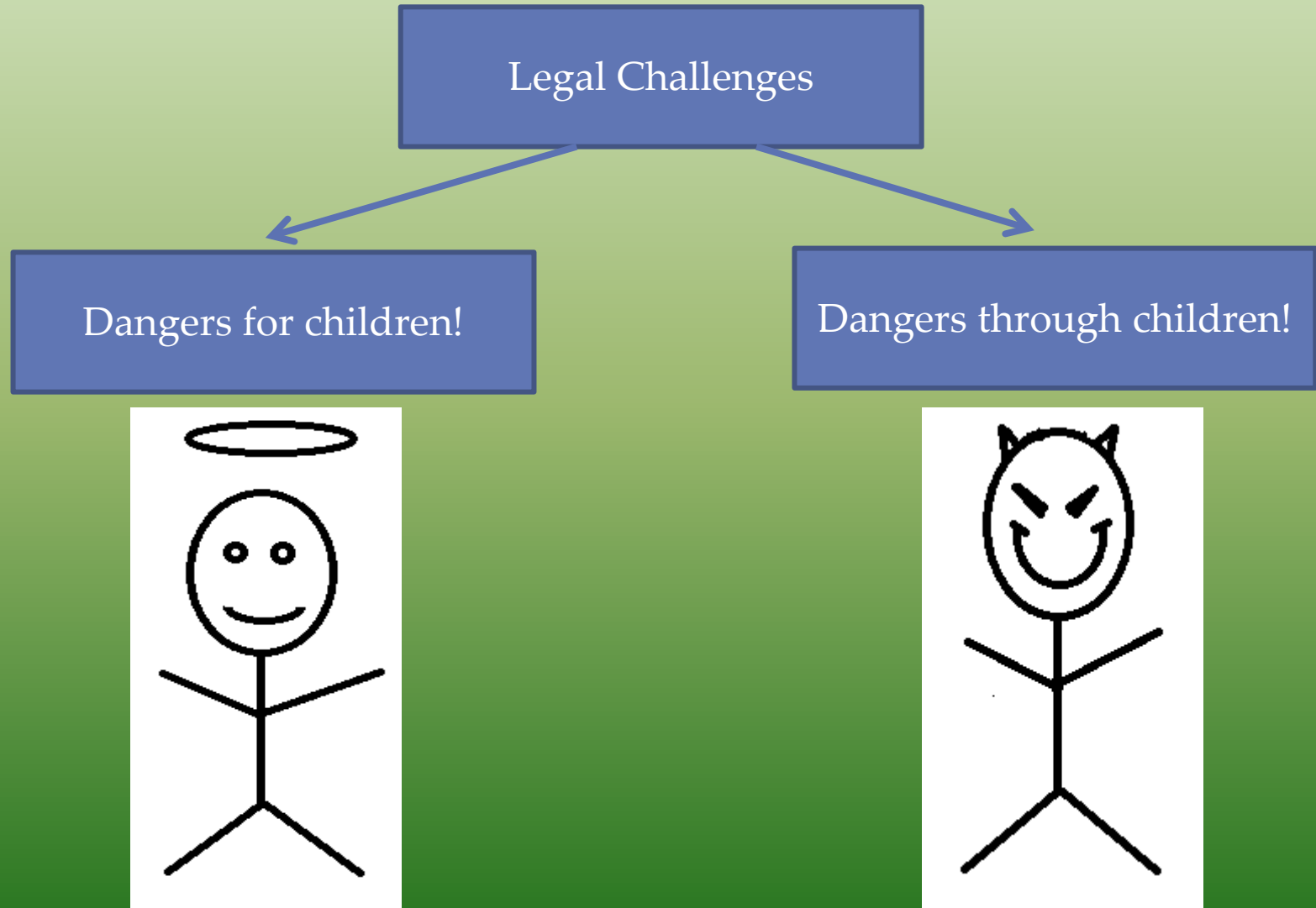


ISP law

Data
protection
law

Criminal
law

Children and Social Media



Children and Social Media

The Topic

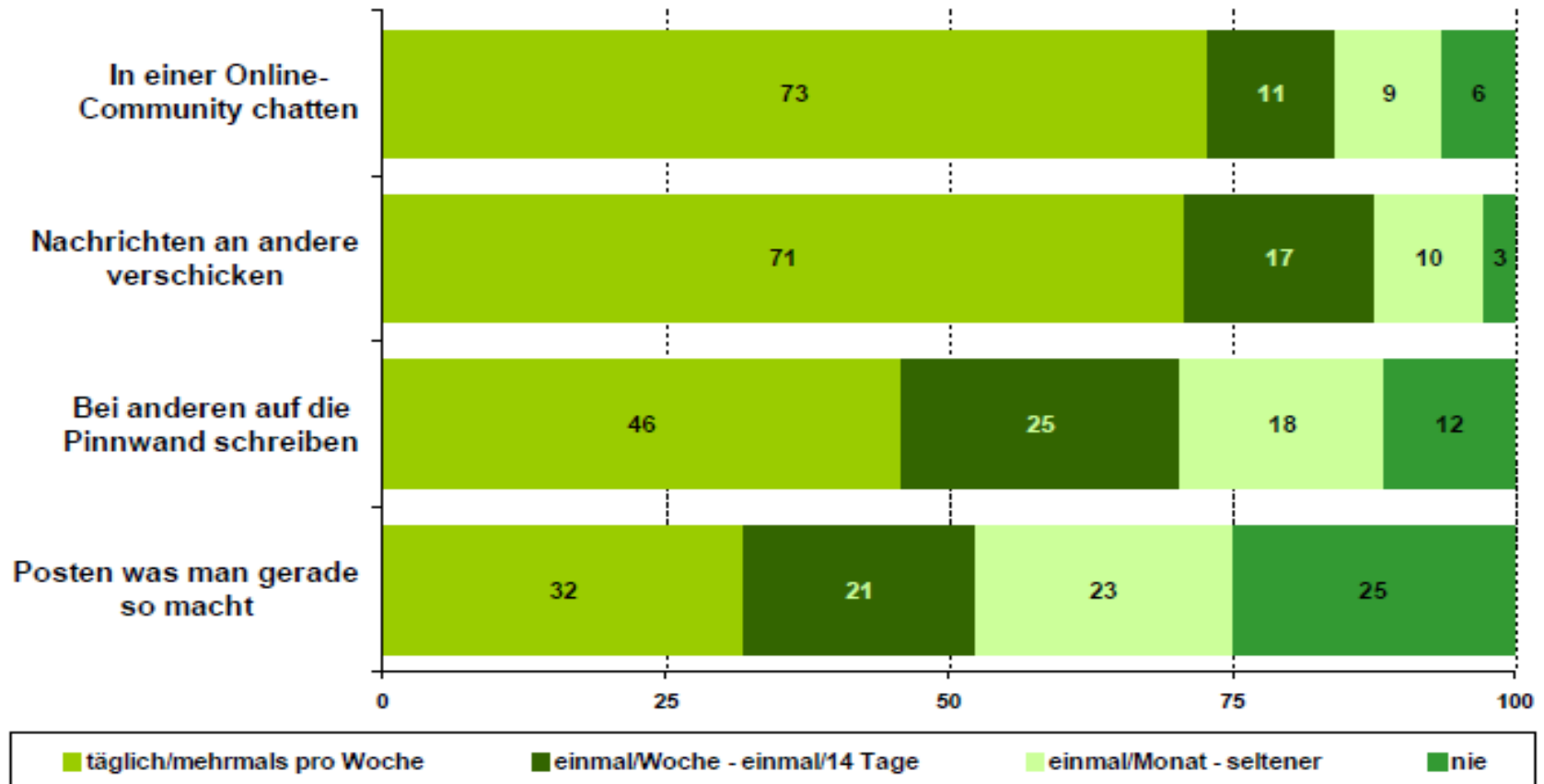


What do children do on the internet?

Children and Social Media

What do children do on the internet?

Online-Communities: Funktionen Nutzungsfrequenz 2011



Quelle: JIM 2011, Angaben in Prozent

Basis: Nutzer Online-Communities, n=1.041

EU-Study: Online Usage by children „EU Kids Online“

- Survey: Over 23.000 Children between the age of 9 and 16 from 25 european countries.
- 12% made negative online experiences.
- 39% of the children had contact with one or more typical „online risks“ .
- 25% of childrens' privacy settings are „public“ , 20% allow access to their phone number and/or address
- Only 56% of the 11 to 12 yo know how to change their privacy settings, whereas 78% of the 15 to 16 yo are able to change them.

Dangers through children: Contracting

- Contracting
 - Facebook: Participation allowed from the age of 13 (US COPPA), (soon also Art. 8 Abs. 1 DS-GVO-E)

German alternative legal contract requirements for 7to17 yo

- Parental consent

- Contract can be financed by pocket money

- Contract is legally advantageous only

- Example Ebay:
 - Age recognizability?
 - Spelling (-)
 - Interests (+)

Children and Social Media

Dangers through children: Contracting

- Contracting: Synallagmatic relationship?

- Child gives:

- T&C deviating from basic legal situation
- Creation of a contract performance reason (GDPA)
- Data use
- IP Licence consent
- Use of „Sociale Moral rights“?

- Child gets:

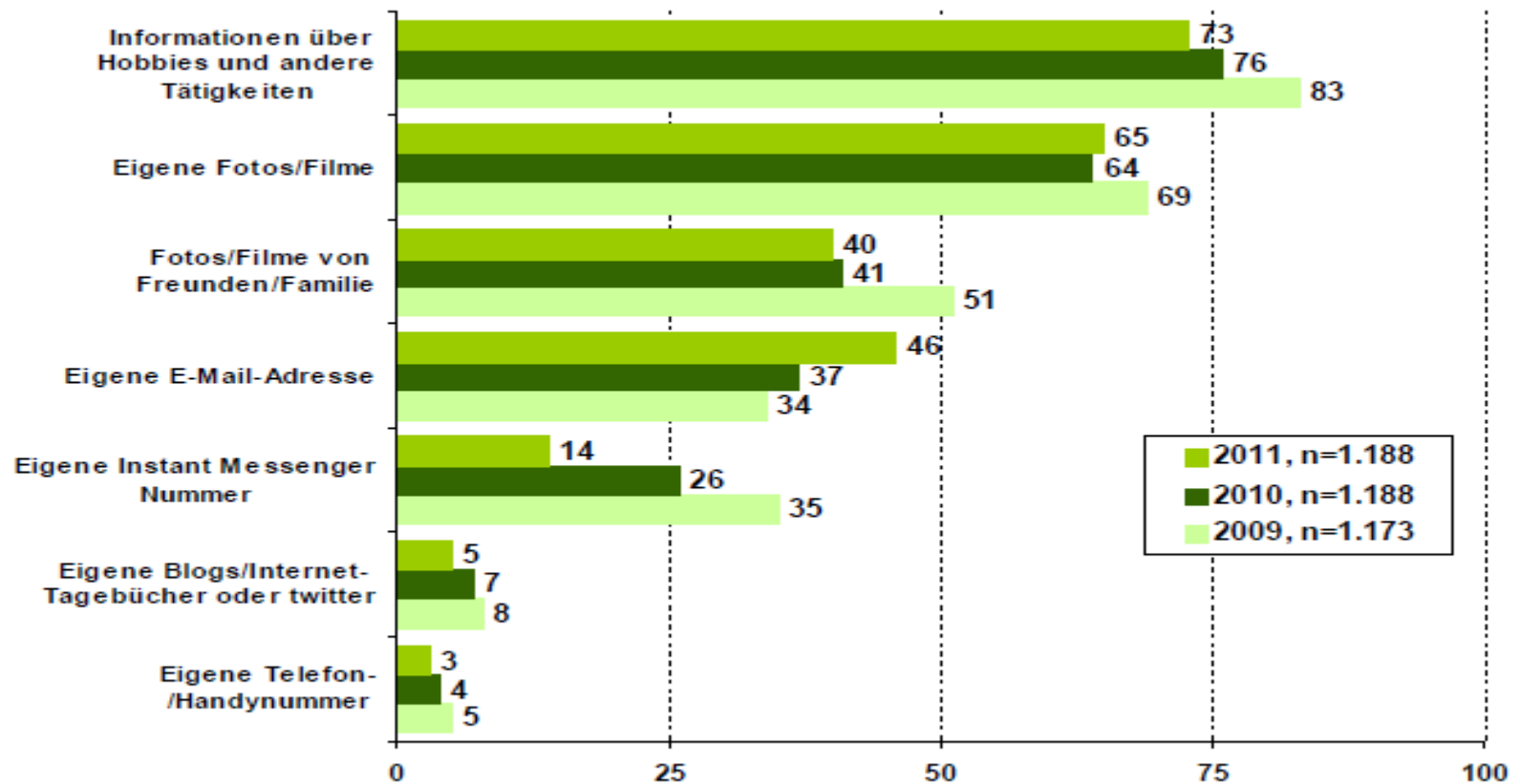
- Use of the Social Media Platform
- Middle-rate fun



Children and Social Media

Dangers through children : Data protection

Hinterlegte persönliche Daten im Internet 2011 - 2009



Quelle: JIM 2011 - 2009, Angaben in Prozent

Basis: Internet-Nutzer

- Child Consent following TMG/GDPA
 - Creation of a contract performance reason questionable:
Validity of contract?
 - Depending on capacity of discernment
 - Possible consequences:
 - Parents consent required
 - For platform use +
 - For data use -

Dangers through children: Contracting

- Accidental contract with parents?

Contract closure by using parent's password?

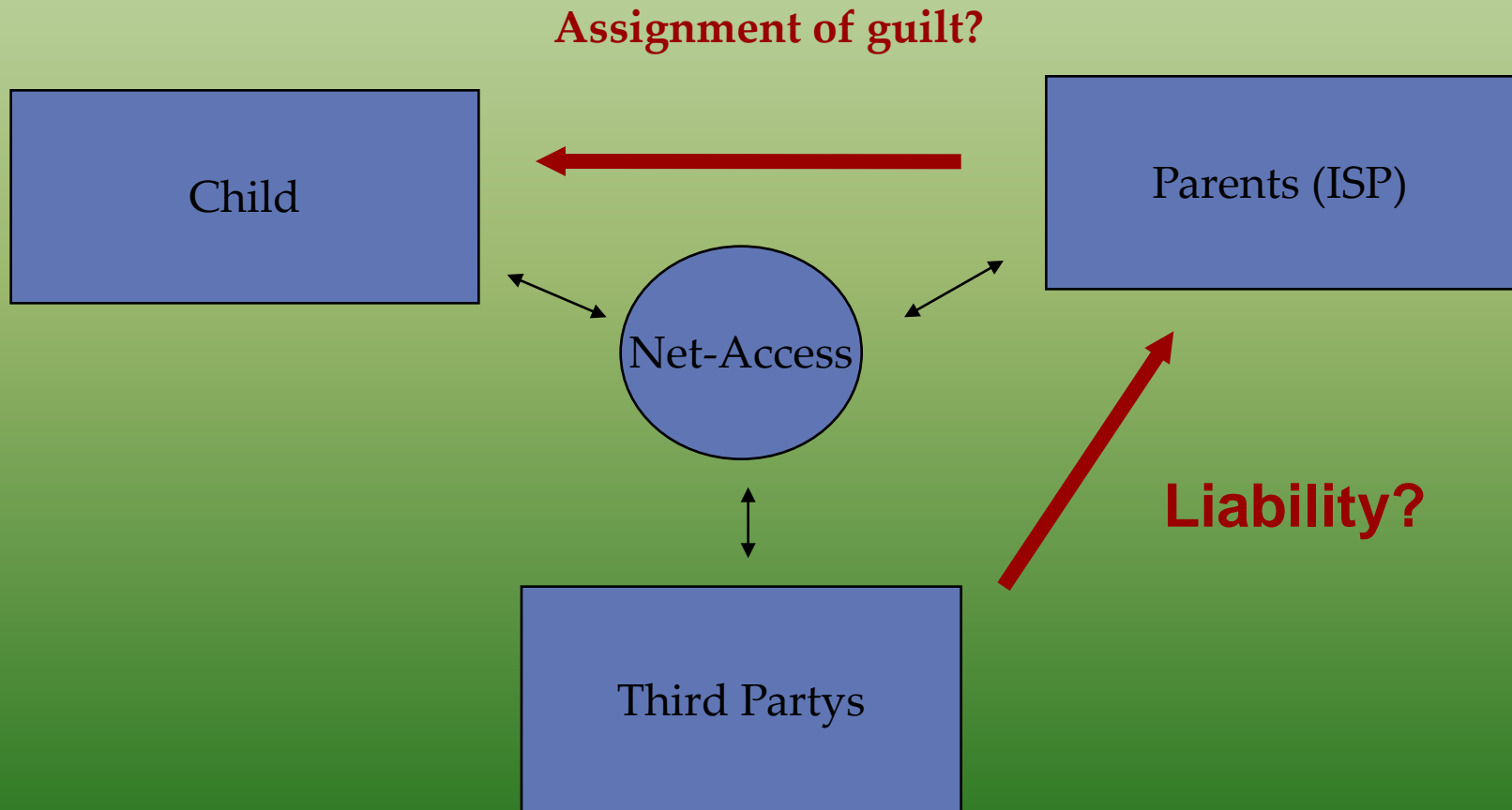
LG Bonn, 19.12.2003 - 2 O 472/03

No representation-power analogy just by password misuse through children

(Explicit representation or representation by good faith principles)

Children and Social Media

Dangers through children



Dangers through children: Children liability

Law of Torts: German liability system

Sec. 10 Tele Media Act:

Host provider liability eg. in cases of IP violations and other infringements:

No obligation to search for illegal information BUT

- responsibility for known illegal information
- or for not deleting illegal information after receiving a notice

Easy to comply with?

Dangers through children: Children liability

Law of Torts: German liability system

BUT

German Jurisdiction

The TMG will not apply for injunctive relief claims against providers

Dangers through children: Children liability

German supreme Court (Ebay, Rapidshare):

„Co-Liability“ („Mitstörerhaftung“) without negligence, depending on the following criteria

- Quantity and quality of already happened infringements
- Marketing with illegal activities
- Provider might have access to the illegal contents,
- Provider gains revenue directly or indirectly from illegal content
- Technical options to obtain access to the content

Dangers through children: Children liability

Law of Torts

Section 828 Minors

(1) A person who has not reached the **age of seven** is not responsible for damage caused to another person.

(...)

(3) A person who has not yet reached the age of eighteen is, to the extent that his responsibility is not excluded under subsection (1) or (2), not responsible for damage he inflicts on another person if, when committing the damaging act, **he does not have the insight** required to recognise his responsibility.

Dangers through children: Parents' liability

Law of Torts

Section 832 Liability of a person with a duty of supervision

(1) A person who is obliged by operation of law to supervise a person who requires supervision because he is a minor or because of his mental or physical condition is liable to make compensation for the damage that this person unlawfully causes to a third party. **Liability in damages does not apply if he fulfils the requirements of his duty to supervise** or if the damage would likewise have been caused in the case of proper conduct of supervision.

(2) The same responsibility applies to any person who assumes the task of supervision by contract.

Dangers through children: Parents' liability

Law of Torts

LG München I, decision as of June 19 2008 - 7 O 16402/07

1. A PC is a dangerous item.
2. An introduction into internet use by parents for their children is always required for liability reasons (OLG Frankfurt a.M., CR 2008, 243, 244; LG Hamburg MMR 2006, 700, LG Hamburg, 2007, 131) **even if and when the minors are much more experienced than their parents** (e.g. through school IT lessons)

Dangers through children: Parents' liability



Law of Torts

LG München I, decision as of June 19 2008 - 7 O 16402/07

Moreover an **ongoing control of internet** use by the parents is required in order to make sure that the use follows the guidelines of the parents' introduction. **At least one time** such a control has to take place...

(see also: OLG Frankfurt a.M., CR 2008, 243, 244; LG Hamburg MMR 2006, 700; LG Hamburg MMR 2007, 131).

Children and Social Media

Dangers through children: Parents' liability



Limitation of parental control duties?

Control of

- emails?
- Browserdata?
- Logfiles?
- stored private files?

Use of „trojan horses“?

Obtaining information from Providers / ISPs?

Dangers through children: Parents' liability

Landgericht Mannheim, decision as of September 29 2006 – 7 O 76/06

Extension of control duties?

The owner of a private web access has to act like an ISP. Control duties will be necessary depending on

- the age and character of the family members
- Permanent control will not be necessary in most cases

Children and Social Media

Help by Social Media Providers

Example Facebook

Parents' Advisory part 1

1. It might be difficult to stay informed about the latest technical developments. Don't hesitate to ask your children to help you understand the technical options
2. It's easier to understand facebook being account owner. Therefore give joining us a thought, then you will undertsnad what facebook is all about.
3. Set up a facebook group for your family members, so will have your own private room to share all your photographs and information.
4. Instruct your teenager about online security, so he can safely use his facebook profile.
5. Talk about online security in the same way you use to talk about driving security and sports security.

Children and Social Media

Hilfe von Betreibern



Example Facebook

Parents' Advisory part 2

1. Start to talk with your teenager
2. Ask your teenager
 - if he has the feeling that he can talk to you when there is a problem at school or elsewhere.
 - to help you understand why facebook is important for him.
 - If he can help you to become account owner
 - who his friends on facebook are
 - if he agrees to have you as friend on facebook

Children and Social Media

Parents' right to disclosure

How can I know what my child might be doing?

Right to disclosure against Provider?

- Parent represents child, child has the right to know...sec. 1629 GCC -> Parents' control rights sec. § 1626 GCC
- Right to disclosure because of contract with protection effect for third parties?
- data protection rights?
 - 34 GDPA?
 - 13 VII TMG?
- Parental care and deriving rights, sec. 823 BGB? (BGHZ 11, 168).

Children and Social Media

right to disclosure

How can I know what my child might be doing?

Right to disclosure against Provider?

- S. Däubler, in: Däubler/Klebe/Wedde/Weichert, GDPA, 2. Aufl. 2007, § 33 BDSG Rdnr. 13. :
- *Art. 29-Data Protection Working Party states that informations for minors always have to be disclosed to their parents. (s. Art. 29-Datenschutzgruppe, Stellungnahme 2/2009 zum Schutz der personenbezogenen Daten von Kindern, WP 160, 11).*

Children and Social Media

right to disclosure

Conclusio

- Parents must instruct children before allowing internet access
- Parents must control compliance with instruction guidelines
- Children can give their valid consent to their data use
- But they can not close contracts without parents consent
- Parents have to act as ISPs and have responsibility depending on character of the child (or partner) and depending on existing problems.

Children and Social Media

Perspectives



NEW EU Data Protection order

- Introduction of the „right to be forgotten“
- No usage of social media for minors under age of 13 (following COPPA).
- Not matching with European contract law allowing minors over age of 6 to close contracts.

Children and Social Media

Perspective



Perspective: Collecting Society Data Protection (if you can't beat them, milk them)

- No real option to stop exploitation of Social data
- Therefore at least financial participation

Children and Social Media

Perspectives



<http://www.keepcontrol.eu./?lang=p>

Se receberes mensagens ofensivas no teu perfil, no telemóvel ou quando estás a jogar, pensa no seguinte conselho:

- **Não respondas** a mensagens que têm como objectivo ofender-te ou aborrecer-te. Lembra-te que ao responderes podes estar a encorajar o agressor.
- **Bloqueia o remetente.** Não tens de aturar ninguém a chatear-te - bloqueia remetentes indesejados!
- **Relata a situação com alguém da tua confiança.** Falar com os pais, amigos ou professores é normalmente o primeiro passo para lidar com qualquer problema.
- **Respeita-te a ti próprio e aos outros** - estar online é bastante público e bastante real, apesar de não parecer. Conhece os teus direitos (www.internetsegura.pt)! Sê criativo! Sê tu próprio! Controla a situação!
- **Guarda a mensagem;** Embora não seja agradável, esta pode servir de prova caso o assunto assuma proporções tais que seja necessária a intervenção de entidades especializadas.
- **Reporta os problemas** a pessoas que te ajudem a resolvê-los, como por exemplo, aos administradores dos sítios web onde viste os conteúdos. Qualquer situação ilegal deve ser denunciada às autoridades.

Children and Social Media

Perspectives



Suggestions EU-commission:
www.keepcontrol.eu.

Source: PR *EU-Commission* as of Feb 10, 2009.

- Alarm button on any keyboard
- Private Usage Profiles of minors shall not be searchable (neither on websites nor on search engines).
- Privacy settings shall be easy to find and amend, the presettings must follow highest privacy ideas.

Children and Social Media

Comfort

Sanctions?

- Invalidity without parent's consent:
- Data use illegal due to sec. 43 GDPR and sec. 16 TMG
- DPA directions according to sec § 38 GDPR



§ 32(6) BDSG-E

The employer is allowed to use social media data only from networks related to professional activities.



Children and Social Media



Muito obrigado pela sua
atenção!

Contato e informação
adicional:

Prof. Dr. Thomas Wilmer
E-Mail thomas.wilmer@h-da.de



Wissenschaft, Technologie und Innovation
Ciência, Tecnologia e Inovação



h_da
HOCHSCHULE DARMSTADT
UNIVERSITY OF APPLIED SCIENCES