

# Judgment of the Munich Court in the "CompuServe Case" (Somm Case)

Translation and Commentary by Christopher Kuner

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**Comments:** The following is a translation of the full text of the infamous "CompuServe Judgment", in which a local court judge sentenced former CompuServe Germany managing director Felix Somm to 2 years' probation for the distribution of child pornography and other illegal materials that could be accessed via CompuServe's Internet access and its proprietary service. The judgment, dated July 15, 1998, is presently on appeal.

Opinion in the German legal community on the judgment varies between those who think it represents the opinion of a single, Internet-hostile judge and will be overturned on appeal, and those who feel that it carries ominous implications going far beyond this case. What is certain at the moment is that the case has had a chilling effect on the Internet industry in Germany (one foreign provider has already moved its servers out of the country).

Without going into too much detail, there are at least three major legal points on which the judgment can be criticized:

- **The court misunderstands the terms "access provider" and "service provider".** Under § 5 of the German "Law on Teleservices", the mere provision of access does not give rise to liability, while those holding third-party content ("service providers") are liable only to the extent they had knowledge of its illegal nature and it was technically possible and reasonable for them to block it. Most observers felt before the judgment that these provisions would result in Mr. Somm being acquitted. However, in the judgement, the court first refuses to apply the access provider provisions to CompuServe Germany, based on the assumption that the real provision of access to the Internet is provided by the US CompuServe parent, to which CompuServe Germany merely maintains a "fixed line". This interpretation finds no support in German law, and seems to subvert the intent of the German legislator in freeing access providers from liability. That done, the court goes on to misapply the "service provider" provisions, finding that it would indeed have been technically possible and reasonable for access to illegal materials to have been blocked, even though several expert witnesses testified otherwise.
- **The court's definition of "knowledge" is far too broad.** By finding that Mr. Somm had "knowledge" of the illegal content because almost everyone could have accessed it via CompuServe's service, the court stretches the concept of "knowledge" too far. Most legal commentators in Germany had interpreted "knowledge" in this content to mean that the defendant must have positive knowledge of the illegal content.
- **The court improperly imputes actions of Mr. Somm and CompuServe Germany to CompuServe USA and vice versa.** German criminal law is generally based on the principle of personal responsibility, and German corporate law is generally hesitant to impute the actions of one independent legal entity to another. The court does not sufficiently observe these principles and freely imputes the actions of Mr. Somm to CompuServe USA and vice versa.

The German government is presently evaluating the extent to which legislation may be necessary to cope with the implications of the judgment.

## Local Court [Amtsgericht] Munich

File No.: 8340 Ds 465 Js 173158/95

IN THE NAME OF THE PEOPLE

JUDGMENT

of the Local Court Munich

in the criminal case v.

SOMM, Felix Bruno,  
born ..... in ....., married, self-employed, Swiss national, domiciled .....

for the dissemination of pornographic writings

on the basis of the hearings on

Tuesday, May 12, 1998,  
Thursday, May 14, 1998,  
Tuesday, May 19, 1998,  
Wednesday, May 20, 1998,  
Thursday, May 28, 1998,

at which were present

Judge at the Local Court Hubbert as criminal judge,

Prosecutor von Hunoltstein as official of the Public Prosecutor's Office,

Attorney-at-Law Dr. Hans-Werner Moritz,  
Attorney-at-Law Wolfgang Dingfelder,  
and Prof. Dr. Ulrich Sieber  
as counsel for the defense

Court Employee K.....  
Court Employee R.....r  
as Clerks of the Court Office:

I. The accused is found guilty of having assisted in the dissemination of pornographic writings in thirteen legally-coinciding cases, committed jointly, factually coinciding with a negligent violation of the Act on the Dissemination of Publications Morally Harmful to Youth [GjS] in three legally-coinciding cases.

II. The accused is sentenced to an overall term of imprisonment of

**2 years.**

III. Execution of the sentence is suspended on probation.

IV. The accused shall bear the costs of the proceedings.

Law applied: §§ 184 para. 3 no. 2, 11 para. 3, 13, 14 para. 1 no. 1, 25 para. 2, 52, and 53 Penal Code [StGB]; §§ 3 para. 1 no. 2, 1 para. 3, 21 para. 1 no. 2, para. 3 GjS.

### **Grounds:**

#### **I.**

The professional and financial circumstances of the accused are in good order. The accused, who has in the mean time terminated his employment as Managing Director of CompuServe Information Services GmbH, is now self-employed according to his own statements. The accused is married. His wife works together with him in his business. The accused has not rendered himself liable to criminal prosecution previously.

#### **II.**

##### **II. 1.**

As Managing Director of CompuServe Information Services GmbH (hereinafter "CompuServe Germany"), the accused provided the customers of CompuServe USA in Germany jointly with CompuServe Incorporated (hereinafter "CompuServe USA") with access to violent, child, and animal pornographic representations stored on the newsserver of CompuServe USA

The accused was Managing Director of CompuServe Germany with its seat in Unterhaching near Munich. The object of the company, which had approximately 170 employees at the end of 1995, is described in the commercial register of the Local Court Munich as follows:

"Negotiation of memberships with CompuServe Information Service, providing customer services for new and existing members of CompuServe Information Service, rendering advice to the US parent company in the field of product marketing, marketing communication and other fields connected with CompuServe services."

CompuServe Germany is a 100 % subsidiary of the worldwide on-line service provider CompuServe USA with its seat in Arlington, USA.

CompuServe USA offers its customers third-party services (e.g.. news services via own newsservers) and its own (proprietary) services. Contractual party for the service agreements concluded with customers in Germany is solely CompuServe USA There are no contractual relationships between CompuServe Germany and the customers.

Among the tasks of CompuServe Germany is providing the customers of CompuServe USA in Germany with dial-in nodes. The respective customer calls the dial-in node nearest to him in Germany. He is then connected without any further examination of plausibility via

a dedicated line between subsidiary and parent company to the parent company's computing center located in the U.S. After having checked the membership, CompuServe USA provides its customers in Germany via its computing center with access to the Internet through the nearest Internet dial-in node (University of Ohio).

Furthermore, customers in Germany are provided with access to proprietary data content after their membership has been approved.

The purpose of the dedicated line is to offer customers in Germany a dial-in node located as close as possible to them in order to keep telephone rates low.

The relationship between the parent company and subsidiary is controlled by contract. CompuServe Germany receives compensation for its activities from CompuServe USA; at the time of the crimes, the amount of remuneration was 31 % of the revenue earned by CompuServe USA from the field of business supervised by CompuServe Germany. The business premises of CompuServe Germany in Unterhaching were searched on November 22, 1995 based on the order of the Local Court Munich of November 16, 1995. The search order was granted - as specified in the grounds of that order - on strong suspicion that child pornographic writings representing actual events were being disseminated through the computer system of CompuServe with approval of the responsible persons.

In the scope of that search the accused was orally informed about the charge. He was informed, inter alia, that the newsserver of CompuServe USA contain newsgroups which specifically indicate child pornographic content and in which accessible child pornographic representations originating from third parties are stored.

Following the search, the police brought the following child pornographic newsgroups as examples for the existence of newsgroups unambiguously designed for child pornography to the personal notice of the accused:

- alt.sex.pedophilia
- alt.sex.pedophilia.boys
- alt.sex.pedophilia.girls
- alt.sex.pedophilia.pictures
- alt.sex.pedophilia.swaps

The accused immediately informed the parent company about the search and the aforementioned newsgroups and asked them to block or delete said newsgroups.

CompuServe USA as operator of the newsserver was technically able to block such newsgroups or the content thereof without considerable effort. However, CompuServe Germany was not technically able to block said newsgroups or the content thereof via the dedicated line.

On November 29, 1995 the investigating police officers ascertained that the newsgroups stored on the newsserver of CompuServe USA

- alt.binaries.pictures.erotica.pre-teen
- alt.sex.pedophilia
- alt.sex.pedophilia.boys
- alt.sex.pedophilia.girls
- alt.sex.pedophilia.pictures
- alt.sex.pedophilia.swaps

were still mentioned in the table of contents, but no access or download was possible.

Furthermore, the investigating police officers ascertained that access to the newsgroups "alt.sex" or "alt.erotica" was still possible and that these newsgroups contained, inter alia, pictorial files containing pornography within the meaning of § 184 paras. 1, 3 Penal Code.

Thus, on November 29, 1995, the customers of CompuServe USA in Germany could receive a pictorial file from the newsgroup "alt.sex.incest". The picture under the file name "BOY.MOM.jpg(1/3) mother teaches son" shows an adult naked female who is having manual intercourse with an approximately eleven-year-old boy. The following text is attached to the picture: "Mom, age 38, gives her son, age 11, a hard time (don't you wish you had it so hard)".

On December 8, 1995 the police handed over to CompuServe Germany the following list indicating 282 accessible newsgroups (as per November 21, 1995, 10 a.m.) stored on the data storage device of CompuServe USA:

[list omitted]

This list contained all newsgroups providing violent, child, or animal pornography representations being the subject of the conviction and which were accessible for the customers of CompuServe USA in Germany. In this respect, the list contained, for example, the following newsgroups:

- alt.binaries.pictures.erotica.bondage
- alt.sex.incest
- alt.binaries.pictures.erotica.pre-teen
- alt.sex.pedophilia
- alt.sex.bestiality.barney
- alt.binaries.pictures.erotica.bestiality

The accused immediately transmitted said list to the parent company on December 8, 1995 and requested blocking or deletion. CompuServe USA thereupon blocked from December 22, 1995 until February 13, 1996 the majority of the newsgroups on the list.

Upon investigation by police authorities on December 27, 1995 of the newsgroups stored on the newsserver of CompuServe USA, it was ascertained that access to the newsgroups "alt.sex" and "alt.erotica" was no longer possible and that they no longer appeared in the table of contents.

After the deblocking of the newsgroups blocked until February 13, 1996, the police officers ascertained that child pornography was again accessible from the newsserver of CompuServe USA in the following newsgroups:

- alt.sex.incest
- alt.binaries.pictures.erotica.pre-teen
- de.alt.pictures.sex.children.

An electronically accessible letter of February 16, 1996 directed to the customers of CompuServe USA contains the following:

"The introduction of an access control for parents by CompuServe offers to the members new possibilities to meet the responsibility

they have with regard to their children... These possibilities also allow CompuServe to take youth protection seriously and simultaneously to re-open most of the temporarily blocked newsgroups."

A further letter comes from the accused himself. This letter of February 20, 1996 from management and accessible by the customers of CompuServe USA in Germany reads as follows:

"The worldwide turmoil regarding the temporary blocking of newsgroups shows that CompuServe's longstanding efforts to find a careful way to implement youth protection are on the right track... CompuServe provides its members free of charge with the protective program 'Cyber Patrol'™"

By letter of February 21, 1996 counsel for the defence Dr. Hans-Werner Moritz informed the Public Prosecutor's Office for the District Munich I, inter alia, that CompuServe USA and CompuServe Germany were of the opinion that by providing new German-language tools they had taken every effort that could be reasonably expected of them to block access to criminal content in the Internet via CompuServe Information Service for persons under 18 years.

That letter was accompanied by the CompuServe Memorandum No. 06/1996 which reads, inter alia, as follows:

"Bob Massey, President and CEO of CompuServe states in this respect: 'The introduction of Parental Controls assures that the decision to limit access lies where it belongs - with the individual user. This new feature and the cancellation of limited access stresses our commitment to a family-friendly and safe on-line service.'"

Likewise, the letter of February 21, 1996 from the Prosecution at the Regional Court for the District Munich I personally notified the accused of the following:

"With reference to the most recent press releases, I herewith inform you for the purpose of clarification that the Prosecution at the Regional Court for the District Munich I is not of the opinion that the installation of 'Parental Controls' by CompuServe and its management is sufficient to comply with the measures required under criminal law to prevent criminal offenses according to §§ 131, 184 Penal Code and § 21 Act on the Dissemination of Publications Morally Harmful to Youth."

After CompuServe USA had reopened said newsgroups, the newsgroups

alt.binaries.pictures.erotica.bondage  
alt.sex.incest  
alt.binaries.pictures.erotica.pre-teen  
alt.sex.pedophilia  
alt.sex.bestiality.barney  
alt.binaries.pictures.erotica.bestiality

provided access to the following violent, child, or animal pornographic representations

originating from third parties and accessible for the customers of CompuServe USA in Germany:

1. On February 20, 1996 the pictorial file "10 years and hot... 10yrpuss.jpg (1/1)" could be accessed from the newsgroup "alt.sex.incest". The pictorial file shows an approximately 10-year-old girl with whom an adult man is having oral intercourse.
2. At the same date and in the same newsgroup the pictorial file "Daddysphotoalbum.-im002.jpg (2/2)" could be accessed. The picture shows an approximately 4-year-old girl who, obviously upon request of the photographer, assumes a position which places her genitals in the foreground of the picture.
3. Also at the same date, the pictorial file "10vibr.jpg (1/1)" in the newsgroup "alt.binaries.pictures.erotica.pre-teen" could be accessed. The picture shows an approximately 10-year-old girl who manipulates her genitals with a vibrator.
4. On February 23, 1996 the pictorial file "fucking brother and sister-yngl.jpg (1/1)" in the newsgroup "alt.binaries.pictures.erotica.pre-teen" could be accessed. The picture shows an approximately twelve-year-old girl who is having sexual intercourse with a male.
5. On February 26, 1996 the pictorial file "ll-cl-14.jpg" could be accessed from the same newsgroup. The picture shows an approximately 8-year-old girl who is having sexual intercourse with a boy of presumably the same age.
6. On March 12, 1996 the pictorial file "Doberman.jpg (1/1)" could be accessed from the newsgroup "alt.sex.bestiality.barney". The picture shows an adult woman who is having oral intercourse with a dog.
7. On March 21, 1996 the pictorial file "where'deverybodygo-ll-n3f24.jpg (1/1)" from the newsgroup "alt.sex.pedophilia" could be accessed. The pictorial file shows two pictures on which an approximately 10-year-old girl has manual intercourse with an adult man and on the second picture mutual oral intercourse is clearly visible, with the following text in English, German and French: "July 19: It is good to see sweet Sophy again when I return from a business trip. If one only had more holidays! I enjoyed two climaxes: first, "69", so I can best lick her sweet asshole and tender vagina! Then, a hearty ass fuck. Sophy finds it simply thrilling. And that's the way I would describe it."
8. On March 22, 1996 the pictorial file "ll-n3f01.jpg (00/02)" could be accessed from the newsgroup "alt.sex.pedophilia". The picture shows an approximately 10-year-old girl who is sitting on a chair with legs opened towards the camera and is giving manual intercourse to a man standing next to her.
9. On March 26, 1996 the pictorial file "RED-05.jpg (01)" could be accessed from the newsgroup

"alt.binaries.pictures.erotica.bestiality". The picture shows an adult woman having sexual intercourse with a dog.

10. On March 26, 1996 the pictorial file "rape03.jpg (1/1)" could be accessed from the newsgroup "alt.binaries.pictures.erotica.bondage". The picture shows a bound woman who is having sexual intercourse with a man while another man is holding a knife to her neck and the woman is obviously screaming aloud.

11. At the end of July/beginning of August 1996, the pictorial files "b4.jpg" and "b5.jpg" could be accessed from the newsgroup "alt.binaries.pictures.erotica.pre-teen". The pictures show an approximately 10-year-old girl in whose vagina an adult woman enters an object and whose genitals are being manipulated by an adult woman.

12. On October 17, 1996 the pictorial file "003.jpg (1/1)" could be accessed from the newsgroup "alt.binaries.pictures.erotica.pre-teen". The picture shows an approximately 8-year-old girl who is having sexual intercourse with a man.

In all these cases, the accused acted in intended and deliberate cooperation with CompuServe USA, which in violation of its duty failed to block these unambiguous newsgroups.

## II.2

The accused connected the customers of CompuServe USA in Germany via dial-in nodes and a dedicated line with the computing center of the parent company. In the game fora the parent company made games available for use which had been put on the index as its own games and among its own data offering.

These games could also be accessed by the customers of CompuServe USA in Germany with computers at home, where children or youths are raised.

The games concerned are "Doom" and "Heretic", which could be accessed on March 19, 1996, and "Wolfenstein 3 D", which could be accessed on April 1, 1996, which CompuServe USA offered in its own fora as its own games on the basis of an agreement with third parties.

The Federal Review Board decided to put the games on the index for publications morally harmful to youth. This was effected with regard to their social-ethical disorientation (including, but not limited to deliberate, realistically reproduced killings) or elements glorifying National Socialism.

The decisions of the Federal Review Board for Publications Morally Harmful to Youth were published in the Federal Gazette No. 100 of May 31, 1994 ("Doom"), in the Federal Gazette No. 141 of July 29, 1995 ("Heretic") and in the Federal Gazette No. 20 of January 29, 1994 ("Wolfenstein 3 D").

In contravention of his duty, the accused failed learn of the announcement that the games were put on the index and to check whether games on the index were offered in the



proprietary service of the parent company in the corresponding fora. Already prior to the time of the crimes, many different kinds of national socialist, racist, or pornographic material existing in data networks were the subject of public discussion.

There were hints in the media that CompuServe was offering games that had been put on the index (cf., e.g., Buschek, "Digitaler als die Polizei erlaubt", PC Professionell, Issue 12/95).

### III.

These facts have been demonstrated to the Court's satisfaction. They are based on the statements of the defense given on behalf of the accused as well as on the testimony given by the interrogated witnesses Detective Superintendent S....., Senior Detective Superintendent M....., Senior Detective Superintendent M....., Police Inspector C....., Detective Superintendent R....., and Senior Police Inspectors K..... and K..... . They are furthermore based on the statements of the expert Dr. F..... and on inspection of the pictorial files and communications protocols.

The findings as to the organizational structures of CompuServe Germany and CompuServe USA are based on the statements of the accused, which in this respect match the testimony of Mr. S..... .

The course of the search carried out by the police on November 22, 1995 as well as the communication of the five newsgroups containing child pornography to the accused has been conceded by the accused and also results from the testimonies of Mr. S..... and Mr. M..... .

The accused stated that he immediately informed the parent company about the search and the names of the newsgroups and requested that they be blocked or deleted.

The findings of November 29, 1995 are based on the testimony of Mr. C..... .

The findings regarding delivery of the list on December 8, 1995 are based on the testimony of Mr. S..... and have also been conceded by the accused, who immediately transmitted the list according to his own statements to the parent company and requested that they be blocked or deleted. According to his further statements, the parent company thereupon blocked from December 22, 1995 until February 13, 1996 the majority of the newsgroups on the list.

Dr. F....., whose views are shared by the Court in this respect and whose expertise is beyond doubt, convincingly argued that CompuServe USA was able to block unambiguous newsgroups or the content thereof without considerable efforts. The Court also shares the expert's view that CompuServe Germany was not technically able to block these newsgroups or their content via a dedicated line.

The findings of the police of December 27, 1995 were testified to by Mr. C..... .

The findings of the police with regard to the accessible newsgroups subsequent to the deblocking effected on February 13, 1996 were testified to by Mr. R..... .

The correctness of the electronically accessible letter of February 16, 1996, of the accessed letter from the accused of February 20, 1996, of the letter from defense counsel of February 21, 1996 including the Memorandum No. 06/1996, as well as receipt of the letter from the Public Prosecutor's Office for the District Munich I of February 21, 1996 was

admitted by the accused when these documents were put to him.

The following witnesses testified that the pictorial files described in the statement of facts, the content of which originates from third parties, and which were put to the respective witnesses, were accessed at the following dates:

November 29, 1995 Mr. C.....  
February 20, 1996 Mr. R..... (3 pictorial files)  
February 23, 1996 Mr. R.....  
February 26, 1996 Mr. R.....  
March 21, 1996 Mr. C.....  
March 22, 1996 Mr. C.....  
March 26, 1996 Mr. C..... (2 pictorial files)  
end of July/beginning of August 1996 Mr. K.....  
October 17, 1996 Mr. K.....

All the aforementioned pictorial files were inspected. The pictorial file of March 12, 1996 and the relating communications protocol were inspected after having been put to the accused.

Mr. C..... testified that the indexed games "Doom" and "Heretic" could be accessed on March 19, 1996 and the indexed game "Wolfenstein 3 D" could be accessed on April 1, 1996 from the proprietary service of CompuServe USA

That CompuServe USA provided the games in its own fora as its own games is demonstrated by the fact that CompuServe USA provided the games in its fora without indicating the third parties from whom they derived.

The dissemination of software morally harmful to youth, for example the game "Doom", through CompuServe as mentioned in the article " Digitaler als die Polizei erlaubt " by Buschek in PC Professionell, Issue 12/95, was introduced at trial when said document was put to Mr. S..... .

All of the witnesses testified to the events ascertained in the statement of facts in a believable and consistent manner.

The findings as to the personal circumstances of the accused are based on his own statements.

#### **IV.**

##### **IV. 1**

The accused is found guilty of having assisted in the dissemination of pornographic writings in thirteen legally-coinciding cases, committed jointly, pursuant to §§ 184 para. 3 no. 2, 11 para. 3, 13, 14 para. 1 no. 1, 25 para. 2, 52, and 53 Penal Code.

He made publicly accessible pornographic writings containing acts of violence, sexual abuse of children and sex acts between human beings and animals.

Pursuant to § 14 para. 1 no. 1 Penal Code offenses relating to the business of CompuServe Germany are attributable to him as Managing Director of CompuServe Germany pursuant to § 35 para. 1 Act on Limited Liability Companies [GmbHG], i.e., in his capacity as authorized representative.

A. The constituent elements pursuant to §§ 184 para. 3 no. 2, 11 para. 3 Penal Code are found to exist.

1. The representations described in the statement of facts are pornographic writings dealing in one case with acts of violence (case no. 10), in ten cases with the sexual abuse of children (case of November 29, 1995, case nos. 1 to 5, 7, 8, 11, 12) and in two cases with sex acts between human beings and animals (case nos. 6, 9) (§ 184 para 3 Penal Code, so-called hard pornography).

2. The pictures constitute writings within the meaning of §§ 184 para. 3, 11 para. 3 Penal Code.

The word "writings" as most often applied in practice to representations represents all other media as well. However, the generic term as such is "representation" (Schönke/Schröder-Eser, Strafgesetzbuch, Kommentar, 25th ed. 1997, § 11, marginal no. 78; Tröndle, Strafgesetzbuch und Nebengesetze, 48th ed. 1997, § 11, marginal no. 44 with further notes).

Representations mean physical signs which embody an idea and are perceptible by the senses, whereby the physical embodiment has to last a certain period of time (Schönke/Schröder-Eser, § 11, marginal no. 78; Tröndle, § 11, marginal no. 40; BGHSt 13, 375, 376).

This includes content stored on data storage devices. This legal environment already existing prior to the Information and Communication Services Act [luKDG], which took effect on August 1, 1997, was clarified by the revision of § 11 para. 3 Penal Code and addition of the term "data storage device" (Article 4 no. 1 [luKDG]).

The characteristic features of the term "representation" are present, since the pornographic data content stored on the newsserver of CompuServe USA for the customers of CompuServe USA in Germany as ascertained in the statement of facts are physical signs, which embody an idea and the embodiment of which lasts for a certain period of time (Derksen, NJW 1997, 1878, 1881; Higher Regional Court Stuttgart, NSTZ 1992, 38; Walther, NSTZ 1990, 523). They are accessible and thus visually perceptible.

3. The pornographic writings within the meaning of § 184 para. 3 Penal Code were made publicly accessible.

Providing access requires that another person is given the possibility of gaining knowledge of the pornographic content of writings by sensual perception (Lackner, Strafgesetzbuch mit Erläuterungen, 22th Ed., 1997; § 184, marginal no. 5; Derksen, NJW 1997, 1878, 1881; Federal Court of Justice, NJW 1976, 1984). Physical transfer of the representations is not required. Providing access to content is given when electronically-stored information may be accessed and displayed on the monitor of the person receiving it (Higher Regional Court Stuttgart, NSTZ 1992, 38; Walther, NSTZ 1990, 523; Stange, CR 1996, 424, 426). It is irrelevant whether a person gains actual knowledge of the material made available for access (Tröndle, § 184, marginal no. 39).

Furthermore, access was provided publicly. Access is provided publicly when a larger, undefined group of persons not individually defined or at least not personally connected may gain knowledge thereof (BGHSt 10, 194, 196; BGHSt 11, 282, 283; Schönke/Schröder-Lenckner, § 184, marginal no. 32).

The accused committed the acts as an accomplice, i.e., in concert with CompuServe USA (§ 25 para. 2 Penal Code).

An accomplice is a person who contributes to implementation of the same act owing to a joint decision in the scope of a joint plan (Schönke/Schröder-Cramer, § 25, marginal no. 63 et seq.).

The perpetrator's contribution to the act must constitute part of the other person's activity and, accordingly, the action of the other person must supplement his own contribution (Tröndle, § 25, marginal no. 5 a).

His contribution may consist of acting, and the contribution of the other person may consist of a failure to act (Tröndle, § 25, marginal no. 7 a).

The question of complicity must be evaluated and considered on the basis of all circumstances which the persons involved had in mind. Key factors for such evaluation are the person's interest in the success of the offense, the extent of the contribution to the act, and control over the act (Tröndle, before § 25, marginal no. 2 with further notes).

a) The contribution to the act by the accused was that he connected the customers of CompuServe USA in Germany by means of dial-in nodes and a dedicated line existing between CompuServe Germany and CompuServe USA with the computing center of the parent company.

The contribution to the offense made by CompuServe USA was providing access to the Internet together with making available for use data content stored on its newsserver, without having filtered out violent, child, or animal pornographic content and, in conjunction therewith, providing its customers in Germany with the possibility to retrieve said data content and have it displayed on their monitors. In this respect, a failure to act must be assumed.

Moreover, CompuServe is not charged with having opened a communication link between the news services. Rather, the charge consists of CompuServe USA's failure to remove newsgroups that unambiguously indicated violent, child, or animal pornography from its data storage device.

CompuServe USA is also under a legal duty in this regard (§ 13 Penal Code), based on the warranty resulting from physical control over a source of risk. Accordingly, the owner or proprietor of property must control the risks originating therefrom to prevent damage to legal interests of third parties, if prevention of such damage is possible and can reasonably be expected of him (Schönke/Schröder-Stree, § 13, marginal nos. 43, 44).

The violent, child, or animal pornographic representations stored on and accessible from the newsserver constitute a source of risk, because they present the danger of misdevelopment of children or youths and of the abuse of children. Moreover, adults could become victims of offenders having an inclination to violent pornography (Schönke/Schröder-Lenckner, § 184, marginal no. 3).

CompuServe USA exercises the actual physical control over its newsserver. They are in a position to block or unblock both newsgroups specifically indicating hard pornography and news articles assigned to such newsgroups as the expert Dr. F..... explained, which opinion the Court shares.

Therefore, CompuServe USA was under a duty to block access to said pornographic

content. This duty also exists if the risk can be attributed to a third party (Schönke/Schröder-Stree, § 13, marginal no. 43), i.e., if the corresponding news articles are contributed by third parties as in the present case.

CompuServe USA had the opportunity to block access to hard pornography by blocking newsgroups which clearly indicated violent, child, or animal pornography. If CompuServe USA had removed the relevant newsgroups from its data storage device, said newsgroups would not have been made accessible to the customers of CompuServe USA via the data storage device of CompuServe USA. It must be clarified here that it is the data storage device of CompuServe USA that is at issue; CompuServe USA's criminal liability based on failure to act is unaffected by the fact that other persons also made hard pornography publicly accessible through their newsservers.

The blocking could also reasonably be expected. A person failing to act can reasonably be expected to be obligated to take an action when such action is required by law, in particular if no reasonable interests of such person are thereby considerably endangered (Tröndle, § 13, marginal no. 15, 16).

The interest of CompuServe USA in maintaining fora specifically indicating hard pornography is neither reasonable nor worthy of protection. Rather, in view of the seriousness of the risks involved and the importance of youth protection, CompuServe USA can be required to keep its newsserver free from newsgroups that specifically indicate violent, child, or animal pornography. Access was also provided publicly, since the hard pornography specified in the statement of facts was made accessible by the accused and CompuServe USA not only to a closed user group, but to all customers of CompuServe USA in Germany.

b) The contribution to the offense made by CompuServe USA must be imputed to the accused, since the contributions of both were performed due to a joint decision.

The accused and CompuServe USA knew and intended to make publicly accessible the hard pornography specified in the statement of facts and stored on the newsserver of CompuServe USA in clearly-indicated newsgroups.

On the occasion of the search of CompuServe Germany's business premises on November 22, 1995, the accused was notified that child pornographic representations were being stored on and could be accessed from the newsserver of CompuServe USA in newsgroups specifically indicating child pornography.

The following five child-pornographic newsgroups accessed under the name "alt.sex.pedophilia" were brought to his personal attention as examples for the existence of unambiguous newsgroups for child pornography:

- alt.sex.pedophilia,
- alt.sex.pedophila.boys
- alt.sex.pedophilia.girls
- alt.sex.pedophilia.pictures
- alt.sex.pedophilia.swaps

On December 8, 1995, a list (as per November 21, 1995, 10 a.m.) specifying 282 newsgroups accessible from the newsserver of CompuServe USA indicating pornographic content was handed over to CompuServe Germany. Said list also specified the following violent, child, or animal pornographic newsgroups:

alt.binaries.pictures.erotica.bondage  
alt.sex.incest  
alt.binaries.pictures.erotica.pre-teen  
alt.sex.pedophilia  
alt.sex.bestiality.barney  
alt.binaries.pictures.erotica.bestiality

According to the statements of the accused, he informed CompuServe USA without delay of any unlawful content made known to him due to the aforementioned events.

Both the accused and CompuServe USA did not only know that hard pornography within the meaning of § 184 para. 3 Penal Code was being stored on the newsserver of the parent company and was accessible for their customers in Germany, but this was also their intent. The intention to commit the offense was expressed in the parent company's and the subsidiary's decision to continue providing access to hard pornography.

This follows not only from their actual conduct, but also from their own statements.

Both the accused and CompuServe USA made the representations specified in the statement of facts publicly accessible.

The intention to make said representations publicly accessible proceeds from the letter of defense counsel Dr. Moritz of February 21, 1996 to the Public Prosecutor's Office at the Regional Court for the District Munich I, in which letter he communicates, inter alia, that CompuServe USA and CompuServe Germany are of the opinion that in providing the new tools in the German language they have taken every effort that could reasonably be expected of them to block access to criminal content in the Internet via CompuServe Information Service for persons under 18 years.

This corresponds to the statement of the person responsible at CompuServe USA (Bob Massey) according to the Memorandum No. 6/1996 attached to the aforementioned letter which refers to the cancellation of the access limitation, arguing that the introduction of Parental Controls assures that the decision on limitation of access lies where it belongs, namely with the individual user.

The intention of the parent company to make the hard pornography as ascertained in the statement of facts publicly accessible results from the electronically-accessible letter of February 16, 1996 directed to the customers of CompuServe USA, which letter, inter alia, states that an access control for parents allows CompuServe to "reopen most of the temporarily blocked newsgroups".

The accused himself also pointed out the temporary blocking of newsgroups in an electronically-accessible letter from the management of February 20, 1996 directed to the customers of CompuServe USA in Germany when introducing "Cyber Patrols"™, and was of the opinion "that CompuServe's longstanding efforts to find a careful way to implement youth protection are on the right track."

The opinion expressed by the accused and the parent company that the aforesaid safeguard program was all that could be reasonably expected does not exculpate the accused of the charges, since the aforementioned safeguard program does not block public access to hard pornography.

The Public Prosecutor's Office at the Regional Court for the District Munich I drew the accused's attention to this point by its letter of February 21, 1996 personally directed to

him.

The accused and CompuServe USA each contributed to the offense by their intention to commit an offense and to do so in their own interest. Both the accused and CompuServe USA acted in their own economic interest. They made violent, child, or animal pornographic pictorial files publicly accessible in unambiguous newsgroups in order to increase their revenues through winning new customers, extending market share, and increasing the time of use. The economic interest of the accused results already from the percentage of revenues fixed between the subsidiary and the parent company (31% / 69%). CompuServe USA's decision to reopen most of the originally blocked 282 newsgroups proves the respective economic interests of CompuServe Germany and CompuServe USA. This decision is based on the fear that economic loss will result in case newsgroups with hard pornography are removed from the newsserver of CompuServe USA.

Furthermore, the accused controlled the offense together with CompuServe USA, because only the dial-in nodes provided by him made the hard pornography stored on the newsserver of CompuServe USA accessible to their customers in Germany.

Section 184 para 3 no. 2 Penal Code takes precedence over §§ 21 para. 1 no. 2, 6 no. 2 GJS, whereby the conditions of the latter two have also been fulfilled here (Tröndle, § 184, marginal no. 13).

B. The liability of the accused has not been limited by § 5 paras. 2, 3 Teleservices Act (TDG).

Section 5 Teleservices Act, which applies pursuant to § 2 para. 3 Penal Code, is part of the IuKDG, which came into force on August 1, 1997. Section 5 paras. 2, 3 Teleservices Act restricts the liability of providers (§ 3 no. 1 Teleservices Act; as to basic doubts about a privilege of liability related to duties cf. Lehmann, CR 1998, 232 et seq.; BT-Dr. 13/7385, p. 51, nos. 4 and 5).

According to § 3 no. 1 Teleservices Act, the term "providers" means natural or legal persons or associations of persons who make available for use either their own (so-called on-line providers) or third-party (so-called service providers) teleservices or who provide access to the use of teleservices (so-called access providers).

In respect of the legal consequences (§ 5 Teleservices Act), the definitions are based on the responsibilities in question (BT-Dr. 13/7385 p. 19, as to § 3).

Liability is excluded under the conditions of § 5 para. 2 Teleservices Act for providers who make available for use third-party content, as well as pursuant to § 5 para. 3 Teleservices Act for providers who only provide access to third-party content.

1. The conditions for an exemption from liability pursuant to § 5 para. 3 Teleservices Act are not met, since CompuServe Germany is not an access provider (§ 3 no. 1, 3rd alt. Teleservices Act).

An access provider provides his customers with direct access to computer networks, in particular the Internet. CompuServe Germany, however, neither has own customers nor provides access to the network. Access to the network is provided only by the parent company, which also makes third-party content available for use. CompuServe Germany is only responsible for connecting the customers of CompuServe USA in Germany via a local dial-in node and a dedicated line with the parent company. This dedicated line between

parent company and subsidiary does not make the subsidiary into an access provider.

As to the dedicated line, this is technical infrastructure exclusively relating to the on-line service provider CompuServe USA, which the parent company established to enter into the German market. The purpose of a dedicated line is to offer customers in Germany a dial-in node located as near to them as possible to keep telephone rates low and so make CompuServe USA competitive in the on-line market in Germany.

2. Furthermore, there is no exclusion of liability pursuant to §§ 5 para. 2; 3 no. 1, 2nd alt. Teleservices Act.

According to § 5 para. 2 Teleservices Act providers are not liable for third-party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content.

a) Section 5 para. 2 Teleservices Act applies to CompuServe Germany. It is true that CompuServe Germany individually does not make available for use third-party content, but only connects the customers of CompuServe USA in Germany via a dedicated line with the parent company. The third-party content as such (the pictorial files containing violent, child, or animal pornography specified in the statement of facts are third-party content since they are fed in the newsserver by third parties) are made available for use by CompuServe USA on its newsserver.

Nevertheless, CompuServe Germany and the accused can take advantage of the liability privilege pursuant to § 5 para. 2 Teleservices Act, since the making available for use by CompuServe USA has to be attributed to its 100 % subsidiary CompuServe Germany (cf. BT-Dr. 13/7385, p. 51, no. 4 c). Furthermore, the application of § 5 para. 2 Teleservices Act must be based on the organization of the parent company and the subsidiary, since the subsidiary is acting for the parent company through division of labor to the extent that it connects the customers of the parent company in Germany through the provision of dial-in nodes and via a dedicated line with the parent company.

b) The accused had knowledge of the violent, child, or animal pornographic content made available for use on the newsserver of CompuServe USA

Knowledge means knowing the circumstances which make up the statutorily-required constituent elements (Schönke/Schröder-Cramer, § 15, marginal no. 39; Tröndle, § 16, marginal no. 2). This means that the accused has to have knowledge of third-party content, i.e., he has to know that the unambiguous newsgroups specified in the statement of facts make violent, child, or animal pornographic representations available for use.

Knowledge, however, does not mean that the accused had to know the individual contents of the respective violent, child, or animal pornographic articles.

As set forth above (cf. A.3.B), knowledge results from the information communicated by the police on November 22, 1995 and December 8, 1995 and from the fact that the accused forwarded the criminal content of which he had been notified to the parent company. This means that the accused had knowledge.

Even if one is of the opinion that knowledge of content pursuant to § 5 para. 2 Teleservices Act requires concrete knowledge so that finding the content is easily possible (cf. Sieber, CR 1997, 653, 667), this requirement is met here, since even laymen are easily and quickly able to find the violent, child, or animal pornographic content in the newsgroups specified in the statement of facts.



None of the hard pornography specified in the statement of facts are news articles disguisedly stored in other newsgroups by their authors, but were exclusively stored under certain categories of newsgroups unambiguously indicating violent, child, or animal pornographic content pursuant to § 184 para. 3 Penal Code.

Upon entering the terms "alt.sex" or "alt.erotica", the newsreader lists all sex- or erotica-newsgroups in alphabetical order.

In order to access newsgroups with hard pornography, the user is then only required to enter terms like bondage (for violent pornography), incest, pre-teen, pedophilia (for child pornography), or bestiality (for animal pornography).

c) CompuServe USA was technically able and could reasonably be expected to block the use of all violent, child, or animal pornographic content specified in the statement of facts. This must be imputed to the accused.

aa) It is true that, viewed individually, CompuServe Germany and the accused had no opportunity to exercise influence on the data storage device of CompuServe USA.

However, the question of technical ability or reasonable expectancy has not to be based on the subsidiary as an isolated part of the organization of CompuServe USA, but on the organization as a whole.

As set forth above (cf. B.2.a), based on a complete view of the situation the accused enjoys the privilege of § 5 para. 2 Teleservices Act. However, if the accused is allowed to enjoy the liability privilege so that providing access is imputed to the parent company, the fact that it would have been technically feasible for and could be reasonably expected of the parent company to block usage has also to be imputed to him.

If the accused enjoys the liability privilege, although his function was restricted to connection of the customers of CompuServe USA in Germany with the parent company via a dedicated line through providing dial-in nodes and although the infrastructure was accordingly established, it would be contradictory to measure the technical feasibility and the reasonable expectation of blocking use by that technical infrastructure.

bb) It was technically feasible to block the use of violent, child, or animal pornographic content stored in the unambiguous newsgroups specified in the statement of facts.

This proceeds already from the fact that the parent company, upon being instructed by the accused, blocked five newsgroups containing child pornography and from December 22, 1995 until February 13, 1996 also the vast majority of the newsgroups on the list of December 8, 1995.

In other respects, the expert Dr. F..... confirmed that the blocking of newsgroups specifically indicating hard pornography was easily feasible for CompuServe USA, which opinion the Court shares.

Furthermore, the Court agrees with the expert that it is technically not feasible to control the data storage device via a dedicated line. This is in any event not the purpose of a dedicated line, which merely has a connecting function.

A legal evaluation of technical feasibility does not depend on control over a dedicated line, but on the parent company's direct control over its data storage device.

cc) Blocking use of hard pornography in the unambiguous newsgroups specified in the statement of facts, i.e., controlling and blocking them in a data storage device, may also reasonably be expected.

When interpreting "reasonableness", a balancing between legal interests affected must be carried out. Contesting interests, including the degree of the respective risk, have to be balanced against each other. The greater the imminent evil, the more sacrifices may be expected (Schönke/ Schröder-Stree, preamble, §§ 13 et seq., marginal no. 156).

Making available for use the violent, child, or animal pornographic content stored in unambiguous newsgroups affects the legal interests protected under § 184 section 3 no. 2 Penal Code.

On the one hand, said provision furthers the protection of youth, namely protection against undesired developments and indirectly the protection of children against sexual abuse. On the other hand, it is designed to protect adults against impairments to their emotional development or social orientation. Said provision serves insofar also to protect adults, since they could become victims of offenders with inclinations to violent pornography (Schönke/ Schröder-Lenckner, § 184, marginal no. 3; Tröndle, § 184, marginal no. 4).

The interest of CompuServe Inc. is to keep available violent, child, or animal pornographic content stored in unambiguous newsgroups for hard pornography. This interest is purely economic in nature (Sieber, CR 1997, 581, 586), being directed at winning new customers, extending market share, and increasing the time of use.

Youth protection is an objective of primary importance and one of the main concerns of the community (Decision of the Federal Constitutional Court (BVerfGE) 30, 336, 348), as is the protection of adults, in particular against sexually-motivated violence.

In contrast thereto, the interest of CompuServe USA in making available for use newsgroups for hard pornography to its customers in Germany is not worthy of protection.

Rather, society has a vital interest in ensuring that technical progress in the area of teleservices does not entail a legal vacuum, in which important legal interests such as youth protection and protection against sexually-motivated violence will be subordinated to mere economic interests and thus abandoned.

The system of values contained in the German Basic Law also applies to economic activities.

The demand that newsgroups containing hard pornography not be made available to customers in Germany is dependent neither on "paralyzing or restricting considerably the Internet for German users through a 'firewall'" (Sieber, CR 1997, 581, 588), nor on "the extent to which the Internet as central for the information society of the 21st century may continue to exist as international network in Germany" (Sieber, Legal Opinion of July 4, 1997, p. 5, footnote 1). Rather, it is solely based on the fact that it may be reasonably expected of CompuServe USA, in the course of balancing the legal interests concerned, to keep its newsserver free from newsgroups which unambiguously contain violent, child, or animal pornography and to accept the economic loss connected therewith (cf. also BT-Dr. 13/7385 p. 20, as to paragraph 2 and p. 51, no. 4 e).

## IV.2

Moreover, the accused committed a negligent violation of the Act on the Dissemination of Publications Morally Harmful to Youth (GjS) pursuant to §§ 3 para. 1 no. 2, 1 para. 3, 21 para. 1 no. 2, para. 3 GjS, 52 Penal Code, since he acted negligently in making available for use in three legally-coinciding cases a writing, announced as having been put on the index, at a location which is accessible to children or youths or which they can view.

A. The conditions pursuant to §§ 3 para. 1 no. 2, 1 para. 3, 21 para. 1 no. 2, para. 3 GjS have been satisfied.

1. As to the term "writing", there are no differences with the discussion regarding § 184 para. 3 no. 2 Penal Code. Here too the legislator has made it clear by an amendment to § 1 para. 3 GjS that data storage devices are equivalent to writings (Art. 6 no. 2 IuKDG).

The computer games "Doom", "Heretic" and "Wolfenstein 3 D" stored on and accessible from CompuServe USA's own computers within its proprietary services constitute expression of an idea, are visually perceptible, and fulfill the condition of being physically embodied for a certain period of time.

2. Listing of the game "Doom" on the index was announced in the Federal Gazette No. 100 of May 31, 1994, of the game "Heretic" in the Federal Gazette No. 141 of July 29, 1995, and of the game "Wolfenstein 3 D" in the Federal Gazette No. 20 of January 29, 1994.

3. The games were made publicly accessible at a location accessible to children or youths.

This group of persons is deemed to have access to each location which may be entered without the need to overcome legal or factual restrictions. This includes locations designed for the use of a restricted group of persons, for example the apartment in which the children or youths grow up (Schönke/Schröder-Lancer, § 184, marginal no. 11).

These conditions have been fulfilled here, since the customers of CompuServe USA have the devices required for use in their homes, in which also children or youths grow up and so have access.

4. The indexed games were also made accessible to the customers of CompuServe USA in Germany.

As to the term "provision of access", reference is made to the statements with regard to § 184 para. 3 Penal Code.

The conditions for providing access are present, since the customers of CompuServe USA in Germany were offered the opportunity to retrieve games stored on the data storage device in the proprietary service of the parent company and have them displayed on their monitors.

The acts committed by the accused led to the commission of an offense, since he connected the customers of CompuServe USA in Germany through dial-in nodes and via a dedicated line with the parent company.

The customers in Germany would have had no opportunity to gain access to the proprietary data content of CompuServe USA without this connection and retrieve the data made available for use by the parent company.

Therefore, the acts committed by the accused were a necessary condition for providing

access.

5. In this respect, the accused acted negligently.

A person acts negligently if he fails to observe the duty of reasonable care to which he is obliged and able to fulfill due to the circumstances and his personal capacities and knowledge and if, as a consequence thereof, he does not foresee the realization of the constituent elements of the offense (Tröndle, § 15, marginal no. 13, with further notes).

Since the accused connected the customers in Germany with the parent company without examining whether indexed games were stored in the game fora, he failed to observe his duty of reasonable care.

In his capacity as Managing Director of CompuServe Germany he would have been under the duty to obtain knowledge of the indexed games as announced in the Federal Gazette and to keep his knowledge up to date.

Thus, the accused should have obtained knowledge of whether games of that kind were offered by CompuServe USA as its own games in its own newsgroups to customers in Germany.

In his capacity as Managing Director, the accused was responsible for the German business, and it was within his competence to observe that German laws were complied with. Therefore, it was within his duty of reasonable care to ensure that no indexed games were offered to customers in Germany in the proprietary service. The observance of such duty of reasonable care can be expected from anyone in such a position in this area. The accused in his capacity as authorized representative for Germany was not allowed to simply rely on the assumption that the parent company did not make any indexed games available for use in Germany.

The accused could also foresee that the game fora of the parent company contained indexed games, since due to the public discussion at that time focusing on the multiple embodiments of national socialist, racist and pornographic material in data networks, at least those in responsible positions in the teleservices sector knew that criminal content existed (Derksen, NJW 1997, 1878, 1879, 1883 with further notes).

In this connection, CompuServe's offering the game "Doom" was described as a negative example (Buschek, PC Professionell, Issue 12/95, "Digitaler als die Polizei erlaubt").

In view of these obvious circumstances, the accused should have considered that the parent company also provided indexed games in its own game fora as its own games.

It was also possible to block access to such games. The accused could have blocked access to the indexed games by breaking the connection with the parent company or by removing the games from the game fora through the parent company.

Such conduct in compliance with the law could also reasonably be expected of the accused since in his capacity as Managing Director of CompuServe Germany he was under the duty to comply with German law.

B. The liability of the accused is not limited by § 5 paras. 2, 3 Teleservices Act, since, according to § 5 para. 1 Teleservices Act, providers shall be responsible for their own content which they make available for use in accordance with the general laws.

The conditions of § 5 para. 3 Teleservices Act, as set forth above, are not met.

A limitation of liability under § 5 para. 2 Teleservices Act does not apply, since it is proprietary content rather than third-party content that was made available for use. While the three computer games in question were created by third parties, this is of no relevance since CompuServe USA provided said content in its own fora as its own content, i.e., CompuServe USA made the respective content of these games in its services into its own (cf. BT-Dr. 13/7385, p. 19/20, as to § 5/as to para. 1, as to para. 2).

## V.

The accused filed the following auxiliary motions for the taking of evidence in case of a conviction:

### A. General (in particular storage of data and separation of the two companies)

1. Factual issue:
2. The accused, employee of CompuServe GmbH, and/or CompuServe GmbH itself was (were) not the originators of the images and texts named in the indictment, nor did they make those images and texts their own. Rather, the images and texts identified in items II.1 (newsgroups) of the indictment come from third parties; the data identified in items II.2 and 3 (fora) of the indictment come from third-party information providers which concluded information provider agreements (by which they undertook to comply with all and any statutory etc. regulations) with CompuServe Inc. in the US.

Evidence:

- a) Interrogation of J....., a former employee of CompuServe GmbH, as well as P....., S..... and T....., former employees of CompuServe Inc. in the US, addresses already given.
- b) Reading of a service agreement (selected by way of example) as a deed attached as Exhibit 1.b).
- c) Expert opinions, in particular the expert opinion of Prof. Dr. P....., address already given.

Substantiation: The taking of evidence in respect of this factual issue proves that CompuServe GmbH does not fall under § 5 Paragraph 1 of the Teleservices Act (cf. legal opinion of Prof. Dr. Sieber dated July 4, 1997, pp. 28/29, pp. 31 et seq.).

3. Factual issue:
4. The images and texts identified in the indictment were never stored on computers owned or controlled by CompuServe GmbH; at most, CompuServe GmbH, through its data lines, allowed access to those images and data which were stored in other computer systems.

Evidence:

- a) Testimony as under 1.a).
- b) Inspection of the technical sketches "Network Access Services", "Global Internet Infrastructure" and "Internet Peering Backbone '97" as well as the Technical Manual

CompuServe X.25 Reference Guide as in Exhibit 2.c).

c) Expert opinions, in particular expert opinion of Prof. Dr. P....., address already given.

Substantiation: The taking of evidence in respect of this factual issue proves that CompuServe GmbH does not fall under § 5 Paragraph 2 Teleservices Act (cf. opinion of the expert witness M....., opinion No. 41-461/6-40/96-95 VI 10 of the Bavarian State Office of Criminal Investigation of March 5, 1996, pp. 4-10 and 20 (delivered subsequently to the court files by the public prosecutor's office as well as the details of the expert opinion of Prof. Dr. Sieber, pp. 28/29, pp. 31 et seq.).

5. Factual issue:

6. The German CompuServe GmbH and the American CompuServe Inc. are independent companies. The accused as managing director of CompuServe GmbH had no legal possibility whatsoever to influence the institutions and employees of the parent company CompuServe Inc. and, in particular, was not able to compel CompuServe Inc. to delete or block data (issues II.1, 2 and 3 of the indictment) or conclude or terminate information provider agreements (issues II.2 and 3 of the indictment), to amend the network architecture, to amend the access software of customers of CompuServe Inc., or to make other investments regarding CompuServe Inc.

Evidence:

a) Reading of the preamble and of items I and II (pp 1-4) of the deed of December 21, 1993 notarized by Dr. W..... and Dr. B..... as well as of § 5 of the shareholders' agreement of CompuServe GmbH (Annex p 3) as in Exhibit 3.b).

b) Testimony of P..... and T....., already named.

Substantiation: The taking of evidence in respect of this factual issue proves that the companies CompuServe GmbH and CompuServe Inc. did not constitute an economic entity, and consequently Mr. Somm cannot be charged with obligations of CompuServe Inc. (in particular pursuant to §§ 13, 14 Penal Code and § 5 Teleservices Act), and it cannot be assumed that Mr. Somm had any possibility to influence the management of CompuServe Inc. (for details cf. expert opinion of Prof. Dr. Sieber, pp. 26 et seq., 30 et seq., 33/34). The taking of evidence in respect of this factual issue also proves that Mr. Somm could not implement any control measures (e.g., installation of a parallel computer center) which would for technical or legal reasons require the participation of CompuServe Inc. The taking of evidence in respect of this factual issue furthermore proves that no domination or control of employees of CompuServe Inc. by Mr. Somm may be assumed in the sense of direct complicity.

B. Events at CompuServe GmbH (criminal assistance)

7. Factual issue:

8. As is the case with other access providers, in at least 99.9 % of its data traffic (relating to both the overall data traffic and the data traffic of newsgroups) CompuServe GmbH provided access to lawful content (e.g. informative newsgroups, business data of numerous well-known firms, official data, newspaper archives, economic data, schedules). If the images and texts named in the indictment were in fact procured at the stated times through network nodes of CompuServe GmbH, then

they constitute the small number of exceptional cases normal in open data networks, in which criminal content occurs in otherwise lawful as well as socially beneficial international data traffic and its economically and socially desirable infrastructure.

Evidence:

a) Testimony as under 1.a).

b) Inspection of information offered by CompuServe Inc., selected by way of example as in Exhibit 4.b).

c) Reading of items B.I-III and IV.4 (pp 5-9, 13-14) of the declaration of the research minister group of the G7 states (Carnegie Group) of October 17, 1997 as in Exhibit 4.c).

d) Reading of page 65 (2nd half) of the report on university networks in Bavaria issued by the Bavarian Ministry for Education and Science in 1997 as in Exhibit 4.d).

e) Expert opinions, in particular the expert opinion of Prof. Dr. P....., address already given.

Substantiation: The taking of evidence in respect of this factual issue proves that Mr. Somm may not be charged with taking positive actions (neither with aiding and abetting nor assistance and complicity through positive actions) and that Mr. Somm's actions were along the line of the normal actions of an access provider, which actions have been declared to be exempt from punishment pursuant to § 5 Paragraph 3 Teleservices Act (for details cf. expert opinion of Prof. Dr. Sieber, pp. 20/21, 35 as well as the supplementary statement of October 30, 1997, pp. 3 et seq.).

9. Factual issue:
10. The accused took no positive actions whatsoever which promoted the dissemination of the unlawful content allegedly identified by the public prosecutor's office. In particular, he took no actions which go beyond the lawful and/or socially customary operations of an access provider, which operations have now been expressly declared to be exempt from punishment pursuant to § 5 Paragraph 3 Teleservices Act.

Evidence:

a) Testimony as under 1.a).

b) Expert opinions, in particular expert opinion of Prof. Dr. P....., address already given.

Substantiation: The taking of evidence in respect of this factual issue proves that Mr. Somm may not be charged with taking positive actions (neither with aiding and abetting nor assistance and complicity through positive actions) and that Mr. Somm's actions were along the line with the normal actions of an access provider, which actions have been declared to be exempt from punishment pursuant to § 5 Paragraph 3 Teleservices Act (for details cf. expert opinion of Prof. Dr. Sieber, pp. 36 et seq., 43, 46/47 et seq. as well as the supplementary statement of October 30, 1997, pp. 3 et seq.).

## 11. Factual issue:

On the contrary, the accused made every possible effort that could have been reasonably expected of him to prevent the retrieval and storage of possible criminal content via the switching computers of CompuServe GmbH and/or the servers of CompuServe Inc.. In 1996/97, CompuServe GmbH invested far more than DM 1,000,000 for the development of programs and measures for the protection of children. Insofar as the accused received knowledge of possible criminal content on the computers of CompuServe Inc., he immediately communicated the corresponding facts to the responsible persons at CompuServe Inc. with the express request that such criminal content be suitably blocked or deleted.

### Evidence:

- a) Testimony as under 1.a).
  - b. Reading of the following documents selected by way of example showing activities of CompuServe GmbH and CompuServe Inc. for improving protection against contents morally harmful to youth:
    - aa) "CompuServe promotes the initiative 'Schools on the Net'"
    - bb) "Cyberpatrol, CompuServe's Child Safeguard, Obtained Rating 'Excellent'"
    - cc) "PICS, the Childproof Safeguards for the Internet, Filter Software for the Legal Protection of Youth"
    - dd) "CompuServe, the Whole World Through Pressing a Button, CompuServe Presents Parental Controls, Press Statement No. 06/1996"
    - ee) "New Netscape - Cyberpatrol, Your Electronic Child Safeguard"
    - ff) Power of Attorney given by Mr. Felix Somm to Mr. D..... in order to file the application for the RSACI rating system (presumably in August 1996)
    - gg) Summary of costs "Expenditures of CompuServe GmbH on Programs for the Protection of Children" including accompanying invoices

Substantiation: The taking of evidence in respect of this factual issue proves that Mr. Somm may not be charged with taking positive actions (neither with aiding and abetting nor assistance and complicity through positive actions), and that Mr. Somm's actions were along the lines of the normal actions of an access provider, which actions have been declared to be exempt from punishment pursuant to § 5 Paragraph 3 Teleservices Act (for details cf. expert opinion of Prof. Dr. Sieber, pp. 36 et seq., 43, 46/47 as well as the supplementary statement of October 30, 1997, pp. 9 et seq.).

1. Factual issue:
2. At the time of the acts/omissions alleged by the indictment, CompuServe GmbH and the accused had in the network operated by CompuServe Inc. and its numerous foreign affiliated companies no (reasonable) technical opportunities whatsoever to block (e.g., through so-called firewalls) the transmission of images and files named in the bill of indictment. Neither news nor newsgroups from the Internet nor data from the proprietary service of CompuServe Inc. (forum) could be filtered in the network in question (X.25). The installation of corresponding control measures - in particular of



a German parallel computer center having its own newsservers or the corresponding storages of CompuServe GmbH - was not possible in the network in question at the time of the offense for legal and technical reasons (since CompuServe Inc. had had to participate in view of technical reasons, whereby CompuServe GmbH could not compel CompuServe Inc. do so), for reasons of know-how (since CompuServe GmbH did not dispose of the network specialists required), for reasons of time (since corresponding measures would have taken one to two years time), as well for economic and technically unreasonableness (since investments in the amount of DM 10 million and more were necessary). Corresponding control measures for the avoidance of criminal content would also have been senseless, since the corresponding contents would nevertheless have been accessible to German users owing to the possibility of avoiding the firewall, which would have had to restrict German users to the German parallel computer center and "protect" them against alternative access possibilities (e.g., newsservers of CompuServe Inc. in the US, alternative newsservers or WWW servers). Even the Chinese government's attempts at implementing such control measures by means of totalitarianism is ineffective.

Evidence:

- a) Testimony as under 1.a).
- b) Reading of the opinion no. 41-461/6-40/96-95 VI 10 of the Bavarian State Office of Criminal Investigation of March 5, 1996 as already designated, pp. 10-21.
- c) Inspection of the X.25 Reference Guide as above in 2.c).
- d) Reading of the letter of the Global Internet Liberty Campaign (23 leading US Internet companies and organizations) to Chancellor Kohl of April 23, 1997 as in Exhibit 7.d).
- e) Reading of a critical press report on the recent filter system "Perkeo" (which so far has not been available to the accused) as in Exhibit 7.e).
- f) Expert Opinions, in particular the expert opinion of Prof. Dr. P....., address already given, whereby
  - aa) the expert has to be provided with the following documents: documents as above under 7.b), 7.c), 7.d), 7.e), opinion of Prof. Dr. Sieber in the present preliminary investigation of July 4, 1997, supplementary statement of Prof. Dr. Sieber of October 30, 1997 as well as the pleading to the charge by Prof. Dr. Sieber on behalf of the accused of May 12, 1998 (all documents have been delivered to the court files)
  - bb) and the expert has to be included in the interrogation of the witnesses named above under 1.a) and 7.a) (in particular of the expert witness T.....).

Substantiation: The taking of evidence in respect of this factual issue proves that the filter measures as required by the public prosecutor's office in the bill of indictment were technically not feasible and reasonable, also in the sense of § 5 Teleservices Act - (for details cf. expert opinion of Prof. Dr. Sieber, pp. 31 et seq., 81 et seq.).

- 3. Factual issue:
- 4. The images and texts from the Internet newsgroups named in the indictment could have been procured in identical manner via any of the approximately 300 access providers presently operating in Germany or (subsequent to blockings in the

newsservice) via other real-time services (e.g. WWW, FTP, Telnet).

Evidence:

a) Expert opinions, in particular the expert opinion of Prof. Dr. P....., address already given, whereby the expert shall inspect the below mentioned documents 8.b) and explain them to the court.

b) Inspection of various computer printouts as in Exhibit 8.b) showing the simple procedure of how to register another newsserver:

aa) list containing selected newsservers accessible by the public, which list is available in the Internet (including indications relating to the number of newsgroups, the access speed and the biggest number of news articles in the newsgroup)

bb) screen window for the simple registration of a new newsserver

cc) screen window for the selection of one of several registered newsservers

dd) two identical printouts of the news "Birthday Help", selected by way of example, whereby one originates from the server of CompuServe Inc. and the other from the server 195.204.199.88, which was selected by way of example (whereby the printouts show no hints from which server they come)

c) Inspection of corresponding printouts of pornographic images which may be accessed, e.g., via Leibniz Computer Center of the Bavarian Academy of Sciences or via the Bavarian Citizens' Network (in view of the criminal relevance of the contents, corresponding data will be submitted only upon the court's request).

Substantiation: The taking of evidence in respect of this factual issue proves that because of the ineffectiveness of appropriate blocking measures no great demands may be made of the provider concerning the reasonableness of actions if (on the contrary to § 5 Paragraph 3 Teleservices Act) it is assumed that the access provider has a duty to take action (for details cf. expert opinion of Prof. Dr. Sieber, p 12).

5. Factual issue:

6. The accused had at the time relevant to the offense no knowledge of the images, texts and news named in the indictment or of the newsgroups or storage locations of that data. Moreover, he was not in a position to have knowledge of that data. The newsreader contained in the access software of CompuServe GmbH and CompuServe Inc. did not even enable him to retrieve these images. He did not even know that a game forum "Hot Games" existed nor was he in a position to know about it, owing to the many thousands of games stored in the fora of CompuServe Inc. The same applies to the game names identified in items II.2 and 3 of the bill of indictment. He assumed that all criminal content was deleted or blocked immediately upon becoming known to CompuServe Inc. and that CompuServe Inc. made every technically feasible effort to block unlawful content. He had no reason to request CompuServe Inc. to carry out blockings in addition to the blockings requested by him, and he had in particular no reason to install a separate parallel computer center comprising newsservers in connection with the corresponding firewalls for the purpose of avoiding access to criminal content. The accused began to doubt the successful blocking of criminal content by CompuServe Inc. only in 1997 (owing above all to his inspection of the present file). Consequently, he increased his efforts to install effective control measures for preventing unlawful contents and finally

terminated his employment agreement with CompuServe GmbH.

Evidence:

as in items 1.a and 6.b above

Substantiation: The taking of evidence in respect of this factual issue proves that the accused had no intent relating to the unlawful action of any employee of CompuServe Inc. or to any corresponding assistance and that he also may not be charged with negligence (for details cf. expert opinion of Prof. Dr. Sieber, pp. 34/35, 43, 46/47, 107/108).

7. Factual issue:

8. The authorities in charge of the preliminary investigation did not inform the accused about criminal contents which a user could retrieve via the network node of CompuServe GmbH from December 1995 on. If the authorities in charge of the preliminary investigation had informed the accused that the images and texts had been known to them since the end of 1995 and had identified them in the indictment or had informed him about the infection of the newsgroups contained in the list of 282 newsgroups, which at the beginning did not contain child pornography, those images and texts (just like the criminal content contained in the list of 282 newsgroups delivered at the end of 1995) would then have been deleted immediately at CompuServe Inc. in the US.

Evidence:

Testimony as under 1.a.

Substantiation: The taking of evidence in respect of this factual issue proves that the accused took all possible and reasonable actions in order to prevent unlawful content and that responsibility for the continued offer of such content lay possibly with the Bavarian criminal investigation department rather than with the accused (for details cf. expert opinion of Prof. Dr. Sieber, pp. 36 et seq., 43, 44 et seq., 46/47).

9. Factual issue:

10. The criminal images named in the bill of indictment were not at all accessible at the time of the offense using the access software of CompuServe Inc. (Newsreader of the CompuServe Information Manager) because said software did not permit the downloading of images. The images could be printed out only because the authorities conducting the preliminary investigation exchanged the access software of CompuServe Inc. for a different access software. Owing to the special computer network of CompuServe Inc., an ordinary user was able to exchange the access software during the first installation only with considerable technical efforts and expertise. The exchange demanded in any case far more effort than alternative access to the alleged criminal contents, e.g., via other newsservers, would have.

Evidence:

a) Testimony as under 1.a)

b) Testimony of T.....

c) Expert opinions, in particular the expert opinion of Prof. Dr. P....., address already given, whom the defense provides with the corresponding software

Substantiation: The taking of evidence in respect of this factual issue proves that the accused did not increase the risk of retrievability of the criminal data named in the bill of indictment, but rather decreased it (for details cf. expert opinion of Prof. Dr. Sieber, p 26).

C. Events at CompuServe Inc. (willful unlawful principal offense relating to aiding and abetting or complicity)

11. Factual issue:

12. CompuServe Inc. and/or their employees were no more the authors of the images and texts named in the indictment than were CompuServe GmbH and/or the accused, nor did they make those images and texts their own. Rather, the images and texts identified in the indictment come from unknown third persons.

Evidence:

Testimony as under 1.a), 1.b), 1.c)

Substantiation: The taking of evidence in respect of this factual issue proves that neither CompuServe Inc. nor CompuServe GmbH were the originators of the images and texts named in the bill of indictment and therefore, they do not fall under § 5 Paragraph 1 Teleservices Act (for details cf. expert opinion of Prof. Dr. Sieber, pp. 28/29).

13. Factual issue:

14. The employees of CompuServe Inc. had no positive knowledge (as § 5 Paragraph 2 Teleservices Act requires) of the images and files named in the bill of indictment as well as of the newsgroups which contained them or of where they were stored, and also no possible intent relating thereto.

Evidence:

Testimony as under 1.a)

Substantiation: The taking of evidence in respect of this factual issue proves that the employees of CompuServe Inc. committed no crime attributable to the accused in relation to aiding and abetting or complicity (for details cf. expert opinion of Prof. Dr. Sieber, pp. 36 et seq., 43, 44 et seq.).

15. Factual issue:

16. The employees of CompuServe Inc. did not delete the images and texts named in the indictment (in case they actually were stored on their servers) simply because they did not have knowledge of them. They were also not able to delete such content owing to the masses of information offered in the Internet and in the proprietary service, as well as owing to the rapid change of content in the different newsgroups. If in individual cases no objective deletion opportunities were used, this was unavoidable due to the masses of information offered.

Evidence:

a) Testimony as under 1.a)

b) Expert opinions, in particular the expert opinion of Prof. Dr. P....., address already

given.

Substantiation: The taking of evidence in respect of this factual issue proves that the employees of CompuServe Inc. did not delete the images and texts named in the bill of indictment only because they had no knowledge of them. The masses of information offered made a deletion of all and any criminal content impossible (for details cf. expert opinion of Prof. Dr. Sieber, pp. 36 et seq., 43, 44 et seq.).

17. Factual issue:

18. Both with regard to the proprietary service and the newsgroups, the employees of CompuServe Inc. made every possible effort to prevent the dissemination of criminal content. In particular, at the request of the accused, CompuServe Inc. blocked all of the 282 newsgroups that were not obviously harmless and were named on the list delivered by the Bavarian police in December 1995. Some of the newsgroups were not unblocked again until their harmlessness had been established or (in case of soft pornography) corresponding child safeguards had been put in place. CompuServe Inc. charged the independent company M..... with the inspection of the newsgroups found to be suspicious (in relation to criminal contents) and always complied with its blocking recommendations. The news articles identified in the bill of indictment were not included in the list of 282 newsgroups (which the police regarded as a non-binding demonstrative list on sexuality in the Internet) or in the list of five newsgroups blocked at the beginning. At the time of the preliminary investigations, the newsgroups of the exemplary list contained more than a million news articles, which, in the case of the news articles with images, was changed in whole every five days. The third party fora stored by CompuServe Inc. also contained a huge number of data (the number of games, which are only a side product of the forum, alone amount to many tens of thousands).

Evidence:

a) Testimony as under 1.a)

b) Reading of documents as under 6.b)

c) Expert Opinions, in particular the expert opinion of Prof. Dr. P....., address already given.

Substantiation: The taking of evidence in respect of this factual issue proves that CompuServe Inc. as service provider took all possible and reasonable measures which could be required pursuant to § 5 Paragraph 2 Teleservices Act and had no knowledge in the sense of § 5 Paragraph 2 Teleservices Act of the contents identified in the bill of indictment (for details cf. expert opinion of Prof. Dr. Sieber, pp. 36 et seq., 44 et seq.).

19. Factual issue:

20. Insofar as the news articles identified in the indictment come from newsgroups which CompuServe Inc. did not unblock again (in particular the list of five newsgroups announced at the beginning), this was the result of unavoidable or at most negligent actions of technically subordinate employees of CompuServe Inc., who were not able to perfectly implement the blocking of criminal content in a network of approximately 20 to 30 linked newsservers in 1995/1996, which was also a time of vast change in which such blockings had to be dealt with for the first time.

Such a re-appearance of blocked newsgroups, although they were not re-opened,

may be caused (according to research by the defense subsequent to the second day of trial), for example, by the following reasons: blockings which possibly did not consider that control messages from certain administrators of other "trusted" servers may reopen blocked newsgroups; avoidance of the blocking of the feeder-newsreader by crossposting; inaccessibility of one of the newsservers during the automatic transmission of the blocking list (e.g., in case of maintenance); reopening of a blocked newsgroup during the self-configuration of a server subsequent to a server crash; overlooking of back-up computers during implementation of the blocking measures in a highly-complex networked environment.

The news articles identified in the indictment may also originate from newsgroups which at the time of the retrieval by the police had already been blocked by CompuServe Inc., because such newsgroups were still stored in the cache of the computer of the authorities in charge of the preliminary investigation owing to earlier retrievals and, according to their testimony, the authorities forgot to delete the cached files or other temporary files from their PCs because they were not familiar with the caching and the modifications of the caching menu of the Free Agent software.

The newsgroups blocked within the framework of the list of 282 newsgroups contained no relevant content whatsoever at the time of their release by CompuServe Inc., even if they were infected with such content later on, i.e., at the time of access by the authorities in charge of the preliminary investigation (the news articles of the newsgroups are exchanged in whole every five days for images and every ten days for text).

Evidence:

- a) Document Technical Description "The CompuServe Newssystem" (will be filed subsequent to the investigation of the facts)
- b) Testimony as under 1.a)
- c) Expert opinions, in particular the expert opinion of Prof. Dr. P....., address already given, whereby the expert has to be provided with the technical document as specified in 16.a) and has to be included in the interrogation of the witness identified in 16.b).

Substantiation: The taking of evidence in respect of this factual issue proves that CompuServe Inc. as service provider took all and any possible and reasonable measures which could be required pursuant to § 5 Paragraph 2 Teleservices Act (for details cf. expert opinion of Prof. Dr. Sieber, pp. 44 et seq.).

- 21. Factual issue:
- 22. If the authorities in charge of the preliminary investigation had passed on their knowledge of the criminal content they had identified and subsequently named in the indictment, such content would have been blocked or deleted immediately just like the aforementioned 282 newsgroups.

Evidence:

as under 1.1.

Substantiation: The taking of evidence in respect of this factual issue proves that

CompuServe Inc. would have blocked all unlawful newsgroups of which it had been notified, just like CompuServe Inc. did with the 282 newsgroups named in the list of the police (for details cf. expert opinion of Prof. Dr. Sieber, pp. 36 et seq., 43, 44 et seq., 46 et seq.).

23. Factual issue:

24. Blocking or deletion of the newsgroups by CompuServe Inc. would not have made it basically more difficult for German users to gain access to the newsgroups with criminal content, since they could have gained access to the newsgroups blocked by CompuServe Inc. by entering another newsserver (which would not have required any technical effort) or, in case of an additionally attempted port blocking, by, for example, a WWW newsserver.

Evidence:

a) Expert opinions, in particular the expert opinion of Prof. Dr. P....., address already given.

b) Inspection of several printouts as in Exhibit 8.b showing the simple procedure of entering another newsreader.

Substantiation: The taking of evidence in respect of this factual issue proves that it remains possible for a user to access unlawful content even if newsgroups are blocked or deleted. For this reason, no great demands may be made of the reasonableness of actions to be taken by CompuServe Inc. (for details cf. expert opinion of Prof. Dr. Sieber, pp. 81 et seq.).

aa) screen window for downloading newsgroups on the local storage as in Exhibit 19.b)

bb) screen window with the display of a news in the offline mode as in Exhibit 19.b)

cc) two identical printouts of the news "Birthday Help", selected by way of example, whereby one originates from the server of CompuServe Inc. and the other from the server 195.204.199.88, which was selected by way of example (whereby the printouts do not show from which server they come) in Exhibit 8.b.

Substantiation: The taking of evidence in respect of this factual issue proves that the criminal evidence named in the indictment do not unambiguously ascertain that all of the images and texts named in the indictment were actually accessed subsequent to the delivery of the list containing 282 newsgroups from the servers of CompuServe Inc.

25. Factual issue:

26. CompuServe Inc. and in particular the accused did not take any action to bring the images and texts identified in the indictment to Germany. Rather, the preliminary investigation authorities in Bavaria sought the data on their own initiative and accessed them in the US.

Evidence:

a) Testimony as under 1.a)

b) Expert opinions, in particular expert opinion of Prof. Dr. P....., address already

given.

Substantiation: The taking of evidence in respect of this factual issue proves that the employees of CompuServe Inc. undertook no actions whatsoever to bring the images and texts named in the indictment to Germany (for details cf. expert opinion of Prof. Dr. Sieber, pp. 24 et seq., 111 et seq.).

27. Factual issue:

The employees of CompuServe Inc. had no knowledge of the decisions of the German federal inspection agency for publications morally harmful to youth and, owing to having members in over 185 countries, also had no opportunity to gain knowledge of those decisions (completely devoid of legal effect in the US) of the German federal inspection agency for publications morally harmful to youth or of other comparable foreign authorities.

Evidence:

Testimony as under 1.a)

Substantiation: The taking of evidence in respect of this factual issue proves that the employees of CompuServe Inc. were not able and did not need to know the decisions of the German federal inspection agency for publications morally harmful to youth (for details cf. expert opinion of Prof. Dr. Sieber, pp. 26 et seq., 111 et seq.).

Reasons for the interrogation of the expert Prof. Dr. P..... :

In view of the consultation of the expert Prof. Dr. P..... in addition to the expert Dr. F....., who is already involved in the proceedings, it is particularly pointed out that Prof. Dr. P..... has special and superior expertise. The superior expertise of Prof. Dr. P..... relates above all to avoidance possibilities and the uselessness of blocking measures. The expert Prof. Dr. P..... has dealt with these particular questions on behalf of the Federal Ministry for Research and Technology and a number of international organizations (whereas the expert Dr. F..... deals with classic firewalls, i.e., the protection of computer centers against attacks from the outside, excluding the "locking up" of users by a firewall). The expert Prof. Dr. P..... has in particular superior expertise also in view of X.25 networks as well as bigger computer centers, e.g., in universities. By contrast, the expert Dr. F..... is according to his own statements, responsible for a single smaller newsserver with special case-specific information offered for a single authority, at which the installation and supervision of the newsserver requires only minimal effort. Dr. F..... also does not supervise complex networked newssystemes covering worldwide more than 150 states.

All motions for the taking of evidence had to be refused.

As to 1.:

The terms "make...their own" and "information providers" contain evaluations. In other respects, the facts for which evidence is furnished have already been proved.

As to 2.:

The facts for which evidence is furnished have already been proved.

As to 3.:



The term "information provider agreements" contains an evaluation. In other respects, the facts for which evidence is furnished have already been proved.

As to 4.:

The facts for which evidence is furnished are of no relevance to the case. The conviction deals with criminal content as set forth in the statement of facts. Their percentage can not exercise any influence on the court. Whether or not they constitute exceptional cases is also of no relevance to the case.

As to 5.:

The motion does not comply with the requirements for a motion for the taking of evidence. No specific factual issue has been described.

No substantiation is possible by a legal evaluation.

As to 6.:

1st sentence:

The motion does not comply with the requirements for a motion for the taking of evidence. No specific factual issue has been described.

No substantiation is possible by a legal evaluation.

2nd sentence:

The fact for which evidence is furnished is of no relevance to the case. Child safeguards and measures for the protection of children are not appropriate to block public access to hard pornography and access to indexed games.

3rd sentence:

The facts for which evidence is furnished have already been proved.

As to 7.:

1st and 2nd sentence:

The facts for which evidence is furnished have already been proved. They arise from Dr. F.....'s arguments.

3rd to 5th sentence:

The possibility of changing the technical infrastructure is of no relevance to the case, since the subject matter to be considered is the technical infrastructure at the material time.

As to 8.:

The fact for which evidence is furnished is of no relevance to the case. That the criminal content could have been accessed from other persons is not sufficient to deny the accused's causation of conduct.

As to 9.:

1st, 2nd, 4th, 5th, 6th, 7th sentence:

The motions do not comply with the requirements for a motion for the taking of evidence. No specific factual issues have been described which are appropriate to prove that no intrinsic facts exist.

3rd sentence:

The fact for which evidence is furnished is of no relevance to the case, since access to the newsserver of CompuServe USA may also be gained through any other user software (Sieber, Legal Opinion of July 4, 1997, p. 26, sheet 783 of the files).

8th and 9th sentence:

Events in 1997 are of no relevance to the case.

As to 10.:

The facts for which evidence is furnished are of no relevance to the case.

The criminal liability of the accused does not depend on the information given by authorities in charge of the preliminary investigation.

As to 11.:

The fact for which evidence is furnished is of no relevance to the case, since access to the newsserver of CompuServe USA may also be gained through any other user software. Even untrained users are in a position to easily install other software (Sieber, Legal Opinion, p. 26, sheet 783 of the files).

As to 12.:

The term "make...their own" contains an evaluation. In other respects, the facts for which evidence is furnished have already been proved.

As to 13:

The motion does not comply with the requirements for a motion for the taking of evidence. No specific factual issues have been described which are appropriate to prove that no intrinsic facts exist.

As to 14.:

1st sentence:

The motion does not comply with the requirements for a motion for the taking of evidence. No specific factual issues have been described which are appropriate to prove the failure of knowledge as alleged therein.

2nd and 3rd sentence:

No further expert had to be heard. The contrary was proved by Dr. F.....'s legal opinion.

There are no doubts in view of the expertise of Dr. F..... Specific factual issues for the witnesses to testify have not been submitted.

As to 15.:

1st sentence:

The motion does not comply with the requirements for a motion for the taking of evidence.

No specific factual issue has been described.

2nd and 3rd sentence:

The facts for which evidence is furnished are of no relevance to the case.

The alleged activities do not oppose the provision of access to hard pornography and indexed games as set forth in the statement of facts.

4th sentence:

The facts for which evidence is furnished are of no relevance to the case.

The instruction of the company M..... is not sufficient to exempt the accused or the parent company from their responsibility.

5th and 6th sentence:

The facts for which evidence is furnished are of no relevance to the case.

It is of no importance whether the pictorial files specified in the statement of facts were accessible at the date of delivery of the list.

7th sentence:

The facts for which evidence is furnished are of no relevance to the case.

The number of third-party games stored and offered in the fora on a contractual basis with third parties is of no importance.

As to 16. and 17.:

Insofar as the factual issues have been argued in a specific manner and not only in a speculative fashion, the factual issues do not even constitute suppositions. Rather, the factual issues were simply alleged and completely contradict the statements of the accused and the responsible persons at CompuServe USA, who were in different communications of the opinion that in providing an access control for the customers they had done everything that could be reasonably expected of them, and correspondingly informed the customers expressly that most of the temporarily-blocked newsgroups had been reopened.

As to 18.:

The fact for which evidence is furnished is of no relevance to the case.

That the criminal content may be accessed from other newsservice operators via their newsservers is not appropriate to deny the accused's causation of conduct.

As to 19.:

The fact for which evidence is furnished is of no relevance to the case. The possibility of obtaining knowledge is sufficient for providing access.

As to 20.:

1st half sentence:

The fact for which evidence is furnished is of no relevance to the case. What is important is not the knowledge of the parent company, but rather the duty of the accused to have knowledge.

2nd half sentence:

This factual issue is simply an allegation which is in contradiction to the fact that the parent company has a sub-organization in Germany.

In addition, reference is made to the actual findings including the consideration of evidence and the legal arguments.

VI.

Therefore, the Court sentenced the accused to an overall term of imprisonment of two years, execution of which was suspended on probation.

The sentence for the dissemination of pornographic writings was set at twenty-two months imprisonment, and the sentence for the negligent violation of the Act on the Dissemination of Publications Morally Harmful to Youth was set at fine of 90 daily units of DM 200.00.

The punishment according to § 184 para. 3 Penal Code for pornographic writings dealing with the sexual abuse of children ranges from 3 months up to 5 years imprisonment, otherwise up to 1 year's imprisonment or a fine.

An increase in punishment of up to 3 years or a fine under the Act on the Suppression of Sexual and other Dangerous Offenses of January 26, 1998 for pornographic writings dealing with acts of violence or sex acts between human beings and animals is not applicable pursuant to § 2 para. 2 Penal Code. It had to be considered in favor of the accused that no previous convictions have been imposed on him and that his personal and financial circumstances are in good order.

It had to be considered against the accused was that he continued to render himself liable to prosecution despite the fact that the Public Prosecutor's Office expressly pointed out the unlawfulness of his actions.

It furthermore had to be considered that the accused acted for economic interests and insofar ranked the protection of youth lower than economic interests.

What had furthermore to be imputed against the accused was that, determined by the new technology of teleservices, the potential risks have been expanded to considerable

dimensions due to the high degree of distribution. In this respect, it had to be considered that the danger extended even into the home.

In consideration of all circumstances a term of imprisonment of one year and ten months is therefore adequate to the offense and the guilt.

Punishment for negligent violation of the Act on the Dissemination of Publications Morally Harmful to Youth ranges between up to 6 months or a fine of up to 180 daily units.

It had to be considered in favor of the accused that his negligence in this respect was a minor offense of that kind.

To be imputed against the accused was that the degree of distribution was quite high and private homes were also made into places of danger.

In consideration of all circumstances a fine of ninety daily units of DM 200.00 was adequate to the offense and the guilt.

A daily unit in the amount of DM 200.00 was determined to be adequate to the circumstances of the accused also in view of his former employment.

Thus, considering again all circumstances, an overall sentence of two years' imprisonment was imposed as being adequate to the offense and the guilt.

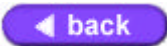
Execution of the sentence could be suspended on probation, since it may be expected that the accused will regard the conviction as a warning and he will commit no further offenses in the future even without being sent to prison now. Insofar, a favorable social forecast may be given for the accused. This applies in particular since the accused is no longer Managing Director of CompuServe Germany.

All other conditions required for a suspension on probation of the overall term of imprisonment are also present here, because after considering the offense and the personality of the accused in whole, particular conditions are present which justify the suspension of the sentence of imprisonment on probation. They arise from the circumstance that this is the first judgment for an offense of that kind and that the accused has meanwhile abandoned his employment as Managing Director.

VII.

The order for payment of costs follows § 465 Code of Criminal Procedure.

Hubbert  
Judge at the Local Court  
July 15, 1998

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