

Evidence and Proof with Electronic Documents

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Issues and Problems

- Admission of electronic documents to proceedings and evidence
- Attribution of electronic documents to means of evidence
- Free evaluation of evidence or binding to evidentiary rules
- Possibility and chances to evaluate the authenticity and the truth of an electronic documentation
- Access to electronic documents



Means of Evidence and Proof

Inspection by the judge

Witnesses

Experts

Documents

Parties



Legal Qualification of Electronic Documents in the Rules of Evidence

- The electronic document as equivalent to a document in writing
- The electronic document being subject to judicial inspection
- The electronic document being subject to experts' inspection and opinion



Electronic Data and Evaluation of Evidence

RISKS

- The electronic lie
 - original
 - subsequent
- Unauthorised access through third parties
 - workstation
 - via the net
 - during transmission

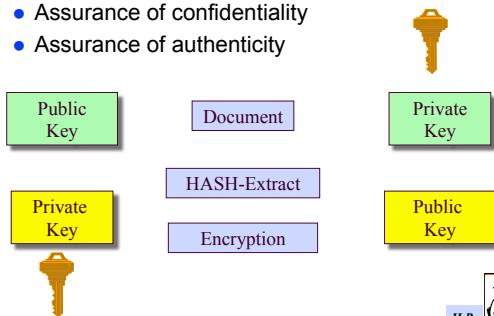
COUNTER MEASURES

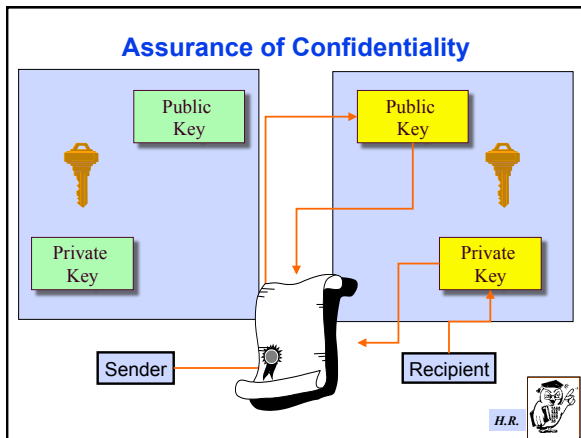
- File backup
- Protocol
- Management of rights
- Encryption
- Electronic signature

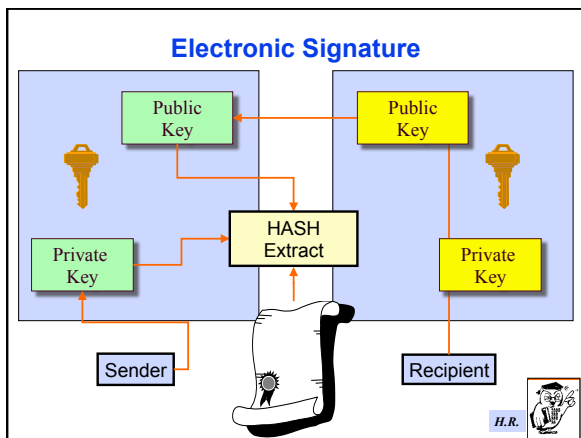


Cryptography and Electronic Signature

- Assurance of confidentiality
- Assurance of authenticity







Where do the Keys Come from?

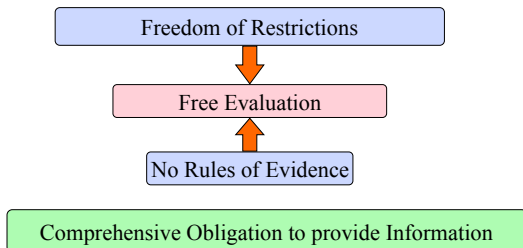
- Trust-Center (certified)
 - SignTrust (Post)
 - TeleSec (Telekom)
 - Bundesnotarkammer
Federal Chamber of Notaries
 - DATEV eG
 - Various professional bodies of tax consultants
 - Medizon AG
- Internal Allocation
 - PGP

Access to the Private Key

- For the qualified electronic signature the private key is embedded in a smart card
- Access to the smart card today
 - Possession
 - and
 - Knowledge
- Alternative access in the future
 - Possession
 - and
 - Biometric attribute



Features of a Modern Law of Evidence



Development of the German Law

- Prima-facie proof of the authenticity of electronic declarations of intent with a qualified electronic signature (2002)
- Equalisation of the evidentiary value of an electronic document with the evidentiary value of a signed document in writing (2005)
- Prima-facie proof of the authenticity of electronic documents with a qualified electronic signature (2005)



Art. 371a (1) Code on Civil Procedure

- Electronic documents as evidence
 - ♦ Private electronic documents with a qualified electronic signature are to be treated as private legal documents regarding their ability to serve as evidence. The anticipation of authenticity can only be falsified if there are serious doubts that it was not the key-holder who declared the statement.



Prima-facie Proof

- Prima-facie proof in case of qualified electronic signature
 - ♦ Unjustified and unsystematic intervention in the free evaluation of evidence
 - ♦ Systematically correct would have been the introduction of a presumption
- The weak point **man – card** (access through possession and knowledge of a five digit PIN) does not justify a presumption nor a prima-facie proof
- Presumption would perhaps be justified in case of access through biometric attributes



Obligations and Duties of Cooperation for the party giving evidence in using electronic documents

- Presentation of a computer print-out
- Access to the system
- Giving insight into the architecture of the system used
- Illustration and documentation of the applied software
- Disclosure of security measures
- Access to protocol files



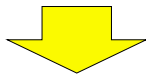
Obligations and Duties of Cooperation

- Own electronic documents
- Electronic documents in the opponent's disposition
- Electronic Documents in the disposition of third parties



Own Electronic Documents

Loss of case due to lack of evidence



Achieving the necessary and wanted activity through the burden of proof



Electronic Documents at the Disposition of the Opponent

- No help by the burden of proof
- Reliance on duties to proceed grounded in substantive law
- Part revisions in procedural law
- **Procedural duty of the party which does not bear the burden of proof to cooperate and disclose**



Electronic Documents at the Disposal of the Opponent

- Part revisions through
 - Downsizing the burden of allegation
 - Upsizing the burden of a substantial defence for the opponent
 - Applying the rules of frustration of proof
- Equality of means in court proceedings



Electronic Documents at the Disposal of Third Parties

- Until 31.12.2001 reliance on duties to proceed and disclose grounded in substantive law
- Until 31.12.2001 no duties to proceed and disclose grounded in procedural law
- **Contradiction to the obligation to testify**
- **Since 1.1.2002 duties to proceed and disclose within the duty to testify**





Results and Perspectives

- Rules of evidence for electronic documents
 - No need for actions
 - Admittance and free evaluation with court inspection and expert opinion
- Duty to cooperate and disclose
 - Need for action has been met with 1.1.2002
 - Start into modern procedural concepts
 - Duty of the party, which does not bear the burden of proof, to cooperate and disclose
 - Duty of third parties to proceed and disclose in accordance with the duty to testify





Thank you for your attention!