The debate on Art. 13 ECD has been intense, after the Commission's initial 2016 proposal and even more after the European Parliament's JURI Committee on June 20, 2018. The directive's primary purpose is to end the European online infringement of intellectual property. In accordance with the principle of general monitoring obligations, all EU member states are required to implement national measures that are necessary to prevent the availability of unauthorized copyright content for hosting providers under certain requirements.

The CJEU and national case law show that reasonable duties of care for hosting service providers, including extensive duties to prevent the availability of copyright content on active hosting service providers, subject to a careful balancing of legitimate interests and rights. Active hosting providers with an in principle legal right to host content should not be held liable for pre-existing copyright content without a court order. However, if the special circumstances of a case require it, the imposition of certain filtering duties may be considered proportionate.

The CJEU has confirmed the German case law for the sister Supreme Court, which confirmed that an injunction imposed on a hosting provider requiring it to install a filtering system obliging the hosting provider to actively monitor all the data relating to all its service users, in order to prevent any future infringement of intellectual property rights is inapplicable to Art. 13 ECD (BGH of 21 Jul 2010, 3 C-143/06 - M. S. , para. 4). Nevertheless, specific filtering duties may be imposed on the search engine (BGH of 14 Nov 2012, 3 C-17/11 - M. S. , para. 4). The CJEU has clarified that an active role is necessary to achieve the goal.

In this regard, Art. 13 ECD helps to balance the fundamental rights at stake by the internet provider. It aims to reconcile the interests of rights holders with the freedom of the internet service provider. However, the CJEU has confirmed that an injunction imposed on a hosting provider requiring it to install a filtering system obliging the hosting provider to actively monitor all the data relating to all its service users, in order to prevent any future infringement of intellectual property rights is inapplicable to Art. 13 ECD (BGH of 21 Jul 2010, 3 C-143/06 - M. S. , para. 4). Nevertheless, specific filtering duties may be imposed on the search engine (BGH of 14 Nov 2012, 3 C-17/11 - M. S. , para. 4).

The CJEU has clarified that an active role is necessary to achieve the goal. However, the CJEU has confirmed that an injunction imposed on a hosting provider requiring it to install a filtering system obliging the hosting provider to actively monitor all the data relating to all its service users, in order to prevent any future infringement of intellectual property rights is inapplicable to Art. 13 ECD (BGH of 21 Jul 2010, 3 C-143/06 - M. S. , para. 4). Nevertheless, specific filtering duties may be imposed on the search engine (BGH of 14 Nov 2012, 3 C-17/11 - M. S. , para. 4).

The CJEU has clarified that an active role is necessary to achieve the goal. However, the CJEU has confirmed that an injunction imposed on a hosting provider requiring it to install a filtering system obliging the hosting provider to actively monitor all the data relating to all its service users, in order to prevent any future infringement of intellectual property rights is inapplicable to Art. 13 ECD (BGH of 21 Jul 2010, 3 C-143/06 - M. S. , para. 4). Nevertheless, specific filtering duties may be imposed on the search engine (BGH of 14 Nov 2012, 3 C-17/11 - M. S. , para. 4).

The CJEU has clarified that an active role is necessary to achieve the goal. However, the CJEU has confirmed that an injunction imposed on a hosting provider requiring it to install a filtering system obliging the hosting provider to actively monitor all the data relating to all its service users, in order to prevent any future infringement of intellectual property rights is inapplicable to Art. 13 ECD (BGH of 21 Jul 2010, 3 C-143/06 - M. S. , para. 4). Nevertheless, specific filtering duties may be imposed on the search engine (BGH of 14 Nov 2012, 3 C-17/11 - M. S. , para. 4).
German Federal Supreme Court (Bundesgerichtshof – BGH) of 15 August 2013, I ZR 79/12, para. 56 – File-Hosting-Dienst II; BGH, I ZR 85/12, para. 61 – File-Hosting-Dienst III; Court of Appeal of Hamburg of 1 July 2015, 5 U 87/12, juris para. 547; see further Jan Bernd Nordemann in Fromm/Nordemann, Urheberrecht (Commentary to the German Copyright Act), 11th Edition 2014, Article 97 German Copyright Act, note 163a. Same opinion in Italy: Court of Rome, Verdict no. 8437/16.


Same opinion Ohly, The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability? GRUR Int. 2018, 517; Jan Bernd Nordemann, EuGH-Urteile GS Media, Filmspeler und ThePirateBay: Ein neues europäisches Haftungskonzept im Urheberrecht für die öffentliche Wiedergabe, GRUR Int. 2018, 527 et seq.; Jan Bernd Nordemann, Recent CJEU case law on communication to the public and its application in Germany: A new EU concept of liability, to be published in JIPLP 2018.)