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INSTITUTE

ELI Updates

April 2012

Message from the Treasurer



Dear Fellows, Observers and Friends of the ELI,

What is so special about the European Law Institute? In what way does it differ from the institutions already operating in the field of European legal development, both at the European and national level? How can it provide added value, given the panoply of contributions from stakeholder organisations, governmental bodies and academia which were already available before the ELI was established?

The most obvious answer to that question is: because of the unique way in which the ELI works. The ELI is not a research institute located at a particular place and operating through a fixed number of permanent staff. It is not a body designed to represent a particular interest group or to support particular political views. Rather, it is a community of many hundred, soon maybe several thousand jurists from all kinds of legal traditions, disciplines within the law, and professional backgrounds, who together engage in a lively discussion on the development of law in Europe and who strive to find solutions attracting the broadest possible support from the European legal community.

This is certainly an ambitious vision. Several mechanisms have been introduced in order to come as close to it as possible. For instance: a Council of up to 60 members elected from among the Fellows in a way adequately representing different legal traditions, disciplines and professions; an annual General Assembly; the right of each Fellow to engage in Membership Consultative Committees; a rule requiring results of ELI projects may only be published after approval by the Council and, in the case of ELI Instruments, the General Assembly. Of course, the ELI is a new institution, and it will certainly be some time before these mechanisms take full effect. However, the broad support which the ELI receives, and also the example of the American Law Institute (ALI) which has been operating extremely successfully for almost a century, encourages us to further pursue the road we have been taking.

As ELI Treasurer, I am often asked how we will manage with such modest funding. I myself am not so concerned about this. Money is, of course, essential, and I would like to urge all ELI Members to pay their membership fees promptly and, wherever possible, to make donations on a voluntary basis. However, even more essential are time, expertise, and personal commitment. The real treasure of the ELI is the wealth of different views, legal skills, and professional experience represented by its uniquely broad membership. Please help increase this wealth and donate your time and expertise to the work of the ELI.

Yours sincerely,

Christiane C. Wendehorst

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ELI expands its Membership Network

Over the course of the last few months, ELI has had the honour of welcoming hundreds of new individual members, all of them distinguished representatives of the legal communities in Europe and overseas. The Institute has also admitted several new Institutional Observers, organizations that have a keen interest in following and contributing to ELI's work as it pursues its quest for better law-making in Europe. We would like to take this opportunity to once again welcome these new Members. We would also like to remind those that have not yet done so, to please contact us for an invoice for the payment of the 2012 membership fees.

Prospective ELI Instrument: Update on Data Protection and Enforcement of IP Rights



Wikimedia/Pierre-Selim

In the meetings of the Senate and the Council in February 2012, both bodies of the ELI endorsed the topic of Data Protection and Privacy. The Projects Committee was given the mandate to develop the topic into a full proposal, which would be submitted to the Council for final endorsement. Senate and Council agreed that the ELI would not simply respond to the ongoing reform of the European data protection legislation. In contrast, the ELI aims to develop a project (instrument) which addresses the protection of privacy in a digital environment. More specifically, the project may highlight the tension between the protection of privacy in electronic communication and the surveillance/monitoring of electronic communications.

Due to the recent global debate surrounding the Anti-Counterfeiting Trade Agreement (ACTA) the ELI assessed the current framework for the enforcement of IP rights in the digital

world and its impact on privacy protection. Traditionally, privacy is not an absolute right and needs to be balanced with other fundamental rights and legally protected interests. The case of IP law enforcement is a crucial one as different actors (private and public) are enforcing IP rights globally. Consequently, a fair balance needs to be achieved in order to protect IP rights holders and internet users adequately.

Although there is no direct legal conflict between EU legislation on data protection and online copyright enforcement (judgments of the Court of Justice in cases *Promusicae* C-275/06, *Scarlet* C-70/10, *Netlog* C-360/10, *Bonnier Audio AB* C-461/10), certain issues remain open. For example, it remains uncertain how to strike a fair balance between the various fundamental rights protected by the EU legal order (right to data protection/privacy and intellectual property rights) or how to apply the principle of proportionality. According to the Court, EU legislation on the topic does not require the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. The Court did not really provide a clear answer and left this issue in the hands of the national legislator. As a result there might be a risk of further fragmentation of the law in that regard. The ELI will also have to look at the situation in non-EU countries, or even globally, to develop an instrument which would give guidance to all stakeholders involved.

A study conducted for DG Internal Market on online copyright enforcement and data protection in selected countries confirms that the right holders cannot effectively enforce their IP rights against infringers. On 24 April 2012, the European Data Protection Supervisor (EDPS) issued an opinion which calls for better protection of privacy within the proposed ACTA framework (available online at www.edps.europa.eu) ACTA is an international treaty, which aims at providing tools to ensure the highest standards of intellectual property rights enforcement (<http://ec.europa.eu/trade/tackling-unfair-trade/acta>). However, as a result of wide-ranging concerns, the European Commission referred ACTA on 4 April 2012 to the Court of Justice. The Court will examine whether ACTA is in line with the European Treaties.

Trade Commissioner Karel de Gucht said in a statement published on the European Commission's website: "The European Union is founded on respect for the rule of law. Considering that tens of thousands of people have voiced their concerns about ACTA, it is appropriate to give our highest independent judicial body the time to deliver its legal opinion on this agreement. This is an important input to European public and democratic debate. I therefore hope that the European Parliament will respect the European Court of Justice and await its opinion before determining its own position on ACTA."

It is currently up to the Member States of the EU and the non-EU countries to balance the different fundamental rights at stake. Most of the national legislations to date do not provide for a solution which would satisfy IP rights holders and help them enforce their rights, especially when it comes to initiating civil proceedings as they do not provide for specific

regulations allowing Internet Service Providers (ISP) to store/keep IP addresses of end users for civil enforcement by right holders. Even if there are regulations regarding disclosure of such data, they are rendered useless in cases where no data can be stored legitimately or if the disclosure is restricted to major offences. However, a mass surveillance of the entire internet traffic which could be used for the enforcement of IP rights as well as other purposes seems to be equally problematic from a legal perspective. As these issues remain unclear at both the European and national level, an ELI project would be able to offer practical advice as it has the potential to help the legal community in solving one of the main problems of the e-society.

ELI ECHR Project Update – Brighton Declaration published

The Conference on the future of the European Court of Human Rights that took place in Brighton on 20 April has issued a final Declaration. This High Level Conference was particularly concerned with the topic the ELI-ECHR working party has addressed: the Court's ever growing workload.

The Declaration is based on a draft of the United Kingdom Chairmanship, which was endorsed by the Conference on several points. For example, in cases where the applicant has not suffered a significant disadvantage and the respect for human rights as defined in the Convention and the Protocols does not require a detailed examination, the Court should be allowed to reject those applications even if they have not been duly assessed by a domestic tribunal. The words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal" in Article 35(3)(b) of the Convention should be removed. The time limit to lodge cases should also be cut down to four months.

However, the Declaration was vague in its position on the

proposal to enable the Court to deliver advisory opinions. According to the proposal, this mechanism would "ordinarily" prevent an individual from approaching the Court in a case where an advisory opinion had been previously sought.

The Committee of Ministers will instead submit a draft detailing its proposals regarding the advisory opinions by 2013 and then decide whether to adopt it. The Member States made it clear that these advisory opinions should, in any case, not be binding for the Member States.

These new reforms of the Convention System will be taken into consideration in the process of finalizing the Statement.

The full text of the Brighton Declaration can be found at the following link:

<http://www.coe.int/en/20120419-brighton-declaration/>

Common European Sales Law Working Party presents its draft Statement to ELI Council

After discussing the details of its proposals with the European Institutions (see March newsletter), the CESL working party has now submitted its draft Statement to the ELI Council. This paper consists of: a summary of suggested changes (Part A); recommendations to facilitate the instrument's effective implementation (Part B); and suggested changes to the instrument (Part C). An earlier version of the working party's draft was presented to the Council during its last meeting in February and has been regularly updated, and available to Council members, since.

The Council is currently discussing the submitted draft via ELI online platforms. While many Council Members were involved during the drafting procedure, the expertise of other members who are joining the discussion now will be of considerable value in finalizing the draft.

The general approach of the Statement focuses on issues

of a technical nature. The working party's aim is to make recommendations which, if adopted, would render the CESL more user-friendly, simpler and effective. It makes a series of suggestions in order to enhance the potential benefits for traders and to improve consumer protection, in particular in the digital age. However, major policy choices reflected by the proposal, such as the form of the instrument as a Regulation or the types of contracts included, were treated as given. The working party understands its detailed suggestions in Part C not as a competing draft, but rather as a "toolbox", in that the suggestions may be adopted as a whole, in sections, or as individual clauses. With this approach the working party hopes to inspire political institutions in the further process of the negotiation and finalization of the CESL to render it of greater practical utility and attractiveness to potential users.

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Building on the wealth of diverse legal traditions, European Law Institute's (ELI) mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective.

www.europeanlawinstitute.eu

ELI Conference Registration opens on May 3rd

The registration for the ELI Conference will open on 3 May 2012 and all Members are invited to fill out the registration form available on the Institute's website (<http://www.europeanlawinstitute.eu/index.php?id=121386>)

The Conference will take place on 28 and 29 September, 2012 at the Royal Flemish Academy of Belgium for Science and the Arts in Brussels. The General Assembly will be held on the second day of the Conference, 29 September 2012.

As announced in the last newsletter, the ELI has secured special hotel rates at the Thon Hotel EU for the guests attending the Conference. The hotel reservation form can be downloaded from the ELI website.

In order to make the event accessible to all of our Members, the ELI has waived conference participation fees. We hope this will make it possible for many of you to join us in Brussels.



**Royal Flemish Academy of Belgium for
Science and the Arts**

