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Review of Program C-5: Hot Topics in Copyright for Librarians

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devised within the context of the library's overall mission, and they should be incorporated into their collection development policies.

Dupont spent his time at the podium focusing on his experiences at LLMC and his work with law libraries giving him their materials for archiving. LLMC's "old" model involved libraries loaning print materials to LLMC for conversion into a microformat. When the print materials were returned to a library, a microform reproduction would be included. LLMC would also make these newly scanned materials available to other libraries.

Nowadays, libraries are more likely to donate materials to LLMC (in the course of their weeding projects) instead of merely lending these materials. Because technology has evolved so much in the past half-century, LLMC's archiving has moved from a microform focus to a digital focus. Dupont confirmed that there is "no going back" to microforms, citing (as McCormack did) the shrinking availability of microform equipment and maintenance support.

Dupont discussed the importance of redundancy and "backing up" these materials. Although LLMC initially intended to back up all scanned materials by creating at least one microform copy, it can no longer keep up with converting all its materials to microformat. LLMC ensures a small amount of material is converted to microform by subcontracting out to another company, but LLMC forgoes this process for most materials because it can no longer handle microform conversion itself.

Dupont stressed that LLMC still takes its archival and "backup" mission seriously, repeatedly referencing an

underground storage space in Kansas that LLMC uses for these purposes. LLMC sends donated print materials there after they have been digitized. Microform backups and "master" copies in other formats are also stored there. LLMC also works with online hosting companies to ensure that multiple digital copies of its holdings are stored on geographically separated servers.

Questions at the end of the program for both speakers led to some further warnings about future library practices. Dupont hoped libraries would give LLMC enough lead time (more than three days) to consider potential donations, as their commitment to meticulously checking their holdings at the volume and page level took a while. He also warned of overreliance on digital archives, even bringing up a recent example of cyberwarfare (in a nonlibrary context) as a lesson for libraries that are abandoning their microforms too hastily. McCormack pointed out that interlibrary loan of microforms has dropped so precipitously that the only borrowing in that format today is for materials that don't exist in any other format.

Between both speakers, there was one overall point librarians were meant to take away. Libraries should be putting more thought into discarding both their microforms and older print materials. Instead of discarding titles on an ad hoc basis, libraries should formulate plans for what role microforms will play in their future collections. Instead of discarding older materials in a rushed and rash manner, libraries should contact a group like LLMC to check if adequate coverage of these materials is available to other libraries.

Todd Melnick Fordham Law Library

Program C-5: Hot Topics in Copyright for Librarians

Speakers: **George Pike**, University of Pittsburgh, Braco Law Library; **Emily R. Florio**, Fish & Richardson, P.C.; **Kristen McCallion**, Fish & Richardson P.C.; **Kevin Miles**, Fulbright & Jaworski LLP; **Steven J. Melamut**, University of North Carolina at Chapel Hill.

This session was primarily an update on current and ongoing issues in copyright law that are of particular interest to librarians. The topics covered and a summary of each are provided below.

The *Stop Online Piracy Act (SOPA)* and the *Protect IP Act (PIPA)* would have made it much easier for content owners to compel site owners to take down

material and to punish contributory infringement by search engines, internet services providers, credit card companies, and online advertisers doing business with foreign websites engaged in piracy. Internet companies were opposed to the legislation because it would require legitimate companies to police the pirates and would hold legitimate sites responsible if users could use those sites to link to sites offering pirated material. This would leave small internet startups vulnerable to the huge cost of defending against lawsuits by content providers. Internet companies like Wikipedia, Reddit, and Boing Boing went dark on Wednesday, January 18, 2012, to protest this legislation. Such pressure from these companies

and web users lead to the withdrawal of the legislation. Content owners may have lost the first round of this fight, but an amended *SOPA* could be reintroduced.

On September 12, 2011, the Authors Guild and others filed suit against the HathiTrust and its partner libraries for copyright violation. The HathiTrust, a digital library of almost 10 million volumes, mostly digitized through the Google Library Project, intended to make books in the public domain or those under copyright but for which the copyright holder could not be found (orphan works) available online. Only “snippets” of copyrighted books would be made available online. Motions for summary judgment were filed in the case in July 2012. The Authors Guild argued that the large scale copying of books by HathiTrust is a prima facie case of copyright infringement and is not permitted under the library exception (Section 108 of the *Copyright Act*) or the fair use exception (Section 107 of the *Copyright Act*). HathiTrust argued that the *Copyright Act* permits libraries to digitize books without permission of the copyright holder for purposes of preservation, search, and to make them accessible to people with disabilities.

On May 11, 2012, Judge Orinda Evans of the United States District Court for the Northern District of

Georgia handed down her long-awaited decision in the Georgia State case. In April 2008, Cambridge University Press, Oxford University Press, and SAGE Publications filed suit against Georgia State University and its library for the library’s practice of placing copies of book chapters and articles on electronic course reserve without the permission of the copyright holders. Opinions differ on the long-term consequences of Judge Evans’ opinion, but most experts see the case as a victory for fair use in the academic library setting. Nearly all of the counts of infringement alleged by the plaintiffs were dismissed following fair use analysis. The judge did find some merit in infringement claims where the amount copied was more than 10 percent of a book’s total page count or where a clear market existed in licenses for digital excerpts of the book in question.

The *Kirtsaeng* case (*Kirtsaeng v. John Wiley & Sons, Inc.*) will be heard by the U.S. Supreme Court in October of this year. The Second Circuit Court of Appeals held that the “first sale doctrine” articulated in Section 109 of the *Copyright Act* does not apply to books manufactured abroad. Library groups like the American Library Association are concerned that an adverse ruling in this case would make it difficult for libraries to loan books that were manufactured outside of the U.S. without the copyright holder’s permission.

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Program G-4: Antitrust Considerations and the Association

Speakers: **Shaun Esposito**, CRIV chair 2011-2012, University of Arizona College of Law; **Stephen W. Armstrong**, Montgomery, McCracken, Walker & Rhodes, LLP; **Margaret Maes**, AALL vendor liaison, executive director of the Legal Information Preservation Alliance (LIPA)

There is not much dispute that AALL is the sort of organization whose activities the *Sherman Antitrust Act* was intended to regulate. The United States Supreme Court held in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) that a professional organization can be held liable for the anticompetitive activities of its members acting under the apparent authority of the organization.

The question, therefore, is not whether the actions of AALL staff and members are within the ambit of antitrust law. The question is what behavior might be considered by courts to be anticompetitive. This

question is of particular interest to members of CRIV, whose official charge involves educating the Association about the practices, including the sometimes dubious practices, of information vendors. It is certainly possible that something written in *The CRIV Sheet* or on the CRIV Blog or sent to a listserv by the CRIV chair could have an effect, maybe even a substantial effect, on the market for legal information. When does communication by CRIV about vendor practices become anticompetitive? Under the *Sherman Act*, what is CRIV permitted to say and do on behalf of the AALL membership? Can CRIV effectively serve the members of AALL under these strictures?

My conclusion after having attended this session is that CRIV is not meaningfully hobbled by federal antitrust law and that it can absolutely meet its charge without running afoul of that law. CRIV can discuss violations of the Code of Fair Business Practices and can even engage in discussions about the price of vendor products and services without violating the