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Review of Program G-4: Antitrust Considerations and the Association

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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

Sherman Act. As with any law, the issue is fraught with exceptions and provisos. But generally speaking, open and honest dialogue about issues relating to vendor activity, including pricing, is protected under the first amendment and is not, by itself, anticompetitive. The *Sherman Act* punishes collusion in restraint of trade, not the dissemination of information that might have the effect of discouraging a buyer from doing business with a particular vendor.

In the program's longest and most revealing section, Stephen W. Armstrong, a lawyer who is an expert in antitrust, delivered a primer on how the primary federal antitrust statute, the *Sherman Act,* affects the activities of professional associations like AALL. Very simply, Armstrong explained, the *Sherman Act* prohibits combinations in restraint of trade. Professional associations are combinations. These combinations can violate the law in ways that are *per se* anticompetitive, e.g. price fixing, limiting production, or refusing to deal. Associations can also violate the law if they engage in joint acts that are not *per se* unlawful but have the effect of harming competition. Many joint activities commonly entered into by professional groups, such as forming purchasing consortia, publishing salary surveys, and lobbying, are not unlawful on their face but could be considered restraints of trade if their effect on the market is found to be anticompetitive.

What can AALL members, staff, and officers do, then, to avoid violating antitrust laws? Avoiding *per se* restraint of trade is relatively straightforward. Members of the Association cannot agree to set the price that they are willing to pay for a particular service or product. They cannot conspire to refuse to purchase a particular product or service or agree to purchase it only under certain conditions. Neither the Association nor a group of its members can solicit or invite a group action such as a boycott. Joint activities that are not *per se* unlawful can be engaged in by the Association if they are carefully crafted to encourage competition rather than restrain it. The Association can publish wage and pricing surveys as long as they are voluntary, aggregated rather than specific, and do not reveal current or projected pricing. Joint purchasing agreements are acceptable if they do not control an overly large portion of the market. Guides to fair business practices must be voluntary, cannot be used to fix prices, and must be prepared with the participation of all interested parties. Lobbying is acceptable if it is consistent with a competitive market.

Following Armstrong's review of antitrust law and its significance to AALL, Margie Maes and Shaun Esposito offered hypothetical situations involving activities by law librarians and asked Armstrong to give his opinion on whether he thought these activities were violations of antitrust law. Rather than go through each hypothetical here, I will summarize what I learned from the opinions the lawyer offered:

- Consortial purchasing arrangements like NELLCO are not anticompetitive if they are limited (i.e., do not control the entire industry), if they create demonstrable efficiencies for both buyers and sellers, and if they allow active participation by all parties.
- CRIV can report on particular vendors violating fair business practices and can tell readers about vendors that abide by those practices. Disseminating valid information that has the effect of harming a particular vendor's business is not a *per se* antitrust violation. CRIV cannot solicit joint action against the violator, and it should allow the violator to participate in the discussion and present its side of the story.
- A small group of library directors can sit around and complain about a particular vendor without raising the specter of an antitrust violation. But it would be a violation if the members of that group agreed among themselves not to pay more than a specific price for a service or product.
- Parallel conduct is not collusion. It is not an antitrust violation for two or more AALL members to make the same decision with regard to a price as long as they did not make that decision in concert with one another.
- Vendors must be meaningfully included in the membership of AALL. An organization is less likely to engage in, or be seen to engage in, a restraint of trade if both sides of any potential transaction are represented by that organization.
- Large organizations tend to be risk-averse. They want to err on the side of caution with regard to antitrust law because the costs of defending against an antitrust suit and the cost of paying damages in the event of an adverse judgment can be considerable. But an organization must not be so averse to risk that it regulates itself into irrelevance. What I take away from this session—and this is my personal opinion and not a matter of CRIV or AALL policy—is that a free and open exchange of information participated in by both vendors and librarians is not likely to lead to a successful antitrust case against AALL. No AALL member, officer, or staff member should ever engage in per se restraints of trade or call for or encourage boycotts or joint action of any kind. But free and open exchanges of information, even about matters of price, have a place at our conferences and in our publications.