

Contents

Editors' Corner	2
From the Chair	2
CRIV Vendor Roundtable	3
Boston 2012: Annual Meeting Educational Program Summaries	4
New Product Award Call for Nominations	8

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www.aallnet.org/main-menu/Leadership-Governance/committee/activecmtes/criv.html

CRIV Tools

<http://www.aallnet.org/main-menu/Advocacy/vendorrelations/CRIV-Tools>

The CRIV Sheet

Editor's Corner

Welcome to the AALL Annual Meeting issue of *The CRIV Sheet*. We selected programs to review and summarize that relate to CRIV's mission. I hope those who were not able to attend these sessions will find the articles helpful. The purpose of *The CRIV Sheet* is to provide its readers with useful material concerning vendor relations. If you have ideas for future articles, please let me or David Hollander know. At the end of this issue of *The CRIV Sheet* you will find information about how to nominate a vendor for the 2013 New Product Award. Last year's winner was Bloomberg/BNA.

I'd like to thank Todd Melnick, who served as co-editor with me last year. He has moved his efforts and skills to the new CRIV Blog. David Hollander is the new associate editor and provided valuable assistance with this issue.

The CRIV Sheet's editorial policy is online at www.aallnet.org/main-menu/Advocacy/vendorrelations/CRIV-Sheet/policy-criv.html. If you have comments about past articles, I welcome your feedback.

Michelle Cosby North Carolina Central University School of Law Library

From the Chair

Thank you for reading the first issue of *The CRIV Sheet* for the 2012-2013 term! I am following Shaun Esposito, and I will be handing CRIV off to Cynthia Myers for the 2013-2014 term.

During our 2011-2012 term, the committee was able to establish the CRIV Blog, which is available at crivblog.com. CRIV will continue on this new adventure, posting news from Vendor Liaison Margie Maes, news from the chair, and other topics of interest to the AALL membership. The CRIV Blog also has links to *The CRIV Sheet*, the *Guide to Fair Business Practices for Legal Publishers*, and other useful information. We encourage AALL members to follow our blog and comment often! The committee has also moved forward and put the Request for Assistance form online. This form, available at www.aallnet.org/main-menu/Advocacy/vendorrelations/request-assistance.html, allows AALL members to submit issues, provide contact information, and upload supporting documentation easily. To this end, CRIV will also continue to encourage vendors to voluntarily comply with the *Guide to Fair Business Practices for Legal Publishers*, available at www.aallnet.org/main-menu/Advocacy/vendorrelations/docs/fair-practice-guide.html.

At the AALL Annual Meeting in Boston, CRIV hosted its annual Vendor Roundtable. The topic this year was e-Books in the Legal Profession. I would like to thank all of the librarians and vendors who attended the discussion this year. You can read the summary of our Roundtable, along with many other program summaries, in this issue of *The CRIV Sheet*.

CRIV will continue to move forward and work toward the committee charge. The majority of CRIV work is done through subcommittees. Each subcommittee is led by the CRIV chair or an appointed CRIV member, and each CRIV member serves on multiple subcommittees, as well as contributes to the CRIV Blog. I would like to thank all continuing and new members of CRIV for their willingness to serve and help CRIV grow. Finally, CRIV will continue to work closely with the vendor liaison and strive to continue to foster relationships with other committees, special interest sections, and caucuses.

For more information about CRIV, including useful tools, please visit www.aallnet.org/main-menu/Advocacy/vendorrelations.

CRIV Vendor Roundtable

The topic of this year's CRIV Vendor Roundtable was e-books. CRIV Chair Michelle Cosby led the discussion. Representatives from ALM, Bloomberg/BNA, Fastcase, LexisNexis, and Thomson Reuters provided the vendor perspective.

When asked if they were offering or pursuing e-books, all of the vendors responded that they either had e-books or were working on developing them. Lexis has recently partnered with Overdrive to provide content. Thomson Reuters plans to have 500 titles available by the end of 2012. Fastcase has recently released advance sheets for a variety of e-readers. It plans on releasing 800-1,000 by the end of 2012. They will be available via Amazon, iTunes, and Google Play.

Cosby asked the group members how they envisioned lending of their e-book titles would work. The representative from LexisNexis stated that the company wants the content to circulate the same as print. A member of the audience stated that large law firms want to be able to sign out an e-book to multiple users at once. They also need e-books to work in several locations, not just at the firm's office. Thomson Reuters is working on its own platform, so they were not sure if e-lending would integrate with a law library's existing library system. The issues of how to handle consortia and interlibrary loan also came up. No one had an answer to how those would be dealt with yet.

Ed Walters from Fastcase queried the group as to whether people wanted or expected e-books to be different from print books. Specifically, should there be greater and more flexible use for an e-book than there might be for print format? An audience member stated they ought to be the same. Others stated there ought to be greater functionality for an e-book, such as linking.

The group also discussed pricing models. Librarians desired unlimited use and were nervous after seeing how nonlegal publishers have handled e-books for libraries. Some of the vendors seemed to think the e-book pricing would be based on, or similar to, pricing for print, though several predicted that unlimited views and circulation would be permitted. Walters opined that perhaps the mold should be broken, and they ought to be looking at what e-books will look like in 10 years, not what books looked like five years ago. He stated he thought e-books ought to be more dynamic. Books have to be static, but e-books do not. A representative from Bloomberg/BNA added that it was difficult to talk about 10 years in the future when the technology is constantly morphing.

Privacy was brought up by an audience member. She queried what data was being captured by the vendor, specifically, whether the companies retain information on what content a user has viewed. The representative from Thomson Reuters stated that they are capturing information at an aggregate, not individual, level. They do this to track what part of the content in an e-book is most valuable. Personal notes added to content are posted separately, so they are not available to the company. LexisNexis tracks who has a particular title checked out and provides that information to the library, but LexisNexis itself does not have access to that information. It was noted that tracking might also vary by country. Other countries have more stringent privacy rules than the U.S.

Librarians asked whether content might be taken off a title list after it had been purchased. The representative from LexisNexis indicated the title should still be available, but the library would not get updates. The issue of updating sparked many questions. Librarians wondered how titles would be updated—would each update be a separate unit, or would it be integrated? Vendors expressed a desire for librarian input on that. A representative from Bloomberg/BNA stated that if updates are merged with the existing title, it would affect citation and paging. It was pointed out that e-books could have dynamic pagination, and page numbers would change if font size was changed. A suggested solution for consistent citations was to cite sections rather than pages.

Librarians also wanted to know if each update would need to be purchased separately or if it would be part of the title. Vendors responded that it might depend on how the title has been set up—as a subscription or single purchase. Standing orders would likely be automatically updated. Otherwise, libraries would be notified of an update and given the opportunity to purchase it. An audience member stated that she thought the monograph model didn't make sense for e-books. Others wondered if the e-book would have to be checked in for it to be updated or if the updates could be pushed to a checked-out e-book. It didn't seem as though that issue had been fully resolved yet. One audience member wanted the option to skip updates to save on costs. She requested predictability in updating schedules so librarians could plan which ones to miss.

There were questions about bundling. Vendors wondered if customers would want the opportunity to buy print alone, print and e-book, or just e-book.

The vendor responses indicated that bundling is not currently being planned for most legal e-books.

Vendors asked for feedback from the librarians about their customers' preferences and the demand for e-books. An academic law librarian stated that her patrons don't care about the format as long as they can get it quickly. No one expressed that there was a huge demand for e-books from patrons. Librarians stated that they see a variety in the types of devices being used, so patrons will want cross-platform e-book access. One audience member opined that something unique has to be done to attract attorneys to e-books.

The representative from ALM asked librarians what they don't like about e-books. Difficulty getting text

out of a document was a concern. Simple copy and paste is needed. Navigation also needs to improve. Tables of content and indices need to be included and must be easy to use.

The last issue raised was how users would access e-books. Would they be linked on a law library's intranet? Would they have a separate entry in the catalog? One librarian commented that at her school a student had found a title before it had even been cataloged. The book had come up in a Google search.

The roundtable ended with the vendors reiterating their desire for input from law librarians. It was a lively conversation, and many questions went unanswered. I hope vendors will continue this discussion by making user testing and focus groups available to their customers.

Boston 2012: Annual Meeting Educational Program Summaries

Jacob Sayward Fordham Law Library

Program C-3: Law Library Collections Post-Microform: Future Implications for the Newest Legacy Format

Speakers: **Laura E. Ray**, moderator and coordinator, Cleveland State University, Cleveland Marshall College of Law Library; **Jerry Dupont**, Law Library Microform Consortium; and **Terrence McCormack**, The University of Buffalo, State University of New York

"Law Library Collections Post-Microform" was not set up as a debate between its two key speakers. Terrence McCormack and Jerry Dupont actually agreed on key issues, including the importance of foresight in preservation and the role microforms may play in that process. They both criticized the rash decision-making and rushed discard process that leads to the loss of microforms as an archival tool. Although they both spoke to law libraries' future as a place with fewer (or no) microform holdings, they focused on two different aspects of preparing for this future. McCormack addressed what libraries can and should do on their own, and Dupont dealt with how and why libraries should be working with groups like his own Law Library Microform Consortium (LLMC).

McCormack began by telling the audience of his own experiences at the University of Buffalo. His library had a large microform collection, but its microform subscriptions were dwindling for a number of

reasons. Manufacturers were no longer making the equipment necessary for reading and printing these materials. Patrons hated using microforms, and microform use did not yield helpful usage statistics. His library canceled many of its microform subscriptions because of their cost and the presence of digital alternatives.

McCormack also highlighted the reasons his library was keeping some subscriptions. Microforms were more durable and reliable than some other media. Additionally, there were some microform subscriptions (including governor's bill jackets) for which the University of Buffalo was one of the last subscribers.

Nonetheless, the trends with microform were clear. Libraries might maintain their existing microform holdings, but they were less likely to add new microforms to their collection. Even if they continued many of their existing microform subscriptions, they were unlikely to add new ones. They were also likely to move more of their microforms into storage.

McCormack stressed the importance of libraries putting together actual plans for how they would deal with microforms in the future, even if that involved eliminating these holdings. These plans should be

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.

Todd Melnick Fordham Law Library

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.

New Product Award Call for Nominations

Have you discovered any great new library products this past year? If so, let us know! It is time to nominate these products for AALL's New Product Award.

The New Product Award honors a new and innovative commercial legal information product that enhances or improves existing law library services and/or procedures. New products may include, but are not limited to, printed material, computer hardware and/or software, or other products or devices that aid or improve access to legal information, the legal research process, or procedures for technical processing of library materials. Any product that has been reintroduced in a new format or with substantial changes is also eligible. A new product is one that has been in the library-related marketplace for two years or less.

All AALL members are encouraged to think about the exciting new information products being used in their libraries and to send us their nominations for this award. Interested vendors may also self-nominate their new products. Recipients of the New Product Award need not hold membership in AALL. Nominations can be sent by mail to the address below or via email.

To Submit a Nomination for the 2013 Award

Nomination forms can be found on the CRIV website under the new product award tab or at www.aallnet.org/committee/criv/news/newproductform.pdf. The deadline for receipt of submissions is January 31.

Librarian Nominations

If you are a librarian nominating a product, please give as much information about the product as possible. The New Product Award Subcommittee will contact the publisher of the product for any further information required.

Vendor/Publisher Nominations

If you are a vendor or publisher nominating a hardcopy product, please submit the form along with a sample product, if available. If you are nominating a web-based or online product, please submit the form with all necessary contact information, including URL(s) and temporary login and password information.

For hardcopy products, brochures, and/or any other materials, we recommend that you send four copies for the New Product Award Subcommittee and the AALL Awards Committee.

Submit completed forms and documents by January 31 to:

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