

National Institute of Standards and Technology

Codes and Standards Public Policy Case Studies (Federal Award ID Number 70NANB15H344)

Technical Report for period 9/30/2017 - 12/31/2017

NIST Standards Services Curricula Development Cooperative Agreement Program

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1. Objectives and Accomplishments

Under this agreement, we proposed to introduce law and policy students to codes and standards through the development of two in-depth case studies related to topics that are already in the curriculum of core and elective courses in law schools and public policy programs. We made significant progress since our last progress report.

The first case study addresses jurisdictional conflicts and preemption challenges between local building codes and federal energy efficiency regulations of heating, ventilation and air conditioning appliances. It draws on lawsuits that challenged state and local green building codes. One suit challenged the City of Albuquerque's green building code, the other suit challenged a similar code adopted by the State of Washington. In both jurisdictions, construction industry groups went to court to argue that U.S. Department of Energy efficiency regulations preempted the state and local efforts. In New Mexico, the federal judge found that the Albuquerque code was preempted, while in Washington State, the federal Court of Appeals found that the building code was not preempted. The contrasting outcomes provide a promising opportunity for students not only to understand and debate preemption, but also to consider what levels of government are best suited for addressing different kinds of public policy problems. This case study was piloted in classes on environmental law and state and local law.

The second case study addresses standard essential patents (SEPs) and is intended for use in intellectual property and related courses. Professor Cynthia Dahl tested out the case study on SEPs based around the litigation in *Microsoft v. Motorola* in two courses at Penn Law— Dahl's intellectual property clinical course and Professor Cary Coglianese's regulatory law and policy course. The case study, built around an actual litigated dispute decided in 2015, raised key contractual issues surrounding standard-setting organizations (SSOs) and about the implications of "fair, reasonable and non-discriminatory" (FRAND) terms for standard-essential patents. The case study introduces students to the world of SSOs and walks them through the complex issues presented to the district court and resolved in its voluminous opinions, including its 207 pages of findings of fact. The case study distills this record down into a manageable and accessible document, making it possible for students to learn about the key issues in a typical 80-minute class. The case study is supplemented with the SEP Course Module pursuant to our other NIST agreement.

Since our last progress report, we have further refined each case study and conducted and edited video-taped interviews with key protagonists in the cases. These case studies are also

being integrated into the law and public policy course modules that we are developing pursuant to a second, separate agreement with NIST. The following details report progress on each case study.

A. Preemption Case Study

We reworked the draft of the Preemption Case Study narrative and edited our video-recorded interviews with the following two key protagonists in the energy efficiency building codes case:

Joseph Mattingly
General Counsel (retired)
Air-Conditioning, Heating, and Refrigeration Institute

Martin Chávez
Former Mayor
Albuquerque, New Mexico

The videos of these interviews also form part of our multimedia course modules but also helped provide additional background information for the case study narrative. Below is a summary chart of our progress on the Preemption Case Study:

Objective	Accomplishments
Research & writing	Edited case study narrative
Project administration	Held team meetings re: case study and project progress
Production of multi-media materials	Edited video interviews with key protagonists

B. Standard Essential Patents Case Study

We reworked and edited the case study on *Microsoft v. Motorola*. In addition, we have video-recorded and/or edited recorded interviews with principal protagonists involved in this litigation.

Kirk Dailey
Senior Vice President of Business Development
Marconi Group
Former Corporate Vice President of Intellectual Property, Motorola, Inc.

T. Andrew Culbert
Partner, Perkins Coie LLP
Former Associate General Counsel, Microsoft Corporation

Steve Fortney
Partner, Summit Law Group
Former Law Clerk to Judge James L. Robart

The videos of these interviews also form part of our multimedia course modules but also helped provide additional background information for the case study narrative. Below is a summary chart of our progress on the standard-essential patents case study:

Objective	Accomplishments
Research & writing	Edited case study narrative
Project administration	Held team meetings re: case study and project progress
Production of multi-media materials	Edited video interviews with key protagonists

2. Significant Developments

To recap, our significant developments with respect to both case studies have included refining the written case narratives and conducting and/or editing video-taped interviews with protagonists in the cases. Materials from these case studies are available on the project website, www.codesandstandards.org.

3. Other Related Developments

An essay we wrote for the *Public Administration Review*—which was based in part on our case study of the Albuquerque building code—was reprinted in *The Regulatory Review*. That reprinted version captured the attention of two attorneys for the California Air Resources Board, who wrote a response—to which we responded and a series of essays emerged that were published as a series on State and Local Regulation of Climate Change in *The Regulatory Review* at <https://www.theregreview.org/2018/02/19/state-local-regulation-climate-change/>.