

National Institute of Standards and Technology

Course Modules on Codes, Standards and the Law (Federal Award ID Number 70NANB15H343)

Technical Report for period 09/30/2017 - 12/31/2017

NIST Standards Services Curricula Development Cooperative Agreement Program

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1. Objectives and Accomplishments

In our original proposal, we proposed to develop three course modules that would make it easy for faculty to integrate codes and standards into the curriculum of core and elective courses in law and public policy graduate programs. We made significant progress since our last report. Indeed, as noted below, we have actually developed an additional course module since our last report.

To recap, we proposed to develop course modules that could be used in multiple law and public policy school courses. The modules are intended to provide all the materials needed to support one or more lectures on a topic that would typically be taught in these courses, but using a codes or standards-related example. The three course modules were:

- federal preemption of state/local laws, organized around a case study completed under a separate agreement with NIST of energy efficiency building codes being preempted by federal appliance standards for HVAC equipment.
- standard-essential patents, organized around a case study completed under a separate agreement with NIST of the dispute between Microsoft and Motorola over the
- incorporation by reference in administrative rulemaking

In addition, as described below, we have created a course module on risk regulation that organizes a series of teaching options around the Supreme Court's decision in the "Benzene Case."

Intended to be used by instructors without prior familiarity with codes and standards, each module includes selected readings, teaching notes, PowerPoint slides, and study or discussion questions. For all of the modules, we have conducted video interviews with relevant practitioners and scholars that can be used to supplement readings or be used in the classroom. In total, we conducted fourteen video-taped interviews for download and display on a project website we created in approximately 3-5 minute segments, each on relevant questions. In addition, as stated in our original proposal, for each module we have included lists of news articles, primary law materials, and other readings that could be assigned to students to read.

Course module materials are publicly accessible on the website we developed for the project, at: www.codesandstandards.org.

For the purpose of this report, we discuss our progress with each module in terms of the three themes, namely the "Preemption Module," the "Incorporation by Reference Module," and the "SEP Module." In the "Other Developments" section below, we report on the "Risk Regulation

Module,” which is in addition to those initially proposed. Collectively these materials applicable to a wide variety of law school courses on subjects as varied as Administrative Law, Environmental Law, Intellectual Property, Legislation, Property, and Real Estate Law, among others.

A. *Preemption Module*

The materials in this module were developed in a collaboration between Cary Coglianese, Edward B. Shils Professor of Law, and Shana Starobin, a Regulation Fellow at the Penn Program on Regulation and now an Assistant Professor at Bowdoin College. We continued to develop and refine the teaching guide to accompany the case study and edited video-taped interviews with two key protagonists from the energy efficiency building codes case study. Videos feature the following individuals:

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

Martin Chávez
Former Mayor
Albuquerque, New Mexico

Finally, PowerPoint slides were created and supplemental readings were identified. In summary, progress included the following:

Objective	Accomplishments
Research and development of teaching materials	• Revised teaching guide • Identified supplemental readings
Project administration	• Held team meetings held re: module materials and project progress
Production of multi-media materials	• Prepared interviews with key protagonists • Created PowerPoint slides

B. *SEP Module*

We continued to develop and refine the teaching guide to accompany the case study based on the *Microsoft v. Motorola* litigation. The module supports a faculty member interesting in teaching a class using the case study. It provides supplemental materials, discussion questions, PowerPoint slides, and background reading suggestions. Professor Cynthia Dahl was the principal drafter of these materials, but the development of the module was overseen by Cary Coglianese, who edited all of the materials.

In addition to the written materials developed for this module, we also video-taped and edited interviews with the following key individuals associated with the *Microsoft v. Motorola* 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

In summary, progress included the following:

Objective	Accomplishments
Research and development of teaching materials	• Revised teaching guide • Identified supplemental readings
Project administration	• Held team meetings held re: module materials and project progress
Production of multi-media materials	• Prepared interviews with key protagonists • Created PowerPoint slides

C. *Incorporation by Reference Module*

The course module for Incorporation by Reference (IBR) was developed under the oversight and editing of Cary Coglianese by Professor Emily Bremer of the University of Wyoming College of Law, who was the staff attorney at the Administrative Conference of the United States (ACUS) in charge of its study and recommendations on IBR. Since the last progress report, the already-extensive teaching guide went through multiple rounds of additional editing and development. Discussion questions were created; lists of supplemental readings prepared; and PowerPoint slides were created. We also worked on three video-taped interviews with the following legal scholars who have participated in policy deliberation over IBR and have written articles about private standards and about IBR:

Emily S. Bremer
Assistant Professor of Law
University of Wyoming College of Law

Peter L. Strauss
Betts Professor Emeritus of Law
Columbia Law School

Nina A. Mendelson
Joseph L. Sax Collegiate Professor of Law
University of Michigan Law School

In summary, progress included the following:

Objective	Accomplishments
Research and development of teaching materials	• Revised teaching guide • Identified supplemental readings
Project administration	• Held team meetings held re: module materials and project progress
Production of multi-media materials	• Prepared interviews with scholars • Created PowerPoint slides

2. Significant Developments

To recap, significant developments with respect to the above three course modules included:

- Conducting and/or editing of video interviews for use with multi-media teaching.
- Editing and amplifying teaching guides
- Creating PowerPoint slides
- Developing lists of supplemental reading materials

In addition we refined and added content to the project website, www.codesandstandards.org, including creating a section on additional resources.

3. Other Related Developments

In addition to the above work in alignment with our initial proposal, we also made progress in terms of several add-ons that integrate with the overall project:

- A. We planned a major workshop on standard essential patents, organized around the *Microsoft v. Motorola* case study, to launch of the entire project. This event was scheduled at Penn Law on March 16, 2018 and included an opening keynote address by Judge James L. Robart, the presiding judge in the *Microsoft v. Motorola* litigation. NIST Chief Counsel Henry Wixon also was included as a speaker on the workshop program. No NIST funds were used to support this workshop but we designed it to dovetail with and help promote the two projects supported via NIST cooperative agreements.
- B. We conducted additional videos for inclusion on the project website and integration into various of the course modules. These additional videos featured the following professionals from NIST, ANSI, ASTM, and ICC:

Gordon Gillerman
Director, Standards Coordination Office
National Institute of Standards and Technology

Travis Murdock
Manager, Technical Committee Operations
ASTM International

Nathan Osburn
Director, Corporate Communications
ASTM International

Mary Saunders
Vice President for Government Relations and Public Policy
American National Standards Institute

Sara Yerkes
Senior Vice President
International Code Council

- C. We developed a fourth course module on Risk Regulation for use in courses on administrative law, constitutional law, environmental law, or legislation. This new module was created in collaboration between Cary Coglianese and Gabriel Scheffler (a Regulation Fellow at the Penn Program on Regulation). It is built around the U.S. Supreme Court's decision in the "Benzene Case," or *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607 (1980). This case centers around an OSHA permissible exposure limit for airborne benzene in workplaces. The Supreme Court decision in this case is featured in every major casebook on administrative law, environmental law, and legislation—and mentioned in the Court's opinion (and hence mentioned almost every casebook) is what the Court refers to as an "ANSI standard" for benzene (even though ANSI does not develop standards). The Court also refers to a benzene standard adopted by the American Conference on Governmental Industrial Hygienists (ACGIH). But the Court never explains either of these two standards, nor do the leading casebooks that excerpt the Benzene Case say anything about them. Our teaching module gives instructors all the materials needed to take advantage of obscurity of these references to offer students a lesson on private standards. The course module includes an extensive teaching guide, a selection of background readings, discussion questions, and PowerPoint slides.