Prof. Peter W. Martin
CRDP Conference, May 12, 1995
Crown Copyright In Cyberspace

How Traditional Models of Distributing Official Information Have Been Influenced by Available Technology

This past summer, on a hike in Yoho National Park, Canada, I met and learned from a geologist, whose research focused on lake beds. As we climbed by a number of small mountain lakes, he explained how he sought information about their past by boring into the bed beneath and studying small samples drawn from a few locations in detail. His technique involved inferring change what he found at different levels in those samples. In similar fashion, the following reflections (designed to provide background for the exploration of challenges posed by electronic means for distributing official information) rest on or are at least illustrated by core samples drawn from a range of depths.

Before opening the sample case, let me say a few things about what we might be looking at and looking for. The lake under which we dig carries the name "Law". It has had a long and, may I say, fluid history, interacting with its surroundings in pronounced and complex ways. My samples will be drawn not only from different depths but different locations -- including one proximate to an area we now call by the name "legislature", another from over by a growing cluster of "administrative agencies", a third from the "judiciary".

My analysis of these samples will focus on three elements that appear fundamental to the legal system however it flows. They are: 1) communication (i.e., the straightforward process of information flow); 2) interpretation (the process of decoding and applying what is received); and 3) authenticity or authority (sorting out bogus representations about what the law is from the accurate). While drawing attention to these three elements, I shall try to avoid crushing or dissolving the samples in the course of our analysis so as to provide the opportunity, perhaps for us to observe other striking elements.

How deep should we dig? We might try to pull a sample from oral societies. However, finding any observable trace of the communication, interpretation, and authenticity elements of law in such a sample is near impossible because we are dealing with soft tissue organisms, no exoskeleton, and the press of many

heavy centuries. These problems notwithstanding, useful speculation is possible; modern scholarship has suggestively illuminated the characteristics and techniques of law and information transfer that likely operated pre-writing -- the importance of repetition, of poetry, and acoustic rhythm, of narrative and public occasions, notions of justice or rightness expressed in examples, instances rather than abstract statement. We might probe for the deepest written documents of law. But even if we struck a cuneiform tablet,say, or similar piece of ancient law writing, we would find great difficulty in understanding for whom and what purposes it was set down -- essential, I would assert, to understanding not what it appeared to say but how it worked. Scholars debate quite vigorously, for example, whether the codes of Hammurapi and other Mesopotamiam rulers were considered by Babylonian judges. In other words, reliable information about sources of authority and communication from this period are missing.

Because of these concerns, I'll begin our sampling a much more recent level, one of great turbulence and therefore special interest. From the early days of printing, one finds some very provocative specimens and, significantly, sufficient information about the surrounding structure to draw conclusions about how they fit.

Littleton's Tenures

Here from the layer 400 years down is Littleton's Tenures -- judged by most to be the first law book printed in England --being first printed in 1481 or 1482. The edition here, published in 1581, was its 47th printing, the 14th printed by Richard Tottel. There are many striking features to this early use of print to convey legal information -- most striking, perhaps, to a contemporary eye is the language in which it is written. In the 15th century in which Littleton lived and wrote, the language of law in the King's courts in England was not the language of the people, but so-called "Law French".

For over a century and a half of law printing in England, Law French was its principal language. Now to the extent that the effectiveness of law depends on effective communication we can tell, right off, that this is an intriguing specimen. For it reminds us that communication can, and in the past repeatedly has been, used as a means of control. To the extent that official information can not be understood directly by those affected they are dependent upon those of the social, professional, educational class, who can access, read, interpret, understand the "language of the law".

Treatment of Dower in Littleton

Language aside, this early law book specimen has several other features that illuminate the legal information process of its time. For this book did not begin as an authoritative document. This is not the product of a law maker, but an effort to describe, to interpret law in a particular field for a very distinctive audience. This we now know was written as a teacher's book, written, in fact, for Littleton's son, who was preparing for a career in law. It was not intended for wide dissemination. Its great weight as authority the book earned after Littleton's death by its quality and uniqueness. As for access points to other legal materials -- observe this shocking fact: Littleton (the original Littleton) has neither footnotes nor citations. This is a short book -- a book meant to be read from cover to cover -- and mastered, that is to say, remembered, not verbatim perhaps, but in its main. This is a book that by 1581, as it was being printed and reprinted, was meant to be used as a personal information resource in another important way -- a use few if any contemporary law books fulfill. Most 16th century editions of Littleton were, like this one, printed with large margins (many were far larger than these) intended and used for the owner's notes.

This 1581 edition of Littleton once had a cover and a table of contents showing its division into three books; it never had an index. It does, however, incorporate a technological breakthrough that subsequent editions of Littleton have carried forward, unchanged, for over 400 years, technology critical to any law book's use as authority -- I am referring to a system of identifying units of the whole. If you and I, both familiar with Littleton, had sought to bring his text to bear on a discussion of a point of the law of dower in 1560, we would have no means beyond referring to the subject and initial words of the relevant paragraph to identify the passage in our different editions. Indeed, the first edition of Littleton had no paragraphs; chapters were set off by an initial illuminated letter, and sentences by an initial capital. There was no punctuation but for a scattering of periods. Richard Tottel the genius who published this issue of Littleton with section numbers also commenced consistent pagination of successive editions of law reports -- at considerable expense (and despite all sorts of deviations within the page). In addition, Tottel established the practice of numbering the judicial opinions within each term [H.42.E.3.pl8 = the eighth case of the Hilary Term of 42 Edward III] in printing the Yearbooks, but we haven't yet looked at our samples drawn from the judiciary. Lacking citation or means of being cited, written for highly personal use, Littleton's book was not designed to fit into an extensive information system. A person could and for years, it is reported, lawyers did read Littleton from cover to cover as a annual refresher (the precursor of CLE).
At a layer only 50 years or so higher in our boring than Littleton we find this outgrowth.


THE
FIRST PART
OF THE INSTITVTES
OF THE LAWES OF
ENGLAND:
OR,
A COMMENTARIE
VPON LITTLETON, NOT
the name of a Lawyer onely,
but of the Law it selfe.
Author E. C.
LONDON,
Printed by the Assignes of Iohn More
Esquire.
Anno 1628.

Coke on Littleton

This is the first volume of Sir Edward Coke's Institutes, published in English. Subsequent volumes of the Institutes were freestanding Coke but volume one was Coke on Littleton. Coke's preface explains why he translated Littleton and presented his own commentary in English -- namely, that "the nobility and gentry of the realm...may understand ... seeing that ignorance of the law is no excuse." But at least as significant as the change in language is the altered approach and purpose to this book.


Lib.2. Cap.5. Of Dower. Sect.36.

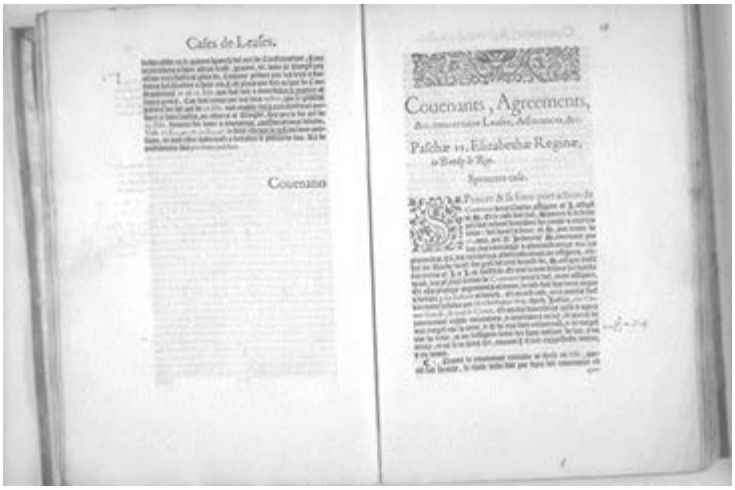
Dower.

Lib.2. Of Dower. Sect.36.

Treatment of Dower in Coke on Littleton

Coke on Littleton began as a personal reference; it was quite literally Coke's notes on a personal copy of Littleton. But Coke turned this into an interpretive work that acknowledges and points to other elements of an information system. It is not a memory refresher but a reference work, pointing by citation to countless cases. Following that reference let us move laterally in the same stratum to the judicial area and draw up a collection of judicial opinions.

Since I am a property teacher, my eye is caught by decision from that field -- Spencer's case decided in King's Bench two years after publication of the edition of Littleton we have been tracking -- 1583.


Cases de Leases.

Covenants

Covenants, Agreements,

Pasche 31. Elizabethæ Reginæ,

Spencers cale.

Spencer's Case, As Reported in Volume 5 of Coke's Reports

This is a landmark case; for well over three centuries that case has had attributed to it three requirements that must be met before a covenant will run with the land (at law). (Intention, "touch and concern" the land, and privity of estate.) As one property text observes, however, the ironic fact about this landmark decision is that there is true doubt about what the case, in fact, held and even more astoundingly, who won. An anonymous case reported in Moore's Reports from about the same time and with a remarkably similar set of facts allowed the plaintiff's action. The conventional view is that the case in Moore is a different and aberrant case, and that the decision did in fact, as reported by Coke, hold against the plaintiff.

How can there be such doubt and how did Coke get back in this lecture in connection with Spencer's case? We are, of course, referring to the same Sir Edward Coke who wrote Coke on Littleton. As some of you will recall, Coke's first venture into law publishing was a set of reports on judicial decisions, the first issued in 1600. Sir Edward Cook edited, in all, eleven volumes of those reports between 1600 and 1616. No

printed report of Spencer's case appeared in 1583 when it was decided, nor in 1590, 1598. It was not until 1605 that volume 5 of Coke's Reports carried news of this decision to an anxious bar and bench -- which tells us, of course, that judicial decisions played a very different role in law at the beginning of the seventeenth century.

The first regular reports to be brought out more or less contemporaneously with the decisions did not commence until King's Bench 1785 (two century's after Spencer's case). Coke's reports served a very different purpose. Coke, like his distinguished predecessor Plowden, was no mere scribe; he intermixed his own commentary with the opinions he selected and reported upon. Unlike Plowden Coke did not use italics to separate one from the other making it difficult at times to distinguish Coke's views or notes of earlier cases from his report of the judicial opinion. But to Coke and his contemporaries, the precise text of a judicial opinion rendered orally was less important than the soundness of the doctrine. Coke viewed his reported cases as illustrations of doctrine, not sources of law. The reports were intended to be instructional material using actual cases (more casebooks than law reports).

Spencer's case is gathered with cases on related topics under an appropriate heading. Plowden claimed in his preface, perhaps disingenuously, that he had prepared the commentaries as personal notes. Pressed to publish them, he expressed the hope that they would be "of some benefit to students of the law."

In sum, it appears even as law material was being printed in books, courts and those arguing law before them operated with an oral and handwritten tradition. Education required years spent with common lawyers whose memories held the law and cases that exemplified important points of law. The only official records of decisions were the plea rolls, but they contained only the pleadings and formal dispositions, omitting the detailed discussion of legal points. If the attorney wished to cite to such a skeletal record, he would "vouch the record."

Cases were cited for, by the time of Spencer's case, the existence of reported cases (the body of year-books) had led to their being viewed increasingly as at least useful reference points of law. Individual lawyers indexed points and authorities for themselves and by the mid sixteenth century there had appeared in print two major abridgments which organized reported cases by topic.

The shift did not occur abruptly but one can observe it in the contrast between Littleton's Tenures and the important sixteenth century law books, which were filled with case references.

Spencer's case was decided during a period of change in legal information systems. There were already some one hundred printed law books; all the inns of court had small collections they called libraries. By 1558, the year books had been printed.

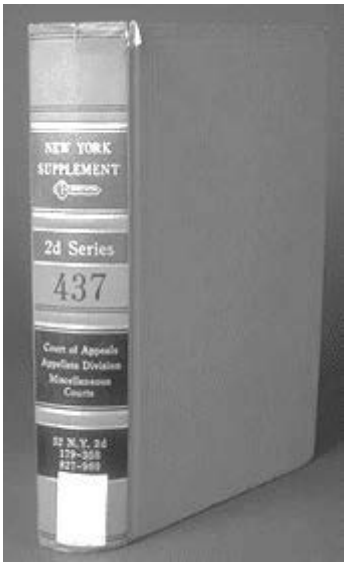
An information explosion that would lead by 1800 to over 1,500 legal titles led to creation of new access devices, abridgements and new forms of text. While contemporaneous access to Spencer's case depended on oral and manuscript accounts, paradoxically, it fell into the new systems in a way that it became an accessible precedent with impact that would have startled a common lawyer in 1583 -- an impact it would not have had if it had been decided a century later or ten years earlier or if Coke had not picked it to exemplify the law of real covenants.

Characterizing this first set of samples, I would suggest that they show a transition from a system in which legal information was passed from generation to generation, from professional to ordinary person to one in which a published record of the law became a mechanism for transmitting it both laterally (printed word of a decision or statute going out at the time it was handed down).

By 1800 or a little thereafter our samples begin to show U.S. law particles with an explosion of them by the end of the nineteenth century.. However, one measures an enduring unit of legal information, that was a time of explosive growth -- in two respects. First, there was much more law data not only had reported decisions avalanched -- 18 volumes in 1810; 800 or so in 1848; nearly 4000 by 1885; double that number by 1910 -- but statutes had come to address wider and wider bands of legal topics. Second, those whose professions required them to work with legal information, judges, lawyers, large insterests affected by law had, increasingly, to be concerned about legal information from more than one law-making jurisdiction within the U.S. federal system. More and more legal issues or problems crossed state boundaries as individuals and businesses did so.

But the stratum of greatest interest to today’s project lies far closer to the surface -- roughly 25 years down, just before LEXIS and its countless digital progeny. From that level, let us pull up, brush off, and examine three samples -- a case report, a set of statutes, a volume of regulations, and a treatise.

Case Report



Contemporary U.S. Law Report (Published by the West Publishing Company)

Precedential Weight (at time of judgment)

Today over fifty percent of the decisions of U.S. Courts of Appeals are "unpublished" (the figure was 61% for 1987) but the concept and its implementation are in chaos because of electronic media. Unpublished decisions (meaning those not printed by the West Publishing Company) are printed in various specialty reports and loaded into computer databases.

Precedential Weight (over time)

Books are lumpy and static, electronically held data is fluid. This poses some intriguing issues about treatment of obsolete law data. How it might be, we can see at the boundary of publication.

Print has the characteristic of being fixed, once issued. Occasionally, decisions will be withdrawn by a court between the printing of advance sheets and a full volume --and they are truly withdrawn from the printed volume, with a small epitaph to mark their passing. The Supreme Court does, although we may not notice, correct decisions between slip sheets and preliminary prints, but then they are fixed; that is what I mean by static.

Print also packages law data in mixed bundles; that is what I mean by lumpy. We can't dispose of the one district court decision in a volume of F. Supp. that has been totally reversed on appeal or the decision of the Court of Appeals panel that is reversed en banc. Yet once the earlier decision has been

rendered obsolete but for the static quality of print wouldn't there be a strong temptation to have it removed from our active legal information system; that is, of course, doable in the electronic library. Under the publication policies of most of the U.S. Courts of Appeals, they will print a decision they would not otherwise publish if it reverses a district court decision that was itself published; imagine instead that a Court of Appeals would in that event direct the removal of the District Court decision from public distribution. Let us ride our imaginations even further. A 1976 empirical study by Posner and Landes calculated the median age and depreciation rate for precedent cited by the Supreme Court and U.S. Courts of Appeals.

They found, for example, the median age of non-Supreme Court decisions cited in Court of Appeals decisions to be 4.3 years.

(Supreme Court decisions had a half-life over twice that long and the age of cited cases did, they found, vary some according to field. Posner and Landes filled tables with such numbers.) The underlying fact, I take from their counting is that precedential decisions, those distributed in print, have value as precedent (on average) for a relatively short time. Let me describe a small empirical experiment I conducted last month. I pulled volume 400 of F.2d (selected because it contains decisions that have just passed the 20 year mark and because of its nice round number). Volume 400 contains, by my count, 211 opinions in 1115 pages, including a handful of per curiams. I next took the relevant volumes of Shepard's Federal Citations and inspected how many of those 211 decisions had entries, over the segments into which Shepard's divided the intervening 20 years. From publication up to 1982, 205 had entries. [I counted everything including those several where the only entry was cert denied or the same decision in some other stage.] For the three year period 1982-1985, only 103 had entries. For the four year period 1985-Jan 1989, only 58 had entries (22 of these were cases that had not been cited in the 1982-85 period). Projecting the clear trend forward, let us imagine that in the next three years, 11 of these decision not previously cited in the decade are invoked as precedent. With an electronic system, can't you imagine a policy that would in 1993 remove the 75 that have not been cited for over ten years (not to speak of the six decisions that have never

been cited, not once in 25 years) -- from the active collection to the archives? Not erase them from history or the public record, but treat them precisely as that history and a public record to be kept in a data archive, maintained perhaps by a law school. Books, you see, present us with a dilemma in packaging so much different law data together. Volume 400 of F.2d holds decisions that are still being cited today; it holds a few that will still be cited in the year 2000; and so it is a volume that a functioning law library must own and provide space and care for -- even though a rising fraction of its 1115 pages hold material of solely historic interest. Some decisions retain their value for a long period of time (Spencer's case continues to be cited by state appellate courts at a rate of at least two a decade), consequently, retirement of a decision to the archives should not rest on age alone. But the flexibility of electronic media will hold out new possibilities that relate to whether or not a particular decision continues to be used as precedent.

Citation

How does one refer to a decision, unit of a decision, statute or unit of a statute? Such references are necessary within the system and of course there they can be totally unintelligible to the human eye (machine but not brain executable). The issue is how one identifies a law point to another lawyer, judge, citizen -- a person who may have access to the same electronic system, a different one, or to print materials. Our current citation conventions are premised totally on print. The current edition -- edition 14 -- of the Blue Book contains but one example of a permissible citation to an electronic legal database -- in extremis, if you will. (I find delicious irony in the fact that the blue book has itself, for the au courant lawyer, been replaced by computer software designed and sold by a company that has just been acquired by LEXIS.) What we need through this transition period and beyond is a set of conventions that are indifferent to the medium of storage and access. Each court decision should carry a unique identifier, ideally one that would provide the date and court and link to all other actions involving the same litigation. This identifier should be applied by the court to remove any issue of its being proprietary. Units of decisions should, like so much other law writing, be designated by paragraph numbers. That would permit more precise "jump" citation and eliminate the need for or need for dispute over diverse paginations -- a division that becomes utterly arbitrary, even meaningless, with decisions that

are not distributed widely in print. I have referred to decisions but drafters and codifiers of statutes face a similar challenge and need for new discipline. Computer-based systems capable of following statutory cross-references require a consistency and completeness in identification of the unit being referenced -- that most statutes, today, do not meet -- relying as they do on print format to set off distinct provisions.

Access

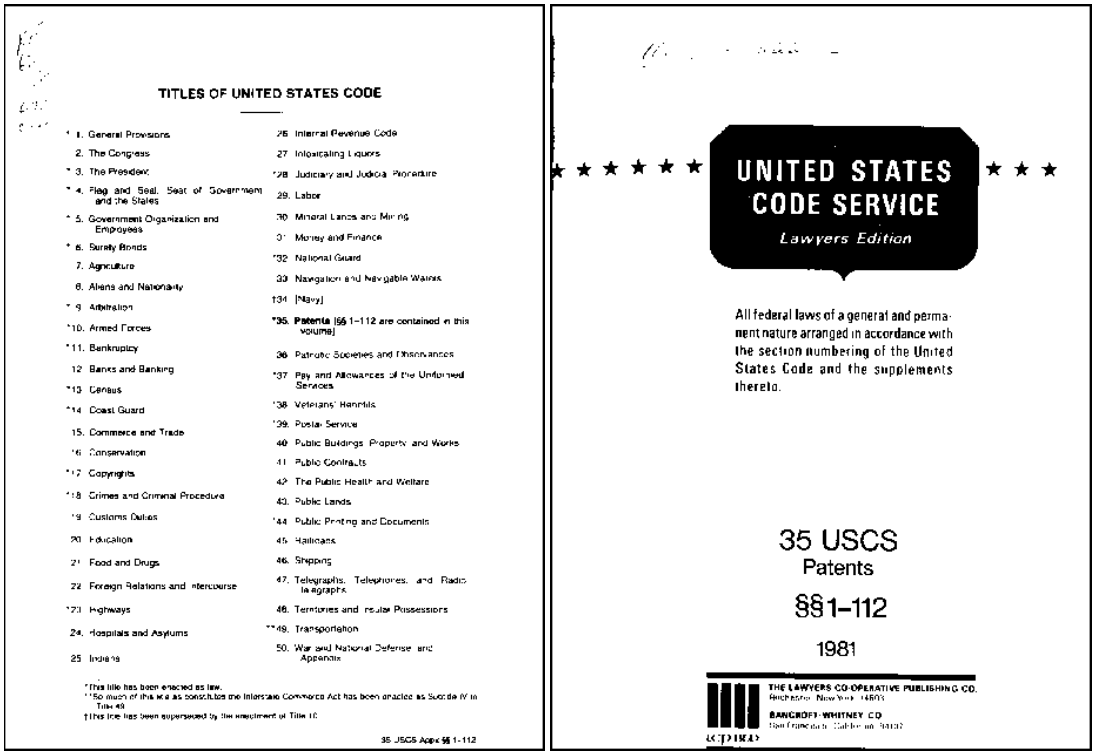
In 1879, the West Publishing Company in St. Paul began printing the Northwest Reporter. By the end of the century, West's full package of innovations was available -- a system of regional reporters that covered the nation, a similar system of federal reports that for all but the Supreme Court displaced other forms of print distribution. Compared to any competing "official" reports West reports were swift to appear, but their greater advantage lay in an indexing framework -- reaching from "abandonment" to "work and labor" against which all these decisions were linked by West editors. This allowed them to be collated in the companion American Digest system, first published in 1897. The West digest brought every reported case (West claimed there to be over 500,000) into a single data access system -- printed in 50 volumes. The search for the precedent directly in point became more manageable.

Portion of Code

In 1865, Field published a general Civil Code, divided into four parts. Until his death near the end of the nineteenth century, Field pressed, without success, for adoption of his code. Field's code supplanted the common law in important areas with statute -- whence so much of the opposition. His New York opponent, James Carter, believed codification wrong because it moved too much law making authority from courts to the legislature -- an untrustworthy body, passionately addicted to the short run. But the shift in gravity which Carter fought was, like gravity itself, inescapable. And codification as a means of dealing with the accumulated enactments of a legislature succeeded where Field's codes saw only fragmentary success. For the chronological printing of legislative enactments creates even greater problems for the lawyer seeking the relevant statutes on a topic than chronological printing of court decisions does for the lawyer seeking the current posture of the common law. Subsequent enactments must be collated with prior ones to determine the effect of amendments, adding, deleting, or

modifying the language of enactment, indeed to be sure that a section has not been repealed. Enactments dealing with the same or related topics must be brought together.

The U.S. Congress authorized the first codification of the Statutes at Large of the United States in 1866; it resulted in the Revised Statutes of 1875 -- which performed all these organizing tasks. In varying mixtures of legislative and private publishing responsibility, with or without annotations linking the codified sections to court decisions, inevitably accompanied by a Shepard's publication, codified statutes became a tool of ordering statutory law on which we have come to depend.



TITLES OF UNITED STATES CODE

* 1. General Provisions
2. The Congress
* 3. The President
* 4. Flag and Seal, Seat of Government, and the States
* 5. Government Organization and Employees
* 6. Surety Bonds
7. Agriculture
8. Aliens and Nationality
* 9. Arbitration
*10. Armed Forces
*11. Bankruptcy
12. Banks and Banking
*13. Census
*14. Coast Guard
15. Commerce and Trade
*16. Conservation
*17. Copyrights
*18. Crimes and Criminal Procedure
*19. Customs Duties
20. Education
21. Food and Drugs
22. Foreign Relations and Intercourse
*23. Highways
24. Hospitals and Asylums
25. Indians
26. Internal Revenue Code
27. Intoxicating Liquors
*28. Judiciary and Judicial Procedure
29. Labor
30. Mineral Lands and Mining
31. Money and Finance
*32. National Guard
33. Navigation and Navigable Waters
†34. [Navy]
*35. Patents [§§ 1–112 are contained in this volume]
36. Patriotic Societies and Observances
*37. Pay and Allowances of the Uniformed Services
*38. Veterans' Benefits
*39. Postal Service
40. Public Buildings, Property, and Works
41. Public Contracts
42. The Public Health and Welfare
43. Public Lands
*44. Public Printing and Documents
45. Railroads
46. Shipping
47. Telegraphs, Telephones, and Radio Telegraphs
48. Territories and Insular Possessions
**49. Transportation
50. War and National Defense and Appendix

*This title has been enacted as law.
**So much of this title as constitutes the Interstate Commerce Act has been enacted as Subtitle IV in Title 49.
†This title has been superseded by the enactment of Title 10.

35 USCS Appx §§ 1-112

UNITED STATES CODE SERVICE
Lawyers Edition

All federal laws of a general and permanent nature arranged in accordance with the section numbering of the United States Code and the supplements thereto.

35 USCS
Patents
§§1–112
1981

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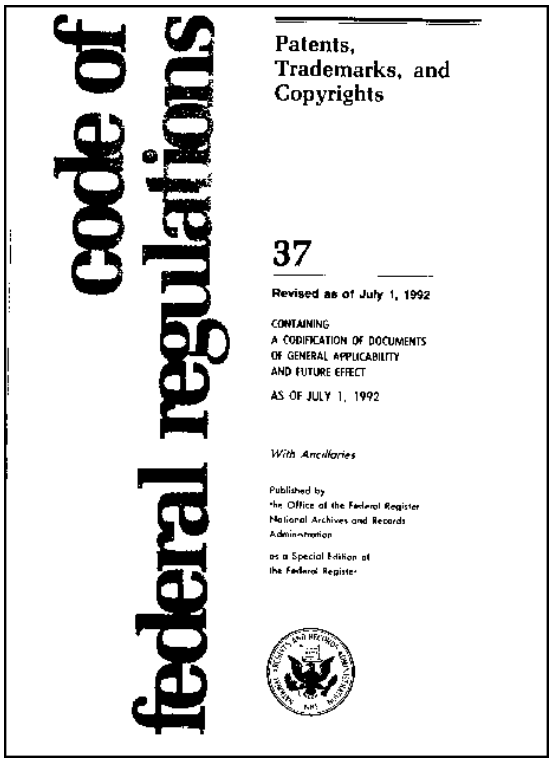
Code of Federal Regulations



code of federal regulations

Patents, Trademarks, and Copyrights

37

Revised as of July 1, 1992

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1992

With Ancillaries

Published by
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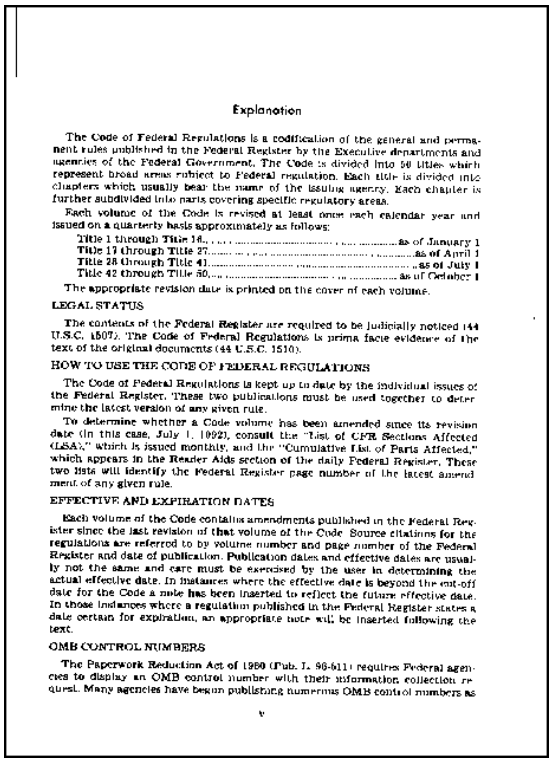
the Federal Register



Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, July 1, 1992), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

EFFECTIVE AND EXPIRATION DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request. Many agencies have begun publishing numerous OMB control numbers as

v

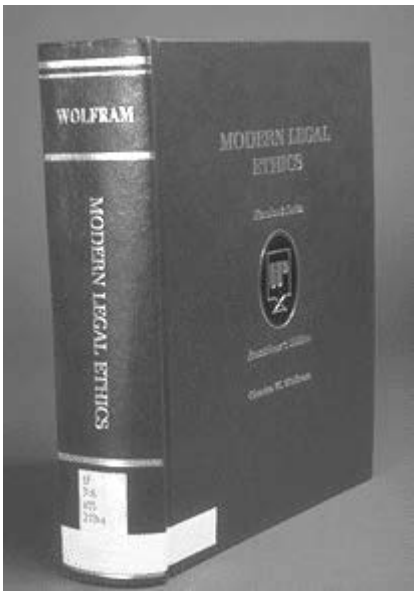
Code of Federal Regulations, Published by the Federal Government -- A Topically Organized Compilation of the Regulations Issued in the Federal Register (Lagging the Latter by As Much as a Year and a Half and Carrying Minimal Editorial Enhancement, Compared to Commercial Publications of Statutes or Speciality Collections)

Treatise

Modern Treatise in Its Natural Habitat

That tells one that the most recent book on legal ethics, one written by Charles Wolfram of this faculty, is to be found in the Cornell Law Library's closed reserve. There surrounded by other books on the same or related subjects (drawn together by virtue of a standard classification system) are several copies of Wolfram.

Compare this fine modern law treatise to Littleton's Tenures.



Wolfram, Modern Legal Ethics

This book is written for the institutional library. It required the resources of a fine law school library for its writing. This book is designed for institutional ownership. It has no space for personal notes. Indeed, to place notes in it would in most libraries constitute an offense. This book is built to stand up -- not lie down. It carries its identity on its spine. The book's references assume ready access to the resources of a large library; indeed, it is fair to say that the book principal intended use is with such resources at hand. Observe, that the author has selected his print references with care and independence. (He refers throughout to works printed and sold by other publishers than his own.)