

LINDA K.

So in our second session, that will end in the afternoon, we're going to revisit some of the

ENGHAGEN:

same areas that we talked about earlier today-- meaning we're going to come back to fair use, and some of those kinds of things.

But this presentation has a little bit of a different organizational slant to it. And, again, this came out of my personal frustration with the frequency with which people told me, earlier in my career, doing these presentations, that they learned something but they didn't know what to do with it.

So I actually, literally, did this one day. I made myself sit at my desk with a piece of paper in front of me. And I said, if you had to explain copyright and fair use law to people who didn't understand it, and all you were allowed to use was one side of one sheet of paper, what would you tell them? And I only gave myself 45 minutes. Because I knew that was rabbit hole. And that rabbit hole could go on forever and ever.

And while this is not one side of one sheet of paper, the six rules are what I came up with. I realized that the way to talk about copyright and fair use was to look at what we actually do, and what the different questions and issues are at different steps in the process, and then flush those out. Because, if you break it down to six rules, it's far less intimidating. All you have to do is figure out which rule you're under. And you muck around in there a little bit, and you figure out the answer to that, and then you get to go on to the next thing.

So I call this copyright compliance made simple. Six rules for course design. And we are, once I turn the remote on, again going to start with the requisite disclaimer, in case there's anybody here who was not here for the first presentation. The information contained herein, along with any questions and answers, are for educational purposes only. Neither is a substitute for legal advice, and neither is to be construed for rendering a legal opinion.

Now, this time I'm going to give you a little bit of background about copyright and fair use, before jumping into the six rules. I want to give you a little bit of context for this. And you may remember that I mentioned Article 1, Section 8, Clause 8 of the Constitution earlier this morning when I was explaining to you this idea that you can't copyright an idea. And you can't copyright an idea because that runs afoul of the intent of the Founding Fathers, who said, in the Constitution, that "Congress shall have the Power to promote the progress in

Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Now, I want you to note that it says, securing for limited times to authors and inventors the exclusive-- not absolute-- right to their respective writings and discoveries. And you see, here, that the language is "Authors and Inventors," because Article 1, Section 8, Clause 8, addresses copyright law, patent law, and trademark law. All three fall under this. Now, we're going to focus on copyright. But, the inventor's part here, my point is that you understand that that's where that comes from-- that that really relates more to patent law, and trademark law, in regard to product branding, and that kind of thing.

So what were the Founding Fathers really thinking about? Well, they're dead, so we all get to decide what they were thinking. Right? This is what I think they were thinking. Or this is what I hope they were thinking. I think the Founding Fathers recognized what I call the day job problem. And that is this-- if we want to encourage creativity, and promote progress, some people got to be able to do it as their day job. Otherwise, it's all left to the midnight tinkers and weekend warriors. Because you all got to figure out a way. I mean, most of us, we're not independently wealthy. Maybe some of us here are, I don't know. I make a decent living, but I'm not independently wealthy. If some people could do it as their day job, then we're going to get more progress at a faster clip.

So I see it as a recognition of what I call the day job problem. Their solution was intellectual property law-- that we create a way where some people can earn a living at it. And then we'll get more of it faster and we'll all benefit, at least in the grander totality of the scheme of things. Yes.

STUDENT:

Quick question. Copyright for some people make it very, very difficult to create thing. I want to quickly tell you a small problem. I was trying to find out how I'm going to [INAUDIBLE] a [INAUDIBLE] to a brain tumor in this [INAUDIBLE]. Said, OK. After all my research, said OK, I'm going to use this product. When I start to search for that product, I saw somebody in University of Tennessee made a copyright that I cannot use anything related to that product.

LINDA K.

That's not a copyright issue. That's a patent issue.

ENGHAGEN:

STUDENT:

Well, patent issue-- I mean, it's compound. It's compound. Anybody can make it. OK. This compound with this OH, and H3, and this, and this, and that, you cannot use it. Because it's

copyright. OK--

LINDA K. No, no. It's patented.

ENGHAGEN:

STUDENT: OK. Another product. Their product-- first product-- forget about that project. I'm not going to do anything with it, just because I cannot use any of that products because it's already patent.

LINDA K. There is a way that you can use it. However, you need to get their permission, and get a
ENGHAGEN: license to do so. I understand your frustration, and I'm not trying to diminish it, or trivialize it. And I mean that. But there is a way you can do it. And that is, if they will authorize you, you can get a license-- i.e. permission-- to use it. They can say no.

STUDENT: I just talked to one of them He said, you have to pay money.

LINDA K. Right. Well, that's the way that works.

ENGHAGEN:

STUDENT: I'm going to use it. I'm not paying money.

LINDA K. I understand. I understand. It's frustrating. Yeah. It absolutely is. And that's why I say, here,
ENGHAGEN: even in relation to copyright law, the balance that gets struck between what we do to promote the progress, by enabling some people to earn a living at it. And on the other hand, have progress that we all benefit-- it's imperfect and imprecise. It's true for copyright law, it's true for patent law. I mean, you get people going about pharmaceutical companies, and you get a room all, like, agitated over that.

Trademark stuff, people don't seem to get as exercised about. But people can get really exercised both about copyright and patent. And you're never going to hear me say that the system is perfect. You're never going to hear me say that, in Linda's view of the world, that they got it perfectly right.

Having said that, there's some things that I have opinions about, that I would change. There's other things that I'm not sure what we might do that would make it work better. And this gets back to that, in the legal world, you become accustomed to the idea that, sometimes, the only option available to you, in a meaningful way, is to least bad one. And that happens.

So the imperfect and imprecise balance in the world of copyright law, is the rights of the

copyright owners. Copyright owners own an item of intangible property. I hold the copyright on these slides. They're my expression of these ideas in a fixed, tangible medium. You can't see or touch the copyright. You can see the words. But the copyright, itself, is a property right-- just like owning a house is a property right. It's a different category of property, but it's a property right.

So there's the rights of the copyright owners versus the rights of the owners of copies of the copyright-protected works. So each of you are now owners of copies of some of my copyright-protected works, because you've got the workshop packet of handouts. So that's a copy, that you own-- Texas Tech bought it for you-- of a copyright-protected work.

And people get confused between owning the copy and owning the copyright. We're all kind of familiar with the idea that you don't get to go to the bookstore, buy a copy of a book, reproduce the whole thing, and hand it out to your students. But when we start talking about other categories of works, that becomes less clear.

But it's the ownership of the copy versus the ownership of the copyright. A copy of materials, in the case of these pieces of paper, it's tangible property. You can touch it, you can see it, you can feel it, you can pick it up, you can move it. Intangible property, you cannot touch, feel, see, or move, because it's a bundle of rights that are recognized by law.

But what copyright law tries to do, what patent law tried to do, is strike a balance between the rights of owners-- the creators, to give them an incentive-- and then the rights of users. Because we do, in the ideal world, want to promote your research, and promote progress. It's, how do we do that, and keep everything chugging along, that's not always so easy to sort out.

So, generally speaking, when we're talking about copyright, the same rules apply to both faculty and students. Students own copyrights. Sometimes people don't realize that. I sometimes ask my students, how many copyrights do you own, and they'll like look at me. Occasionally I'll have a musician in the group, and they'll say, I wrote a song, and they'll know that they hold a copyright to that. But every paper they ever wrote, every email any of us ever authored.

I mean, think about that. You actually hold the copyright to your emails. They're an expression of an idea in a fixed, tangible medium. Most of them have zero commercial value, and many of them are of little interest to a wide range of people-- maybe even the recipients that we send them to sometimes, and they wish we'd stop doing these things but sometimes we have to tell

them.

But the same rules apply to faculty and students. So it doesn't matter if they're undergraduate students or graduate students. The same rules apply. Generally speaking, the same rules apply-- remember we're talking about course design, here-- to both on-ground and traditional online classes. And the notable exception to that is rule number six, that we'll use to close the afternoon today, is streaming under the TEACH Act. And don't worry if you don't know what that's a reference to, we'll talk about that later.

The same practice may be prohibited under one rule, but permitted by another. You need the one that says you are good to go, and you are good to go. That's the way that works. So that's the basic framework of how that happens.

Now, here are the six rules that, in 45 minutes, appeared on one side, of one sheet of paper, on that fateful day. Rule number one-- if you own the copyright, you can do whatever you want. We're going to take each of these rules, and we are going to flush them out. But this is the one page version. If you own the copyright, you can do whatever you want.

Rule number two-- if the materials are not protected by copyright law, you can do whatever you want.

Rule number three-- if you acquired or access the materials unlawfully, you can't use them. I should put a period followed by seven exclamation points there.

And it's [INAUDIBLE] rule number four-- if you acquired, or were given access to, materials by someone else, and you know, or have reason to know, that person obtained or accessed them illegally, you can't use them. This is the Mikey thing that we talked about earlier today. Mikey did it. I didn't steal. Mikey gave it to me. That's where I got the disc. I didn't do it. No. If you know, or have reason to believe, that they were obtained or accessed illegally, you are not allowed to use them. That gets us back to contributory and vicarious infringement.

Rule number five-- if you own a copy of the materials, not the copyright, or you lawfully access the material, if someone else owns the copyright, you may use them-- if the use is a fair use. You may use them under an implied license. You may use them under an express license. And if none of those three apply, you can use them if you obtain permission, and pay required royalties. And we're going to talk about what each one of those. We're going to revisit fair use. I'm going to explain to you what an implied and express license are. And we've already talked

about permissions, and depending on how the time goes, we may talk about that a little more, too.

And then rule number six-- if the requirements of the TEACH Act have been met, you have expanded rights to use copyright-protected works in distance education courses. Now, I'm curious. How many of you, prior to today, have ever heard of the TEACH Act? Oh cool, a number of you. How many of you, in the room, know whether or not Texas Tech is TEACH Act compliant? All right. I guess we're going to talk about that.

UMass used to tell me it was TEACH Act compliant until I pointed out to them that there was one mandatory requirement under the TEACH Act that they didn't satisfy. And I'm like, what do you mean? Yeah, we're-- no. This is kind of like my frustration sometimes. They put a non-lawyer-- a perfectly nice man, I actually like him a lot, I've worked with him for years, he's really a good technical designer-- and put him in charge of TEACH Act compliance. And they didn't have it reviewed by a lawyer. They didn't even ask me to look at it. And they know I do this stuff.

They tried to tell me they're TEACH Act compliant, and it was like, no, here's the list. You see item number 3-- required notice. We had no required notice on any of our stuff. Put the required notice on stuff. [INAUDIBLE] So, we'll talk about that.

You got to laugh. I mean, what makes you an expert? Right? You got to be at least 200 miles away from home. I'm like a 10-minute walk across campus, what could I possibly know? Like, possibly, that I might be willing to share with my home institution if someone asked me nicely-- for free? I love UMass, actually. I've been there thirty years and I'm not going anywhere any time soon. But you probably have your frustrations here, once or twice in your careers. Maybe? No.

OK. Rule number one. Let's start drilling down into the details of [INAUDIBLE]. If you own the copyright, you can do whatever you want. Well, that begs the question of how you figure out whether or not you own the copyright. Now, when we were doing our myths and misconceptions meet reality presentation, I explained to you that copyrights come into existence at the moment of creation, because that's what the rules say, and that you don't need to put a copyright notice on them.

Having said that, I don't know if everybody in this room is an employee at Texas Tech, as opposed to working on a consulting basis. We have a whole category at UMass. We call them

03's. And that's because, if you're paid out of an account-- if your salary comes out of an account-- that begins in the numbers 03, you're not a state employee. So we call them 03's. And that makes it clear, we're talking about 03's.

So if you're an 03-- i.e. you're a consultant, you're not an employee-- then this will not apply to you. But anybody who's an employee has to start here. How do you know whether or not you own the copyright, when you're creating something that you're using in the job that you get paid to do? Well, the answer is, you have to look to see what any applicable institutional policies or contracts say.

So do you have an intellectual property policy that applies to employees? Is the intellectual property policy, assuming you have one, the same for faculty and staff? Is there a differentiation? We differentiate at UMass. The policy that applies to faculty is not the same as the one applies to staff, because staff are 12-month employees and faculty are not. So faculty work falls under what we call the CVIP-- Commercial Ventures and Intellectual Property policy. And, for faculty members, we hold the copyright to works we create that are related to teaching and scholarship, with an asterisk. And the asterisk on the scholarship relates to people, primarily in the hard sciences, who create patentable works. And patentable works fall under a different category.

Do you want to know why? Do you care why? Like we cloned one of the first calves, back when cloning was popular. Somebody in one of our [INAUDIBLE] programs who cloned one of the first calves. And he ended up leaving the university after getting in a major battle over who owned the patent to the calf. But there's different rules that apply, because of the labs and start up costs and all of that kind of thing. It makes sense when you think about it in that respect. But there can still be gray areas with that.

So you have to ask the question, is there a policy or contract that determines ownership? At UMass, I hold the copyright to my teaching and research-related materials, and I don't own a patent. So I don't have to worry about patent issues. For year-round, 12-month professional staff people, they do not get to retain the copyrights to anything that they create as part of their job. So, even within the same institution, you can have different policies depending upon the individual's role and assignment.

Sometimes it's not a policy that you're dealing with, it's a contract. So we are, at UMass, a unionized environment, including the faculty. I'm a member of the Massachusetts Society of

Professors, I think is the name of the union. Now, because we have an institutional policy that grants the intellectual property rights to faculty, for the most part, there is not a provision in the union contract. However, there could be. And sometimes I talk to audiences at colleges and universities where they do have unionized environments where the intellectual property policy is part of the union contract, not part of an employment policy that you sign on for when you become an employee.

So if there is a policy, or contract, that determines who owns what, and you are subject to that policy, or a party to that contract, then that determines ownership. The terms of that control who owns what. Just like any other employment relationship, is really all that means.

Whenever we go to work for an employer, there's certain things that we are agreeing to as a condition of employment. We do not have to agree to them, and they are not required to hire us. Sometimes people will say to me, well what if I don't want to do that? And I go, well, don't go to work for them. You don't have to. But they're not obliged to negotiate that with you.

Now, people far enough along in their career who are successful enough, who are the rock star equivalents in their disciplines, might be able to negotiate special deals. But that's what most of us. So most of us are just subject to whatever the ordinary terms and conditions are.

If there is no applicable policy, or contract, then you have to go to the default rules. And the default rules are the rules in copyright law that determine ownership in the absence of an agreement to the contrary. So this is what kicks in and fills in blanks when you don't have it. So you start from the default rule we've already talked about. The creator owns the copyright, unless there's an applicable policy or contract. The exception to that, under the default rules, is the creator owns it unless it's a work for hire.

Well, what is a work for hire? It's something created by an employee in the course of his or her employment. The thing for faculty, in particular, however, is that our positions are decidedly ambiguous. I didn't do that on the next slide, so [INAUDIBLE]. They're decidedly ambiguous in this respect. At many institutions, faculty members are not on 12-month contracts. They're on 9- or 10-month contracts.

I get paid 12 months out of the year, but I have a 9-month contract. So I have no responsibilities, in my role as a faculty member, to the University of Massachusetts at Amherst, during the months of June, July, and August-- technically. I mean, we all know it doesn't work that way, because there's stuff to do and it's got to get done. And if you don't do it, you pay a

bigger price later. So you do it. You might do it at home in shorts and a t-shirt, but you're doing it.

But, as faculty members, we don't have 12-month contracts. As faculty members-- those of us who are at research universities-- we have research requirements and expectations. But we're not assigned to an R&D team-- where we're creating the next best windshield wiper.

Actually, my favorite location when I used to go around and talk to people like General Motors-- there were two of them. One was the tech center in Warren. I got to see the first electric car ever made by GM. That was cool. It was red, and they did not allow me to touch it. It's true. I could look, it was [INAUDIBLE]. The other thing was the people who made the taillights and the headlights. There's a whole division that that's all they do. Then you go into their shop-- walls of taillights and headlights. Everywhere.

But that's not what we do. We don't get assigned to the taillight and headlight division. Right? We define, within our fields and disciplines, our own research programs. And we proceed with them, and we try to get grants for them, or whatever we do within our fields. But we don't have somebody directing us.

And depending upon the nature of our work, we also, often, use our own resources. I use my personal computer that I own, when I work at home. I buy my own printer paper, and my own printer, and my own ink, and my own-- all of these kinds of things. It's my personal resources that I'm using a lot of time. It's not even the incidental use of institutional resources-- which is permitted anyway.

So when we're on the clock, and when we're not on the clock, it's not crystal clear, is really the point of this. And so, what I often advise faculty when they're working on something, and they're concerned about how it falls under the intellectual property policy of their institution, and their goal is to be able to say that it really is mine. If it's a critical claim, based on the answers to questions that I ask them, then I suggest to them-- work at home.

Don't work in your office. Buy your own paper. Buy your own stuff. Make it clear that you're using your own resources. Do it during the summer when you're on not responsible time-- that's what we call it Massachusetts, it's not responsible time. It doesn't go only for the taxpayers. I've never liked that label. We are not responsible. We're adults, but we are not responsible for anyone in June, July, and August. That doesn't sound very good.

STUDENT: And we should use just our own computer, right?

LINDA K. ENGHAGEN: Yes. So these are the kinds of things that you have to sort through. So if you conclude, after looking at all of these things, that it's yours-- you own the copyright. Then, you may use them in the development and delivery of any course you choose, regardless of the delivery method. So, face to face, secured online, or open access, traditional, nontraditional online-- whatever you want to call it. Such as a MOOC.

One of things that I should add, back here, when we were talking about the policy or contract-- in addition to the possibility of there being a union contract provision, in a unionized environment, we all, sometimes, get grants and contracts to create [INAUDIBLE]. And if you are creating a work under a grant, or another kind of contract, it's the same thing. You have to look at the intellectual property clause of that grant or contract, to determine who owns what, and what you're allowed to do with it.

The same as when we were talking, earlier this morning, about how do you deal with a journal article [INAUDIBLE] where you wrote the journal article but you transferred the copyright rights to the publisher as a condition of publication. You have to look to see what you are giving up, or not, under a grant or other kind of contract that you might get for some kind of a project that ends up creating, or resulting in, a product, or materials, that you'd like to use in your sources.

It's fairly straightforward. I think the thing that trips people up the most, here, is some people go to the automatic assumption that, because it's part of their work, that it automatically goes to the institution. And for, what I would call, non-educational employers, that's going to be true, for the most part. But in educational environments, particularly when dealing with faculty, it can be ambiguous. It's not always crystal clear. Yes, sir.

STUDENT: So what about dissertation of students?

LINDA K. ENGHAGEN: What about-- I just didn't catch the word?

STUDENT: A dissertation of--

LINDA K. ENGHAGEN: A dissertation. OK. What about it?

STUDENT: Who owns the copyright?

LINDA K. ENGHAGEN: The dissertation, it is a product that is copyright-protected to the student who produced the dissertation. Yeah.

One of the things that I get asked the most about, from graduate students, is not the dissertation issue. Although some of them get very unhappy with the publication requirements-- the online publication requirements, now, for dissertations. It's the graduate student collaborating with the faculty member on a research project, and feeling like they're not getting proper credit for their contributions to that. My answer to them is always, it's tricky territory-- that, in an ideal world, the conversations are had upfront about what the expectations are between the faculty advisor and the graduate student, or students, involved, or faculty advisors, because sometimes there's multiple faculty members involved.

The other thing that's the more delicate subject to raise-- and when people come to these questions, I don't know what the truth of it is, I just kind of know what the questions are. And one of the questions always, of course, is, graduate students sometimes believe that their contributions were greater than they really were. I mean, because they're learning. It's not because they're bad, shiftless, and those kind of things. It's because they're learning.

And so they do things, and then we have to redo them, or edit them 6 times. And by the time you get through that entire process-- which is our job-- they can end up feeling like their contribution was not given some kind of appropriate credit. And I think that, sometimes, they're focused more on the amount of time that they spent at it again, because they're learning-- and less on what the ultimate final contribution was the ultimate final product.

Which, again, gets to you have the conversation with in advance, and try to be as clear as you can. And then, if the situation shifts, you have to revisit the conversation with them. And I find that when people do that, that seems to work out OK. But sometimes there is that disconnect. Yes.

STUDENT: So along those lines, in science research, it's pretty standard for professors to say, any data generated belongs to the professor, and the lab, and it has to stay there. Is that a defensible position for them?

LINDA K. ENGHAGEN: Yeah. That's a defensible position, absolutely. Mhm.

STUDENT: Yes. You said it's ambiguous-- the ownership of the course. But what about the online course?

Because the [INAUDIBLE]. For example, I put up the course, and then the old the course material's in the learning management system like Blackboard. Right? And then I can teach several semesters. But what happen I leave this university for other institution, but the course is in the Blackboard?

LINDA K. The course is not in the Blackboard. The course materials are loaded to a software system.

ENGHAGEN: And the software system goes by the name Blackboard. I'm describing it that way in an attempt to differentiate. Assuming that, here at Texas Tech, you own your course materials. I'm going to assume that for the sake of my answer.

STUDENT: The university doesn't have that ownership of that course?

LINDA K. No, no, no. Don't talk in terms of course. Talk in terms of course content, and the software system that holds the content. You still own the content.

STUDENT: The creator.

LINDA K. The creator. Thank you. You still own the content. So if you resign today, to move to another institution, for an upgrade of an offer, then that course content goes with you. And Texas Tech, unless it has a policy that gives it permission to do so, cannot reuse your materials.

ENGHAGEN:

They can have another faculty member create their own version of the course, and deliver it. That's the course. If you teach Math 350, that's the course. The materials, the tests, the examples, the exercises, that you create-- not the [INAUDIBLE] [INAUDIBLE] the textbook thing. You create on your own. They're not the course. They're your teaching materials.

Those teaching materials go with you. Math 350 stays here, and somebody else gets to make their version of it-- unless Texas Tech has a policy, or an arrangement with you, that permits them to continue to have Math 350 taught using your materials. And some institutions do that. They do it under what's called a non-exclusive license. But it's not all that common.

So don't think in terms of the course. I know, as faculty members, that's how we think about it. We think in terms of courses. In the law, you have to separate out the course materials that we create, from the software system that we distribute them through.

STUDENT: OK. Here is kind of the situation. So we have a number of sections. And then, we, as one faculty member, design the course to use by different adjunct instructors, for example. Right? And then, that ownership goes to the design of one faculty member who create the material. Is

that correct?

LINDA K. ENGHAGEN: Depends upon the terms and conditions of that arrangement. I can't answer that question in those general terms.

STUDENT: OK. So then we need to have some kind of policy, or some kind of agreement, with [INAUDIBLE]?

LINDA K. ENGHAGEN: There needs to be some policy, some agreement, some understanding, about what is the legal significance of that arrangement.

STUDENT: Sorry to interrupt, but--

LINDA K. ENGHAGEN: Please.

STUDENT: --the Faculty Senate, right now, is rewriting, reevaluating, Texas Tech intellectual property policy. So it's gone through multiple iterations. And so, I think, what you're asking is Texas Tech specific, and our speaker doesn't have Texas Tech specific IP policy knowledge.

LINDA K. ENGHAGEN: But it is, specifically, the kind of thing that an IP policy should address. And so it's good that you're working on it.

STUDENT: So the IP policy is in Faculty Senate and General Counsel's Office, right now. And that's where it's at.

STUDENT: So they are working on it, right?

STUDENT: Yes.

STUDENT: I'm a little confused.

[INTERPOSING VOICES]

STUDENT: It's just not as succinct as the one that they're working on.

STUDENT: I'm a little confused, was about the content. How is that related to the IP policies, or the rules.

LINDA K. ENGHAGEN: Well, he was asking a question about, instructor A creates the course content for a particular course, and then multiple other instructors use those materials to teach different sections. So

there's five sections of course-- I'm making this up. There's five sections of course. He creates the materials that are used in all five sections. But he only teaches one, and four other people teach the others. And then, so there's the question around how that works. And his response was, Texas Tech is working on it-- figuring out exactly what the legal significance is of that arrangement.

OK. Are we ready? You get this. Rule number two-- if the materials are not protected by copyright law, you can do whatever you want. In response to a question earlier today-- what isn't protected by copyright law? Excuse me. I indicated that it's things like blank forms that collect information, but don't really yield anything significant. Facts, theories, scientific, and mathematical principles, theorems, and formulas, research methodologies, and statistical techniques-- we need these things to be available to everyone in order to promote progress. So you cannot copyright any of those things and corner the market on them, as the expression goes.

Works created by the Federal Government-- and note that I parenthetically say, this does not apply to works created for the Federal Government-- sometimes the Federal Government, they give a lot of grants and contracts out. And so, if it's somebody who's created something as the recipient of a grant, or a contract, then the rules might differ. But when we're talking about federal employees, at federal agencies, those materials are not eligible for copyright protection. And while it's not necessarily going to get you everything, the US National Archives and Records Administration website does have a wealth of information, in a one-stop shopping kind of way, for information that is in the public domain because it is federal.

Note that the same thing does not work for works created by states. Works that are created by employees of state agencies may be protected by copyright. The reason for that-- I put it up here, Federalism, if there are any historians or political, scientists, or policy wonks in the room, you know what Federalism is all about. It's that debate over, to what extent can the Federal Government impose its will-- i.e. mandate to the states. The Founding Fathers, in the Federalist Papers, were not fond of the feds mandating to the states. It's that old power tends to corrupt, and absolute power tends to corrupt absolutely. So we're going to divide the power. And one of the ways we're going to divide it is limiting the authority of the Federal Government to dictate to the states. And this is one of them.

What I always do, when I go to state websites, for any reason-- websites from state agencies, for any reason-- I always scroll around to see if they put a copyright notice on it. We know that

the absence of a copyright notice is irrelevant, but I always look. And I do a certain amount of research, on a regular basis, where I'm compiling data on what happens in every 50 states on topic x.

Like, my most recent project was on what are called electronic sales suppression systems. You know what those are? They're kind of cool. I mean, they're illegal, but they're kind of cool. It's software that reconfigures your electronic cash register to eliminate sales, to adjust your inventory-- you can do all kinds of things. It's the high-tech version of old school two-cash register drawers. And it's a way of skimming. It's high-tech tax evasion. It's high-tech retail skimming. And so, I was looking to see what each of the 50 states says, if anything, about electronic sales suppression systems, and their legality.

So in doing that, I ended up on websites from each of the 50 states. And every state that I went to had a copyright notice on it. So it appears as if-- and these are all state agency sites-- that most states are doing that. And I've never seen one that did not. And, if they did not-- remember how this works-- it doesn't mean it's not copyright protected, unless there's some indication that they are placing it in a public domain. Because the copyright is created by operation of law. But Federalism would give the states the option of asserting their copyrights or not.

Works that are placed in the public domain by the owner-- I just alluded to that a couple of seconds ago-- it's not common, but it's possible. It requires some kind of explicit relinquishment of copyright. You cannot transfer a copyright without a written agreement. You can't do it orally. Most things you can do orally. You can have proof problems later, but oral contracts are valid. They just can be very, very difficult to prove. But this is one of those times when you got to have something in writing. So that's what I mean when I say explicit relinquishment.

Creative Commons licenses, that I mentioned earlier, they actually have an icon for giving up your copyright and placing it in the public domain. I've never seen it used anywhere. I've never seen it on anything. But they do have it as an option. Don't confuse public domain with permission to use at no charge. We talked about earlier. Free doesn't mean public domain. And don't confuse it with open access. Right? Public domain and open access are different. Public domain and free are different. Public domain is about ownership. Free, and open access, are about method of distribution.

The final thing, and I only mentioned this in passing earlier today, is that, copyrights don't last forever. Remember when I said, at the beginning of this segment, that it's a limited monopoly for copyrights and patents. So copyrights expire. They don't last forever.

How do sort things out? Well, generally speaking-- and you'll see that my parenthetical says works created in the United States-- anything created prior to 1923 is in the public domain. The copyright has expired. Works that were pre-1978 that were published without a copyright notice, are in the public domain. 1923 to 1963, with a copyright notice, but the copyright was not renewed, are in the public domain.

And if you're finding the logic of the time frames, and stuff, confusing, all you need to understand is that the law changed in different ways, at different times, and it created this. This was the outcome of it, when you go back and look at it. Most other works today-- I'm sorry.

STUDENT: But, as you said, copyright will not expire, when we do it.

LINDA K. ENGHAGEN: No. I did not say that. Let me get to that. Most other works remain copyright protected.

Now, if you create a copyright-protected work today, and you personally, as a human being, are the copyright owner, the duration of that copyright is your natural life, plus 70 years. So when you die, that copyright becomes an asset of your estate, and it goes to your heirs. And if it has any commercial value, then your heirs are the ones who have the opportunity to financially benefit from that commercial value. They can do that for 70 years after the date of your death. One day after the 70th anniversary of the date of your death, it goes into the public domain and anybody can use it.

Now, if that same work is created, only it's not under his name as a natural person-- it's under a corporate name, or an organizational name, or it's done anonymously, or it's done under a pseudonym--s then the duration of the copyright is 95 years from date of publication. I don't know why they made that different. It's the rule. So it's just one of those things you've got to know. So then it becomes, the duration of the copyright is 95 years from the date of publication. And after that period of time has expired-- that's the period of time for the limited monopoly, 95 years, or life plus 70-- it goes into the public domain.

Now, let me add one more thing about natural persons, and the life plus 70. If you have joint

owners, they typically don't die on the same day-- that would be convenient for the purposes of copyright law, but we're not going to be morbid and talk about that. So what happens with joint ownership is, the life of the last to die plus 70. So, if it's two people, after the second person dies. If it's five people, the last of the five to die plus 70, is how that works.

Don't confuse orphan works with public domain works. Let me say a few words-- yeah, I didn't put that there-- about orphan works. An orphan work is a work that you have every reason to believe is still protected by copyright law, but you can't find the copyright owner. And that happens for a couple of different reasons. It could be that the copyright was owned by a publishing company. And we know how publishing companies have consolidated, and they bought each other, and bought each other out, and there was fewer and fewer of them. And it can be hard to identify which of the larger publishing houses bought Rinky-Dink publisher 35 years ago. So it can be hard to identify for those reasons.

The other thing that can happen is, if a copyright-protected work was owned by natural person-- and you know they have passed away but you're in that 70 year window-- you now have to identify who their heirs are, to get permission from the heirs. And that is not easy to track down, automatically. So we call those things orphan works. You are not able to identify an owner, but you have every reason to believe that it's still copyright protected.

The Copyright Office in DC-- and I don't want to go into this in a lot of detail, you can find one of these applications-- they have some guidance on how to deal with orphan works, and the steps you should take in your attempts to identify the copyright owner, at the moment. And then, what you do if you fail in those attempts. But I don't want to go into the detail of all that now. Yeah?

STUDENT: In the case of somebody with a copyright died, is transfer of copyright synonymous to inheritance of copyright?

LINDA K. Yes. Yes. It is for that purpose.

ENGHAGEN:

STUDENT: Oh, I actually had the same question.

LINDA K. Same question. OK. Great minds thinking alike on a Friday.

ENGHAGEN:

OK. So how does that all play out? Well, if the materials are not covered by copyright law you

may use them in the development and delivery of any course you choose, regardless of the delivery method-- so face-to-face, secure online, or an open access, non-traditional kind of online course.

I want to pause for a moment-- see if you have questions before we move on to rule number 3. Yeah?

STUDENT: I had a question about blank forms.

LINDA K. Sure.

ENGHAGEN:

STUDENT: Does that extend to data collection instruments that you create as part of a research study?

LINDA K. It depends upon what the outcome is at the end of filling out all the information. Let me see if I can give you this example. If you were doing medical research, and by answering all of the questions on your form, you were able to render a diagnosis, that's not a blank form. Because it yields an outcome.

But I was a tax lawyer in an earlier life. And I, like, actually like those green-columned accounting forms. I actually went and bought a big supply just last week at Staples. They make them in new shades of colors, which makes me very happy. Those are not protected by copyright law. They're blank forms. I'd squiggle a bunch of numbers in them, and I'd total them up, and I'd put them in the right box on my tax return. But the numbers by themselves are meaningless, whereas something that could be used for diagnostic purposes, or something like that, is different. But that's a question. What kind of form gives you something useful? And it can be that useful.

Rule number three-- if you acquired or accessed the materials unlawfully, you can't use them. You've heard me say this before-- so illegal downloads, hacking, any kind of unauthorized access. The thing I do want to highlight here is, situations where you have authorized access, but then you try to use them in a manner that exceeds the authorization.

And the example that I use here-- and it's because I've been asked this question more than once. And, interestingly to me, at least, the first time I got asked the question, it was from a graduate student who identified himself as having been sent by his dissertation advisor to find out the answer. So the faculty member didn't want to come to the presentation. But the faculty

member sent his PhD student with a specific question.

And this was from an engineering faculty member who worked in nuclear engineering, a highly specialized field, is what the student described. So faculty member has a personal subscription to a specialized journal that, at least at that point in time, was not part of the library collection. And he wanted-- he the faculty member-- wanted to know if he could give every student in his class his personal-- you know what I'm going to say-- username and password, because he wanted his students to be able to access the entire journal, and all of the issues.

No. It's an authorized access to the extent that the faculty member had a personal subscription, that I believe he paid for-- I didn't the question that part of it-- but he was using it in a manner that exceeded the authorization.

Now, having said that, if it had been that the faculty member said, there's one particular article, out of this one particular issue, that I want people to have-- copy it, grab the PDF, post that. No problem. But you can't give all of your students access to your single-license personal subscription, by giving them your username and password. No.

STUDENT: Is there a way to have a password so that the student will access only for one article?

LINDA K. ENGHAGEN: I have no idea. That's a technological question, not a legal question. If there was a way to do that, then I think that's probably fine. But I doubt that anybody sets up their software that way. Actually, I would advise them against it-- setting up the software that way-- if they asked me. Because that's just like the loophole that you drive a fleet of Mack trucks through. Right? Because you do that for every article.

STUDENT: No. I mean, if the article allowed the teacher to have a temporary password, or the faculty, to get the student one--

LINDA K. ENGHAGEN: Yeah. I get it. But I wouldn't do that. Just me. You know, I don't think control is a dirty word. Right? I'm that person. So, you know.

OK. What does this do for classes? If you acquired or accessed the materials unlawfully, you may not use them in the development or delivery of any course, regardless of the delivery method. Period. Just the way it goes.

And rule number four-- it's pretty similar-- if you've acquired, or were given access to, the materials by someone else, and you know, or have reason to know, that person obtained or

accessed them illegally, you can't use them. As I like to say, out of sight, out of mind, is not a defense. We have to be the adults in the room. And if it looks bad, smells bad, then we have to treat it accordingly. It's actually analogous.

And it's analogous-- it's not the same as. And I mean that in a literal legal sense. It's not the same as. But it's analogous to being in possession of stolen property. You know, you buy the TV that fell off the back of the truck, kind of thing. One of my law professors used to always do that, you want to buy a watch? They used to walk around our property while a class going, hey, [INAUDIBLE] you want to buy a watch? You want to buy a watch from that guy?

STUDENT: Quick question about this, here. Let's assume that I stole something. And I make that [INAUDIBLE] university. The university did not discover that. OK. They allow me to make a patent. Somebody else came, and bought the patent from the university. Start to use it. The company who I stole from them, they found out that. They can sue that person, or the university, or me?

LINDA K. All of you.

ENGHAGEN:

STUDENT: What is the fault for that person, who holds from trusted place, like university, a patent?

LINDA K. Innocent mistakes are mistakes. If you are in position of stolen property, you are in possession of stolen property. Now, the fact that you have this one genuinely innocent-- i.e. unknowing-- party in this, who got bamboozled by someone, that person, in a court of law, is highly likely going to be treated differently than the others who knew, or should've known, that something smelled funny.

STUDENT: Another one. In this case, here, before I use anything from anybody, I have to go and get all his life and make sure that person is good?

LINDA K. No. I mean, if want to go do that, you knock yourself out. But you're going to spend an awful lot of time doing that.

All this is really asking people to do is to make informed, confident professional judgments. None of us has perfect judgment. None of us has a crystal ball where we flawlessly see everything. I've been lied to, and didn't know it until much later. And I'd like to think I have a little bit of a lie detector going on. But none of us, we don't get it right all the time. So you act in good faith. You act like a competent adult. And when things go wrong, you go, oh my god, I'm

sorry, I really didn't know that, and what can we do to deal?

And the vast majority of the time, my experience is that the other side responds to that appropriately. It doesn't mean they're happy. But it means that they'll work with you. And that there's a way to work it out. And that's the way I try to approach those kinds of things.

STUDENT: Thank you.

LINDA K. Yes.

ENGHAGEN:

STUDENT: So what is the responsibility of the school-- not the institutional level, but the school-- to ensure that, in the courses that are being taught at the school that everything is obtained--

LINDA K. That's a good question. Institutionally, there's no affirmative obligation to inspect and vet. OK.
ENGHAGEN: So whether you're talking about Texas Tech as an institution, whether you're talking about the individual schools and colleges, and departments, within Texas Tech, there is no affirmative obligation to have somebody who goes through every class, or every course, before it launches the first time, and does an inspection, or an audit-- whatever you want to call it-- to determine whether or not it's copyright compliant, whether or not it's ADA compliant-- the question this gentleman asked earlier.

Having said that, the legal responsibility for the failure to do something correctly-- if a failure occurs-- rests at the institutional level. And all of the example I gave would be research center guy from San Diego at the end of the first presentation. If you were the person who allegedly committed the illegal act, it can come to you. But the legal liability rests with Texas Tech as an institution.

Actually, probably, we have a Board of Trustees in Massachusetts. I don't know what you call-- trustees, regents, whatever the Oversight Board is for the public system of higher education, here in Texas. They're the ones who are going to get sued, not the individual schools and colleges, or departments, within the organization. And that gets frustrating. Because you would think that there would be some clear-- like, OK, do this, and if you check off this, and it looks good, and that's a good faith judgement, you're good to go. Yeah, no.

Somebody raise a hand? Yeah.

STUDENT: Recently, in Texas Tech, there was a new rule that chairs of departments have to verify every

publication that people that are in that department, to make sure that they're really their work-- and not somebody else's? And it hasn't--

LINDA K. ENGHAGEN: But for what purpose? Is this is for putting in a course? Is this for personnel evaluation actions?

STUDENT: The reason it happened is that, apparently, somebody, in one department, passed out a lot of publications by someone else with the same name--

LINDA K. ENGHAGEN: Oh, interesting.

STUDENT: --as his own.

LINDA K. ENGHAGEN: That's never happened to me, and there aren't a lot of Linda Enghagens around.

STUDENT: [INAUDIBLE] and everybody on the whole campus has to-- every chair--

LINDA K. ENGHAGEN: Here's the thing-- institutions often respond to things like that with these big global rules that everybody else just groans over. Right? Now, having said that, that's an institutional policy decision, not a legal decision. They're doing it to protect themselves from liability. But the law doesn't require them to do that.

STUDENT: And it probably doesn't protect the university either.

LINDA K. ENGHAGEN: Well, it would protect the university to the extent that you had a department head, or chair, who acted nefariously. But clearly they're trying to put the pressure on everybody to-- I mean, that's an embarrassment, to have something like that happen.

STUDENT: Yeah. In the big departments where there are lots and lots of publications per member, it would be a huge, horrible job-- chair to do that. And they might have to hire somebody else to do it, if they can.

LINDA K. ENGHAGEN: OK. How do you deal with number four? If you acquired or were given access to the materials by someone else, and you know, or have reason to know, that person obtained or accessed them illegally, you may not use them in the development or delivery of any course, regardless of delivery method.

STUDENT: What if you know they got them legally?

LINDA K. ENGHAGEN: If you know that they got them legally, and then you are using them in a manner that's consistent with that, then you're OK. We're going to go on to rule number five, so that we keep moving along in the interest of time, here.

If you own a copy of the materials, but not the copyright-- we're back to this-- or you lawfully access the materials to which someone else owns the copyright, you may use them if the use is a fair use, under an implied license, under an express license, or if you obtain permission and pay royalties.

So let's start with this about fair use. As a general rule, if you are allowed to do something under the rules of fair use, no permission or payment is required. You cannot be compelled by the copyright owner to pay royalties. You cannot be compelled by the copyright owner to get permission, if, in fact, fair use applies. Fair use means, exactly, that you don't have to do those things.

So, again, as we talked about this morning, we're going to come at this in a little bit of a different way-- criticism, comment, news reporting, teaching, scholarship and research-- the myth, and misconception, we talked about earlier, if the use is educational that means it's clear. The reality is that has to satisfy both being one and falling under one of the fair use purposes, and qualify under the four fair use factors.

Here, I've organized the four fair use factors in a little bit of a briefer way. So they're the purpose or character of use. This tends to focus on commercial versus non-commercial, the nature of a work-- is it fiction or nonfiction, is it published or is it unpublished. We've talked about the portion used, and it being quantitatively large or small, qualitatively significant or insignificant. And then, the impact, if any, on the market value for the work, including the market value for permissions.

Now, here, we're seeing the same four factors, and what favors and opposes, in each category-- so nonprofit and educational, teaching, transformative, restricted access. On the oppositional side, it's for profit, there's a broad distribution, you don't include the author, you're trying to avoid paying fees, and you're doing it for entertainment, not educational purposes. So again, here, we're focusing on the character of the use. For the work that's used, the same familiar list-- is it published, nonfiction, facts, not sold in an educational market, not published, fiction, highly creative, sold in an educational market, or sold for one time use.

Three-- we spent some time on this, earlier this morning-- the quantity is small versus large, insignificant versus significant, or central to the heart of the work. The portion used is tailored to a permitted purpose, or it exceeds that reasonably necessary for a permitted purpose. You start to get a flavor for this after a while. And then finally, the effect on the market-- is the copy used lawfully obtained or not, insignificant market impact versus some measure of a negative market impact.

I want to talk, here, a little bit about permissions, because on the favoring fair use, I said, there's no permissions mechanism. And on the opposing, I said there is a reasonable permissions mechanism. If you want to use materials-- and I'm going to use an easy example, like a chapter out of a book-- how do you go about getting permission, if you conclude that you need permission. You're in that situation. You need to get permission.

Well, the first thing I do is, I go to the publisher's website. And I look to see, do they have a permissions link? Some of them do, and some of them don't. And they have permissions link, you click on it. And they ask you a bunch of questions. You know, what is it that you want to use? They want the name of the [INAUDIBLE], obviously the identifying information of the book that you want to take it from. They want to know how many pages. They want to know how many students or copies. They want to know what period of time they're going to use it over.

And, I don't remember what all the other things are, but that's the basic information that they ask. And then you can submit. And then they respond to you, and they say, yes, we'll give you permission, or no, we won't give you permission. And if they say, yes, we'll give you permission, they will say, and this is how much money it's going to cost for that. So they'll give you a fee.

Now, I have sometimes gotten permission from major publishing houses that were free. So don't always assume that it will cost money. But it will usually. And the amount is really highly variable. The times when I went through that process, was actually when I was writing the product liability law book for engineers. And I needed permissions because there were a couple of things that I wanted to use from other books. And so I had to get permission for those things.

And as part of my deal with the publishing company that published the product liability law book, I had a permissions budget. So, any of you who were in that world, again, that's the kind

that's highly variable-- will a publishing company give you a permissions budget or not, as part of it. Now, that was a number of years ago, but it wasn't a lot. I think it was like \$500. But it turned out to be enough for what I wanted. And I actually didn't even use the whole \$500. I think I used \$350 of it, if I remember correctly.

So don't automatically assume that because you're in a situation where you have to get permission to use it, and you anticipate that it's going to cost money, that it is automatically going to be expensive. It might. But it might not be. So just don't assume that.

STUDENT: I have a question.

LINDA K. Where was that? Yes.

ENGHAGEN:

STUDENT: I think I'm getting it, but I can be a little slow.

LINDA K. That's all right.

ENGHAGEN:

STUDENT: I'm not--

LINDA K. This is a lot of detailed information.

ENGHAGEN:

STUDENT: Right. But it's timely.

LINDA K. Good.

ENGHAGEN:

STUDENT: So I recently, last week, contacted-- I teach in a responsible conduct of research course, as I told you. And there was a link on a website of a new film that a researcher had created for that purpose-- for teaching his graduate students. And so I contacted her, and I said I'd love to receive a copy of your film. I was willing to pay for it. But she responded, I'd be happy to send it to you free, if you could, please, after viewing it, have it delivered to your library to make it accessible for others.

So now, do I have to go back and ask her permission to use it in my course?

LINDA K. It depends upon what policies you have for streaming from your library, because your library

ENGHAGEN: now lawfully acquired a copy of it, per that transaction you had with the creator of the film.

STUDENT: So I have to ask the people in the library?

LINDA K. You have to ask the people in the library. It depends upon what your--

ENGHAGEN:

STUDENT: Even though she gave it to me?

LINDA K. No. She didn't give it to you. She gave it to the institution. She lent it to you to give to the
ENGHAGEN: institution. She did not give it to you. She did not transfer title to you. She gave it to you on the condition that you turn it over to her donor, and her donative intent was the library at Texas Tech, not you.

STUDENT: So had I asked, can I have a copy of your film to use in my course? Would I have had to go back and ask for her permission?

LINDA K. No. Because, again, you are back in the world of you now own the copy. Now, let me qualify
ENGHAGEN: what I just said to you. Let's pretend it's my film. It'll be easier to talk about it that way. I'm the one who created the film, you contacted me and said, Linda, I'd love to use that in my course. And I say, great here's a copy of it. Use in your class. You now have my permission. Now, whether or not you said to me, and on campus class versus an online class, presumably, in 2016, I know enough to differentiate between the two, if I care. But based upon my saying, here it is, and you use in your class-- I'm thrilled that you want to use it in your class-- I would deem that to be permission.

Now, here's where the rub is. If this is your classroom for your on-campus class that you want to use that film in. You come in here, there's all kinds of equipment, you throw the DVD in a computer-- and whatever the setup is-- and you show it to everybody in the room, and you're good to go. If you want to use that same thing-- that same DVD-- in an online class, I'm willing to bet you got to take it somewhere, and they have to digitize it and stream it. You don't just put it in a machine and broadcast it to your students. That's not the way the technology works.

Some universities require that the institution own the copy before it will stream it. Other institutions have a policy that says, as long as you lawfully acquired it, we will stream it, even if it's a personal copy. Some institutions say, nope, if the institution doesn't own it, we won't do it. And I've got to tell you, I think that the second one is right, and the first one is wrong, but that's not a settled area of law. If somebody asked my advice, I would say to them, do not digitize

and stream personal copies of faculty members' DVDs.

Now, what I do, personally, if I have a DVD that I want streamed in my class and it's not in the library's collection, and it's not too expensive, I buy a copy and I donate it to the library and then I have them stream it. They like me. I give them stuff.

STUDENT: Can I ask something?

LINDA K. Sure.

ENGHAGEN:

STUDENT: There is a website where you can either buy books, or you can download the free PDF copies. And then it always asks, for the free PDF copy-- what do you want to use this for? This is because I'll never use the whole book. I use just a chapter, or something. If I put in there, using this chapter for course content and copying to students, and I don't hear from them. Does that mean I'm automatically given permission to copy it?

LINDA K. It sounds like you had the permission already, by virtue of the fact that they offer a free copy.

ENGHAGEN: But I'm a little hesitant to say that with greater certainty than that. But the more information you give them. If they make it available to you free, and you know it's copyright-protected, and they don't put restrictions on it, and you are taking a chapter-- not the whole thing-- that sounds like fair use to me. And the fact that you are disclosing to them what you're doing, and they're not objecting, makes your case even stronger. Because you're not pretending or hiding. You're just clarifying. Yes?

STUDENT: Quick question. So if I had a guest lecturer in my class, and I videotape that lecture--

LINDA K. After you got permission to do so.

ENGHAGEN:

STUDENT: --can I show [INAUDIBLE] through the process--

LINDA K. After you got permission to do so.

ENGHAGEN:

STUDENT: So without personal permission I cannot.

LINDA K. Thank you.

ENGHAGEN:

All right. The last thing I want to say about permissions-- Copyright Clearance Center, if you've never heard of them. I said, when I want permissions, the first thing I do is I go to the publisher's website, and I see if they have a link for it. Some of them do, some of them don't. There's also an organization called the Copyright Clearance Center. Some people think they're devil incarnate. Other people think they're the best thing since sliced bread. I think none of the above. I think they have an interesting business model.

So they are an organization where copyright owners can register their works with them. And then, if their works are registered through Copyright Clearance Center, you don't go to the individual publishers. You just go to Copyright Clearance Center, you see if the work that you want to use is registered there, and you tell them what they want to do. And then they tell you what it cost, and they handle everything. So it's kind of like a clearinghouse for permissions.

The reason some people think they're the devil incarnate is because the Copyright Clearance Center would like you to believe that you have to ask for permission for everything. And one of the things-- this did annoy me but it didn't make me think they were the devil-- a couple years ago, they started offering to colleges and universities around the country, for free, that they would send somebody to your institution to talk to your faculty about copyright and fair use.

Now, there's nothing illegal about that. There's nothing improper about them wanting to give you their version of it. But I promise you that what they said to people is not what I'm saying to you today, because I saw their slide pack. And I'm like, yeah, no, that's an interpretation. I really, genuinely, try to stick to my best understanding of the law, not a well, it should be this, or it should be that. I really try to stick with, as much as I'm able-- unless I get on a soapbox, and then I either let you know with the tone of my voice, or I tell you I just stepped on or off one.

But they don't. They're advocates. And so their presentation of it was slanted toward their point of view. Again, nothing wrong with it. But, if there's one thing I learned a long time ago, talking to lay people about any legal topic, is that unless you've gone to law school, you don't understand-- because you can't, because you're not trained to-- the extent to which we advocate for positions and interpretations. And that's what we do.

So you really do have to take everything we say with a grain of salt. And I mean that. We're not supposed to lie, but we get to interpret and advocate. And so you listen for that. And one

of the things I always tell my students in my classes is, if you really want to learn to think like a lawyer? Pay attention to what we don't say. Think about that. Try that one on someday, when you're listening to a lawyer talk. Pay attention to what they don't say, and what they won't comment on.

Because we are advocates, but we have rules about our inability to lie as officers of the court. And you can't lie, you shut up. So if there's a question you're asked, and you don't want to answer it, you redirect the conversation. And you try to do it as smoothly and flawlessly as possible. Here's a question I'd rather answer. Didn't you really mean--

STUDENT: In terms of [INAUDIBLE], what's the most common offense in that-- the thing that we should do?

LINDA K. ENGHAGEN: Yeah. Under factor four, the thing you should not do. The biggest thing that I see, is the reproduction of materials that are sold in educational markets. And we're all tempted to do that, because we know how burdened students are these days, with the cost of textbooks and course materials. The temptation is glaring.

And it's easy. Computer technology-- you can do it in the privacy of your own home at midnight and nobody's watching. At least not in the moment. They might see it later.

But, yeah. I think, today, the biggest pressure is keeping down the cost of a college education. And for us, as faculty, one of the ways we can do that, is by keeping the cost of the textbooks, and other materials, down. So it's very tempting to just make a copy, and nobody will know. Right?

OK. We have 34 minutes. Talking about fair use, in a face-to-face classroom, you can use materials to which you lawfully have a copy but don't own the copyright, within the limits and purposes of fair use. In a traditional online classroom, that is secured with enrolled students, you can use, within the limited purposes of fair use and factors. In an open access model, a nontraditional online class, such as a MOOC, it's unlikely that you're going to get fair use to apply because of the unsecured environment, and the massive enrollments equals broad distribution. So you're going to have a problem there.

An implied license-- I want to get to talking about implied and express licenses a little bit. Because I said that if you lawfully acquired or accessed materials, you can use them in a manner that's consistent with an applied license. As a practical matter, what this means is, the

permission is implied from the intended purpose of the materials. So posting materials to an unsecured website. They were put there by whomever put them there-- assuming they were put there lawfully-- for people to access. And they're put in an unsecured environment.

So the implication is anybody can access them. I can access them. You can access them. All of the students, in all of our classes, from all of our campuses, can access them, because they were put out there in that way. So you can link, or direct, students to the sight. We've already talked about that. Depending on what is there, you may grab a PDF or a screenshot of something and use it.

But the thing to watch out for here-- and this actually relates to the question you just asked-- if textbooks supplements are designed for student purchase, you have to have them buy them. That's central to "sold in the educational market." So this is the applied common sense part of it. And here, as long as it's done in a manner consistent with the terms of the implied license, materials acquired or accessed can be used in the development and delivery of face-to-face, online, and open access classes. Because there just isn't a difference. They're available to anybody for free. So it doesn't matter what format of classes.

Now, here, express licenses are a little different. Here, the permission is explicit. It's not simply, I created a website and posted some content that I hold a copyright to on my free website, and anybody can go find it. Here, the explicit permission might be a licensing agreement. You know, think when you go online, for example, and buy a piece of software, and you have to click, "I agree." Or every time you update an Adobe product, you have to agree to the new terms and conditions, or whatever it is they're asking. That's explicit permission, and then you have to use it in a manner that consistent with that.

I've already mentioned Creative Commons licenses. When you get permission from a place like the Copyright Clearance Center, that's explicit permission. Whether you use the Copyright Clearance Center, or a publisher's permissions link, you're getting explicit permission. It's an express license-- it's specific. So, other than the Copyright Clearance Center, you obtain permission and pay royalties directly from a publisher, or a copyright owner, is the other way that that works. So as long as it's done in a manner consistent with the terms, you can do whatever, in any of the classes.

Because, basically, a license-- all it is is a contract. I don't know, historically, why we talk about licenses when we talk about technology and software. I don't know where that came from. And

there's nothing wrong with it. But what I've learned is that, because we don't refer to them as contracts, sometimes people think they're something different. They're just contracts. We just tend to call them licenses in this context. The same is true with royalties on patentable products.

This brings us to rule number six. Almost there. If the requirements of the TEACH Act are met, you have expanded rights to use copyright-protected works in distance education courses. Now, I asked before if anybody had heard of it, and whether anybody here knew if Texas Tech is TEACH Act compliant. I did not ask, is Texas Tech TEACH Act compliant. Let me rephrase that question. Does Texas Tech believe it's TEACH Act compliant?

STUDENT: Everyone looks at me. And I'm looking for John from IT.

STUDENT: He just left.

STUDENT: And I'm looking on the website.

STUDENT: I think we are.

LINDA K. That's a very good answer-- I think we are.

ENGHAGEN:

STUDENT: [INAUDIBLE] they're saying that y'all were aware there's one area that we may or may not be. I know we have copyright statement on logins, and things like that.

LINDA K. That's what UMass didn't have.

ENGHAGEN:

STUDENT: I know we have--

LINDA K. They have no copyright statements on any login, anywhere. And it's like TEACH Act 101. It's like-- Yeah. So you're ahead of us-- maybe. OK. So if the requirements of the TEACH Act are met, you have expanded rights to use copyright-protected works in distance education courses.

OK. And so, the TEACH Act is the Technology Education and Copyright Harmonization Act of 2002, which, of course, by modern standards, makes it ancient. But it's the only show in town. Its purpose, at the time, was to harmonize certain differences between the rules of copyright law, as they applied to face-to-face classes, and distance education instructional practices. We

were trying to create the rules so that it was a closer replication between the two.

It applies only to distance education. The TEACH Act has nothing to do with what you're doing in your on-campus classes-- it's irrelevant. Only in your online classes. And the only institutions that can benefit from it are those that are both accredited and nonprofit. So the University of Phoenix, excuse me, and other fully-online institutions-- Kaplans, and all of those-- cannot use the TEACH Act, because while many of them are credited, they are for-profit institutions. So it applies only to institutions that are both credited, and nonprofit.

So here are the affirmative obligations. In order for an institution to be TEACH Act compliant, it has to have institutional policies regarding copyright compliance. Now, the statute doesn't say what those policies need to include. It just says you have to have institutional policies about copyright compliance, and permissible uses, and all of those good things.

It also says that you have to provide copyright compliance information to faculty, students, and relevant staff. Doesn't tell you how you provide that information. It doesn't tell you what you need to tell them about. But, actually, bringing me here today, this counts.

STUDENT: OK. We're TEACH Act compliant.

LINDA K. ENGHAGEN: Quiet now. So you've provided people with information. This is the thing that UMass didn't do-- provide a notice to students that materials used in the course may be subject to copyright protection. You have to have it on every class. It's just a little boilerplate statement. The statute doesn't say exactly what [INAUDIBLE] to use, it just says you have to tell them that. You can transmit to enrolled students only.

Now, I sometimes get asked, well, what about students who are auditing, but they're not in it for credit. Congress did not contemplate that. Most people who do the kind of work I'm doing here with you, today, believe that students who are auditing is fine. Because, remember, the goal here is to replicate what happens on campus. And while I haven't had tons of students audit my classes over the years, from time to time you get somebody in there who wants to audit it for one reason or another. So why would we not follow that same practice and standard in an online class, if the situation was appropriate? But, again, the rule is silent on it. In practice I haven't heard anybody advocate that you should not allow students to audit, as long as we do it in a manner that's consistent with what we do on ground.

You limit the retention of copyrighted works. This relates to how long do people have access to

things. And typically-- I know you asked the question earlier today. The typical standard is, whatever your term is, the quarter or the semester-- whatever you follow. And then, to the extent that you might have students who have permission to get an incomplete-- and therefore they need access for the period of time to complete the work-- you could give them access for that period of time. That, too, it's not in the statute. But to be consistent with the legislative intent, which is to replicate the on-campus experience, that's what we do on campus. So that tends to be what people recommend we do in an online world.

You can't interfere with security measures that control the storage and distribution of protected works. That's the one that causes everybody the most consternation. And, as far as I can tell, kind of like everybody ignores, and nobody's had a problem with it yet. We'll wait and see.

After the affirmative obligations are met, you can transmit entire performances. You don't have to worry about this reasonable portion stuff. Entire performances of literary and musical works. That means everything but operas, musicals, and music videos. You can transmit any other performance, as long as the portions are limited and reasonable. So that means, operas, musicals, and music videos, you can do in reasonable portions.

You can transmit the display of any work, as long as it's comparable to that typically used in face-to-face instructions. So think, works of art, images, those kinds of things. The TEACH Act specifically prohibits the copying of material sold for distance education classes.

Now, before I go on and talk about that, I want to make one thing very clear about the TEACH Act. The TEACH Act is a little bit of an oddity in the law, in this respect. Compliance with the TEACH Act is optional. If somebody had told me here, today, that you guys are not TEACH Act compliant, you're not breaking the law, because you're not required to comply with the TEACH Acts. If institutions are TEACH Act compliant, they get to do all these things.

If you are not TEACH Act compliant, you can't do all these things. You're under the rest of the law. You don't have the benefit of these additional streaming capabilities. So that's the value of it. But no one is breaking the law by not being TEACH Act compliant.

However, if you're doing these things because you think you're TEACH Act compliant, and it turns out you're not TEACH Act compliant, you could have a problem. That's a different problem. You with me there? All right.

How does this work? Well, the teach Act explicitly doesn't apply to face-to-face classes-- so

your on-ground classes. It doesn't work here. It explicitly applies to online classes as long as the affirmative obligations are met. The one thing that you do need to note here is that, the idea is to replicate the face-to-face classroom experience. So even in an online class, you can't use the TEACH Act to stream materials for students to use, that they would use in the equivalent of an outside-of-classroom assignment.

Now, you start getting into some mental gymnastics here. Because the translation from face-to-face to an online environment is not a straight trajectory. So I'm just trying to explain what the rules say. So the rules say that if, on-campus, you would have students doing that on their own, outside of class, then you can't use the TEACH Act to stream it online.

Now, my solution to that, is to revise my face-to-face, on-campus assignments to incorporate it. And then I can use it in my online equivalent of the same class. But you've got to play a little bit, in order to make that credible. Yes.

STUDENT: How would you apply this to hybrid classes?

LINDA K. ENGHAGEN: That's a good question. The rules do not speak to hybrid classes, because in 2002, online was so new, it wasn't ubiquitous, that nobody had the language of hybrid or blended classes yet. Most people believe-- and I agree with them-- that, if you have a hybrid, or blended, class, that the TEACH Act can work with the online part of that blended class, but not for the on-ground part of it.

As somebody who teaches hybrid and blended classes, I will tell you that that is how I think of it when I design my classes. And I always try to be clear with people about what I feel comfortable doing myself. And I feel totally comfortable doing that. And, if I'm wrong, and somebody brings it to my attention, I will respectfully cease and desist. Probably. Maybe disrespectfully cease and desist, maybe screaming and yell in the process, maybe try to rattle the cage. I don't know. It depends on what it is.

I think we had somebody here first, and then I'll come back to you. Yeah.

STUDENT: So would the TEACH Act apply if there is not a face-to-face?

LINDA K. ENGHAGEN: You know, that's a great question. If you don't teach the same class face-to-face, what do you do? I do it, hypothetically, because I have a classic that I teach wholly online that I've never taught on ground. And I'm not being facetious here when I tell you that I have an imaginary version of the class on-ground in my mind. I think of it, how would I do it on ground and how

do I then translate that. Because I do genuinely try to make good faith effort to comply to the best of my ability.

Which doesn't mean I'm never willing to take a chance of push an envelope. I believe in fair use, and I believe in flexing fair use. And I believe in pushing back at the Copyright Clearance Center when they say that we should have to get permissions for everything. And I don't think that they're a horrible organization. I just think that they're wrong. Right?

STUDENT: Sure.

LINDA K. Sure. So where was the other hand over here?

ENGHAGEN:

STUDENT: Example of the hybrid-- so something that you wouldn't use in your face-to-face class, but that, because you have it online at the moment, it allows you to use something-- to stream something. That's what I'm trying to say.

LINDA K. Right. I'm not sure where you're going with that.

ENGHAGEN:

STUDENT: Do you have an example how--

STUDENT: Like having students use their own time to watch a movie face-to-face, but then streaming it for the students.

LINDA K. So what I do is, I end up showing on campus.

ENGHAGEN:

STUDENT: Right. That would be allowable.

LINDA K. That's allowable. I show it on campus, and then I stream it to my off-campus students.

ENGHAGEN:

STUDENT: But if you did the other thing, where you told your on-campus students, watch this over weekend.

LINDA K. Yeah. Then I don't stream it. I don't stream it to my hybrid or online students.

ENGHAGEN:

STUDENT: Would you send them the link, to watch it on their own--

[INTERPOSING VOICES]

**LINDA K.
ENGHAGEN:** If they can. Now, one of the other things that I do do, and that your comment reminds me of--

STUDENT: --if you' assigning them to do it at home, from face-to-face, then--

**LINDA K.
ENGHAGEN:** So here's the thing. Streaming, at our campus, is done through the library. If I have a DVD-- not I, because they won't let me, and they shouldn't. If they have a DVD in their collection that want streamed, I have to contact Gabe. There's a form. You have to get the form to Gabe. And you send the form to Gabe. And it's like, this is what I want to do, this is when I need it, this is the pedagogical purpose-- there's this whole thing you have to fill out. And then, he sends something back to you saying-- sometimes he has questions, but most of the time it's like, OK, you're good to go, or we've got this problem. And the problem is almost always a technological one, but I'll get it fixed, and it'll be ready, and yeah, yeah, yeah, yeah, yeah. OK. So there's that.

So that's how you stream when it's in the collection. But what I do do more of-- because we now have a larger, and larger set of databases that have video on demand in them-- so I find videos from those video on demand collections, that you link to in the library collection. And that's the identical legal equivalent of linking to a journal article. So when I want to stream video to off-campus students, I do that.

I also, on occasion, in my online MBA law class. What is that I use that they all watch on Netflix? *Enron-- The Smartest Guys in the Room*. Netflix carries it. Most of them already have Netflix accounts. So I tell them to watch it on Netflix. So sometimes there would be library databases.

We have films on demand. I got a couple others that are newer that I'm always familiar with. And I go look through them. Or I have, when I have a TA-- which I usually don't-- but when I do have one I sometimes have them go through databases of film. And I say, I need a good example of-- and then I tell them what I'm looking for. And sometimes I have titles but I don't have time to go in and see if that particular title's in the collection. And so I send them in [INAUDIBLE] to look for those kinds of things.

Because you could always do that. And then you don't have the "send the form to Gabe"

problem. Because you can send them to the link in the library. Yes.

STUDENT:

So this question is actually for our e-learning and TLPDC people. Do we have a way to do that? So if we had videos that the state agencies have put out, and so forth, some more natural resources that might not be in the library. Can we take them to the library so the library can stream them? Can we pass that responsibility then? Do we have a Gabe?

STUDENT Full confession that Justin and I were just texting each other and asking.

[INTERPOSING VOICES]

LINDA K.

You can't have Gabe. We like Gabe. Gabe knows I make these systems work. That's funny.

ENGHAGEN:

So you've got an assignment.

So where are we? Mini-case-- you want to walk through a mini-case? Yeah? Oh God, you guys are like, yeah, why not?s All right.

So consider the following, based upon what we've said so far. A faculty member posts three excerpts from the same non-fiction book to a secure LMS-- so three different excerpts, from the same book, to Blackboard. None of the three are significant, or central. None of them are the heart of the work. Because remember what I told you. If it's significant or central, or the heart of the work-- those three things are synonymous-- you've got to get permission. It doesn't matter how long they are.

One is 15 pages-- one excerpt-- one is 11, and the other one's two. The total book is 425 pages long. An average chapter is 20 pages long. There is no permission system available. Aren't you glad you came here today? There is a test. This is it.

Under factor one-- the purpose or character of the use. This is how you might think about these things. If your educational institution is nonprofit, as you are here-- so if you put this in the setting of Texas Tech, that's going to favor fair use. If the educational institution is for-profit, there is some case law that indicates that, on this kind of set of facts, this is still going to favor fair use. Because in the one court decision we have that talked about it-- and we have one-- the court said that the educational use was more important than the organizational for-profit status of the institution.

So the for-profit part of it doesn't become irrelevant, but it becomes diminished in significance when it's looked at in the context of-- well, yeah, this is a for-profit organization, but it's a for-

profit educational institution that awards for academic degrees. And so we're going to focus on educational part, is what the court said.

Here, it was excerpts were published nonfiction, right? They were excerpts from a nonfiction book. It was published. We said it was nonfiction. So all of that tends toward fair use. The portion used, it wasn't the heart of the work. It was only 28 out of 425 pages. That represents about 6.5% of the book. And I conclude, here, that that likely is going to favor fair use.

So these things don't have to be overly complicated when you look at them that way. Back before, there was no permission system available, that leans toward fair use. Was there substantial financial harm? Well, again, it was a small portion-- 6.5%-- that leads toward fair use. So my overall conclusion is that this is a strong case in favor of fair use.

So those are the kinds of things that you think of as you go through it. When you look at the lists on the factors, and the what favors, and the what opposes, it can be a little daunting when you see all of the bullet points. But when you start breaking it down relative to which ones apply in a given example, then it can become less onerous.

Lingering questions. We have about seven or eight minutes according to the clock.

STUDENT: In that case-- but we think we've thought about it, and we think it's pretty small-- pretty strong case for it?

LINDA K. Yes.

ENGHAGEN:

STUDENT: You should not apply for permissions, because you want to maintain the fair use?

LINDA K. That's a good question. I never ask for permissions first, unless I'm persuaded that I need to.

ENGHAGEN: If I think I have fair use on my side, I don't give it a whole lot more thought. I go ahead. And I've never had a problem. If it's a closer call, I do a gut check. And then I decide and I go accordingly.

But if you ask for permission, and they say no, and then you go ahead and use it any way, under fair use-- now, let me be clear here, there's nothing illegal or wrong about that. But you are now on their radar. Which means, that if they have strong feelings about it, you are likely going to get one of those nasty letters from lawyers saying cease and desist.

If fair use applies, you don't need permission. Period. And so, I don't believe in asking for permission unless I credibly conclude that I need to. And then I do. And I pay when they ask me to. Or I say, sorry, that's too expensive, I'm going to go on to plan b.

The other thing-- and your question just reminded me of this-- when I say go on to plan b, go back to something we talked about this morning. Copyright law does not protect ideas, it protects the expression of an idea in a fixed tangible medium. So you can take somebody else's idea, create your own expression of it, and give them proper attribution so that you don't have a plagiarism issue, and you are good to go.

Now, that takes more time and effort on your part than copying and pasting, or screenshotting, but you can do that. You create your expression of their idea. That is perfectly legitimate, as long as you give them proper attribution. It takes longer. And often, we want to take somebody else's work because they've done something really well. Most of the time, they've done something really well. And we don't think we can capture it that well, or accurately, or whatever the case might be. But you can always do that. And as long as you give it proper attribution, you are fine. Where was that hand? Yes.

STUDENT: So on that note-- of something being done really, really well, and it's copyrighted-- do I have permission to take your packet back to my faculty and make copies and give it to them?

LINDA K. Yes. Actually you do, because Texas Tech bought that for you.

ENGHAGEN:

STUDENT: OK.

LINDA K. But thank you for asking. And they're recording all of this. Yes? [INAUDIBLE] Yeah. They
ENGHAGEN: bought that, too. It's part of the deal. Yeah.

STUDENT: This is a little like design in the areas of the visual arts, and those areas. What's his name? Peter Jaszi and Pat Aufderheide-- they're at American University. And they've come out with several of the best practices of fair use.

LINDA K. Yes. Yes, I was going to mention those.

ENGHAGEN:

STUDENT: How do you feel about those? Because the ones-- being a visual art program, they're recent-- last year, they gave four presentations to our library society. And they were quite loose in their

interpretations. So I was just wondering what you thought about those things.

**LINDA K.
ENGHAGEN:**

OK. If you've never heard of them, there is a group of people from various communities of practice around the country, who are creating best practices in fair use for their disciplines. It's called the best practices movement. And if you just type in "best practices"-- do you remember the name-- I think it's in the packet of materials-- the name of the website that aggregates all of the best practices and fair use.

So this is when I think about the movement. I actually think the movement is spectacular. Because what they're trying to do is figure out the answer to question that judges often want to know the answer to in court cases, which is, so, how do you guys normally handle this kind of thing? That's what judges want to know. They go, what do you do in your fields? And that's not the end of the conversation, but it helps inform the judge's thinking about how fair use works.

And so the fair use practices movement-- which has been around now for probably a decade and still only getting kind of a lot of air time-- they're trying to come up with what I refer to, or describe, as the complex equivalent of industry standards for different fields. I think the one for academic research librarians is actually very, very good. I'm not familiar with the two that you just referenced.

But here's the thing. We've just spent a lot of time together, today. And while I expect that many of you-- I hope all of you-- walk out of here feeling like you know more than you know when you came in, I'm also certain, because I've done this enough times, to know that it also leaves many unanswered questions. And many of those unanswered questions tend to fall into this whole fair use thing around how do you weigh the factors.

And you can't, as a practical matter, go running to the General Counsel's Office every time you have a question. First of all, you'll be lucky if they talk to you. And then second of all, when they give you an answer, as you no know, they're going to answer on behalf of Texas Tech, not on behalf of you as a faculty member, or a department, or a program.

So where do you go for guidance? You're not going to take money out of your own pocket and go hire somebody to tell you is you can and cannot do. So the thing I love about the best practices movement, and the standards they've come up with, is that they give people something more concrete to work with.

So you read the best practices standards. You read them in the context as she just described

them, and as I'm describing them to you. They're not law. They're coming out of communities of practitioners-- non-lawyers, for the most part. But they can help you identify the kinds of things you need to think about, as you sort through the four factors that we talked about here. They give you additional information to help you make better informed judgments, which, at the end of the day, is the ultimate goal.

I am going to leave you with one more thought. You cannot decide what chance to take, or how risk-averse to be, if you do not understand the nature of the risk you confront.

That's enough for a Friday. Thank you.