

Dear Customer:

Library Video Company understands the challenges faced by educators as they navigate the complex rules of copyright while trying to take advantage of new innovative teaching techniques. Even though technology is rapidly changing the way students learn and educators teach, the basic principles governing copyright remain relatively unchanged. The following is a brief survey of the current state of copyright law related to the classroom.

The General Rule.

Copyright protection exists from the time the work is created in a fixed, tangible form of expression. U.S. copyright law grants the owner of a work the exclusive right to: (i) make copies; (ii) prepare derivative works; (iii) distribute copies of the work; (iv) publicly perform the work and/or transmit the work; and (v) display the work. As a general rule, unless a license is obtained, it is unlawful for anyone to violate any of the exclusive rights of a copyright owner. However, the law recognizes the value and need of educators to use copyrighted material in the classroom for educational purposes and, therefore, enumerates certain limited exemptions and exceptions to the exclusive rights of a copyright owner. If your use of an audiovisual work does not fall into one of the exemptions or exceptions described below, such use may infringe the copyright owner's exclusive rights and, therefore, require a license that grants permission for such use.

Educational Exemptions.

Section 110 of the United States Copyright Act of 1976 (17 U.S.C. §110) establishes a widely relied-upon exemption to the exclusive rights of a copyright owner for the use of copyright-protected audiovisual materials in educational settings. Section 110(1), commonly referred to as the "Classroom Exemption," pertains to traditional face-to-face classroom settings, while Section 110(2) covers distance learning situations. The educational exemptions under Section 110, as described below, only apply to audiovisual materials used to support curriculum and do not include, under any circumstances, uses for recreational, entertainment, or "rainy day" purposes. Also, only non-profit educational institutions are qualified to take advantage of the exemptions.

The Classroom Exemption (Face-to-Face Teaching)

The Classroom Exemption, under Section 110(1) of the Copyright Act, applies to traditional classroom settings, where the teacher and students are in the same location during a live class session. Educators and students are permitted to perform and display copyrighted audiovisual works in a classroom (or a similar place devoted to instruction – such as a library), as long as such use is in the course of face-to-face teaching activities at a non-profit educational institution.¹ The instructor must be present during the performance and no admission or other fees can be charged to students for viewing the program. If all of the conditions of the Classroom Exemption are met, it is permissible to show a legally obtained program in a classroom or school library without obtaining permission from the copyright owner, even if labels like "For Home Use Only" appear on the packaging. The Classroom Exemption

¹ According to the legislative history for the Copyright Act of 1976, instructors and pupils need to be in the same general place but don't necessarily need to be able to see one another or be in the same room to satisfy the "face-to-face" requirement under Section 110(1).

supersedes these written warnings of the copyright holder. Please note, however, that the Classroom Exemption does not authorize teachers or students to make or distribute copies of audiovisual works. The purpose of the exemption is only to facilitate the use of audiovisual materials for live, face-to-face class sessions and does not grant any rights to copy, edit, broadcast, transmit, or otherwise distribute copyright-protected works.

Distance Learning Exemption

Section 110(2) of the Copyright Act governs distance learning situations where the teacher and students are in different locations, requiring the transmission to extend beyond a single building. As communication technologies continue to improve and become more dynamic, many schools are developing distance learning programs to better serve the needs of their students. Until recently, the distance learning exemption was much more restrictive than the Classroom Exemption under Section 110(1) and, therefore, had limited value for teachers. However, passage of the Technology, Education, and Copyright Harmonization (TEACH) Act in 2002 updated Section 110(2) to better serve educators and students in the digital age, while continuing to protect the interests of copyright owners.

Section 110(2), as amended by the TEACH Act, extends the Classroom Exemption to accommodate the performance of copyrighted materials for distance education by accredited, non-profit educational institutions that meet the Act's qualifying requirements. The TEACH Act permits the use of distance learning technologies to show "**reasonable and limited portions**" of an audiovisual work, as long as:

- the transmission is directed by the instructor;
- the performance is directly related to the curriculum;
- the transmission is limited, to the extent technologically feasible, to the students officially enrolled in the class;
- the use is part of a live or asynchronous class session; and
- the transmission includes a notice to students that materials used in connection with the course may be subject to copyright protection.

Limited portions of analog versions of audiovisual works may be converted and saved to a digital format for use in digital distance education only if all of the performance requirements of Section 110(2) are met and only if no digital versions of such works are reasonably available from the copyright owner. For example, analog versions (such as VHS copies) of programs that are otherwise available from Library Video Company in digital format for use on a SAFARI Video Networks system cannot be converted to digital format without the copyright holder's written permission. Furthermore, copyrighted works that are produced or marketed primarily for mediated instructional activities for transmission via digital networks (such as digital programming available from Library Video Company) are completely excluded from the distance learning exemption under Section 110(2) of the Copyright Act. The use of such works for distance learning without the copyright owner's permission may subject the user to liability for copyright infringement.

It is critical to note that Section 110(2) does NOT permit educators or students, under any circumstances, to circumvent or interfere with any technological protections employed by copyright owners to prevent copies or distribution of an audiovisual work. Also, Section 110(2), like Section 110(1), only pertains to in-class performances and displays of audiovisual works and does not apply to textbooks or other supplemental reading materials. Any such use of text-based materials in connection with distance learning technologies is subject to the traditional fair use analysis under Section 107 of the Copyright Act (see below).

Even though the TEACH Act provides greater flexibility to educators to use some audiovisual materials with distance learning technologies, the TEACH Act's numerous requirements, limitations, conditions and exclusions can make compliance difficult and cumbersome. If you are unsure whether your use of an audiovisual work qualifies under Section 110(2), the University of Texas System has published a useful checklist to help educators apply the TEACH Act provisions. The checklist is available online at <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>.

The Fair Use Doctrine.

While the above Educational Exemptions may permit certain limited performances of copyrighted audiovisual works in the classroom and for distance learning, the exemptions generally do not offer flexibility with respect to the copyright owner's exclusive right to make copies, create derivative works, or distribute such works. The only instance where any such uses are permissible without a license is where the use qualifies as a "fair use" under Section 107 of the Copyright Act. The fair use provisions of Section 107 allow for certain limited uses of copyrighted works that do not interfere with the copyright holder's exclusive rights. Fair use is primarily intended to allow the use of copyrighted works for commentary, parody, news reporting, research and education. **However, not all uses in an academic setting or for educational purposes are automatically considered fair use.** Fair use is determined on a case-by-case basis, by weighing the following four factors:

- (i) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (ii) the nature of the copyrighted work;
- (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (iv) the effect of the use upon the potential market for or value of the copyrighted work.

The fair use factors have been the subject of much debate in the courts and in the academic community. The factors are designed to provide flexibility, but they also offer very little certainty with respect to what is or is not a fair use. For example, even if copying or use of a video clip is done for educational purposes, if it is too long or is found to unfairly interfere with the copyright holder's ability to sell his or her product in the open market, it may be infringing. Unfortunately, there is no bright line test for determining what constitutes a fair use. Fair use determinations are generally left to the user's discretion and are subject to potential challenge by the copyright owner.

In an attempt to bring more certainty to the application of fair use, an initiative called the Conference on Fair Use (CONFU) brought together educational organizations, copyright experts and content publishers to develop a set of informal guidelines, called the "Fair Use Guidelines for Educational Multimedia," to help educators apply the fair use factors in educational settings. Even though a final consensus could not be reached and the CONFU Guidelines do not have the effect of law and are not binding in any manner, they do offer good boundaries and guidance for which activities may qualify as fair use. A copy of the CONFU Guidelines can be found on the University of Texas System web site at <http://www.utsystem.edu/ogc/intellectualproperty/ccmcguid.htm>. **It is important to note, however, that the fair use provisions of Section 107 and the CONFU Guidelines do not preempt or supersede licenses and contractual obligations.** Any contractual obligations agreed to by users in a license take precedence over whatever rights they may have under Section 107.

The Digital Revolution.

Digital media and communication networks are rapidly changing teaching methodologies and school infrastructure. Digital delivery networks have enabled new interactive ways to share information both in the classroom and beyond the physical school building. However, except for the new TEACH Act

provisions of Section 110(2) of the Copyright Act, the fundamental rules of copyright are essentially unchanged in digital environments. Unless a license is obtained or the performance is otherwise permissible under Section 107 of the Copyright Act, all performances of audiovisual works for educational purposes must comply with the requirements in Section 110 to avoid liability for infringing the exclusive rights of the copyright holder. Any activity that produces a copy of the work, whether by downloading, saving a copy to a hard drive, or by any other means, must be authorized by license, unless the activity qualifies as a fair use under Section 107.² Furthermore, as discussed above, converting and saving analog works (such as VHS copies) in digital format requires permission from the copyright holder, unless the conversion is for distance learning purposes under Section 110(2) and the work is not available for purchase in digital format from the copyright holder. Except in the limited and narrow circumstances described in Section 110(2), any conversion of an analog program to a digital format that results in the making of a copy of the program is likely a violation of the copyright holder's exclusive rights.

Local and wide-area digital delivery networks have also made it much easier for schools to expand the audiovisual resources available in the classroom. Digital delivery networks enable schools or media centers to broadcast, stream, download, or otherwise transmit audiovisual materials from a centralized location to multiple school buildings or classrooms. However, the ease by which audiovisual materials can be transmitted to or from other locations does not relieve the user from its copyright compliance obligations. Unless the transmission complies with the performance requirements for the distance learning exemption under Section 110(2) or the activity is otherwise permitted as a fair use under Section 107, a license is likely required for any transmission of copyrighted audiovisual works beyond the building of origin, even if the teacher initiates the transmission and/or is in the same room as the students.

The best way to fully enjoy the benefits and flexibility of the digital age is to secure a license for all of your digital content needs. A license can eliminate much of the uncertainty of copyright compliance and free educators and students to take full advantage of the digital environment. A digital content license is the safest and most effective way to meet the educational challenges of the digital age.

Legal Notice.

This copyright resource was created to provide you with general information and may not address your specific question or situation, which may have unique legal implications. In addition, copyright laws are subject to change, and interpretations may vary across jurisdictions. Consequently, this resource is distributed with the understanding that neither the author nor publisher is rendering legal advice or professional services, nor does it form an attorney-client relationship. Please be sure to consult with an attorney licensed to practice law in your jurisdiction before taking any action on your specific question or situation.

If you have any questions regarding your rights for Schlessinger Media-branded programs, please feel free to call our Customer Service Department at (800) 843-3620. Thank you.

Sincerely,

Library Video Company

² The TEACH Act amends Section 112 of the Copyright Act regarding ephemeral recordings, and permits the making of transitory copies created solely to facilitate a transmission pursuant to Section 110(2).