

Moving your Content into the Digital World:

Legal Guide for Individual Artists and Arts Organizations

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Program Agenda

- IP Law and Moving Your Programming Online
- Privacy and Security
- Specific Considerations for Not-for-Profits

IP Law and Moving Your Programming Online

IP Law and Moving Your Programming Online

- What copyright covers – “artistic and literary works”
 - literary works
 - audiovisual works
 - dramatic works
 - choreographic works
 - pictorial, graphic, and sculptural works
 - architectural works
 - musical works (i.e., compositions)
 - sound recordings
- The exclusive rights of the copyright owner
 - reproduction
 - creation of derivative works
 - distribution
 - public performance/display
 - public performance of sound recordings by means of digital audio transmission

IP Law and Moving Your Programming Online

- Different types of licenses you may need
 - photographs: owner or agent (like shutterstock)
 - but see Creative Commons: www.creativecommons.org



The banner features the Creative Commons logo and navigation links: "Share your work", "Use & remix", "What We Do", and "Blog". A prominent green button says "Donate Now". The main headline reads "Open Access matters—especially during a global health emergency." Below this, a photograph shows a person in a white lab coat using a pipette in a laboratory setting. A small caption below the photo reads: "Image: 'Open Public Health Laboratory in Boston' by CDC/istockphoto by shutterstock.com/istockphoto CC BY".

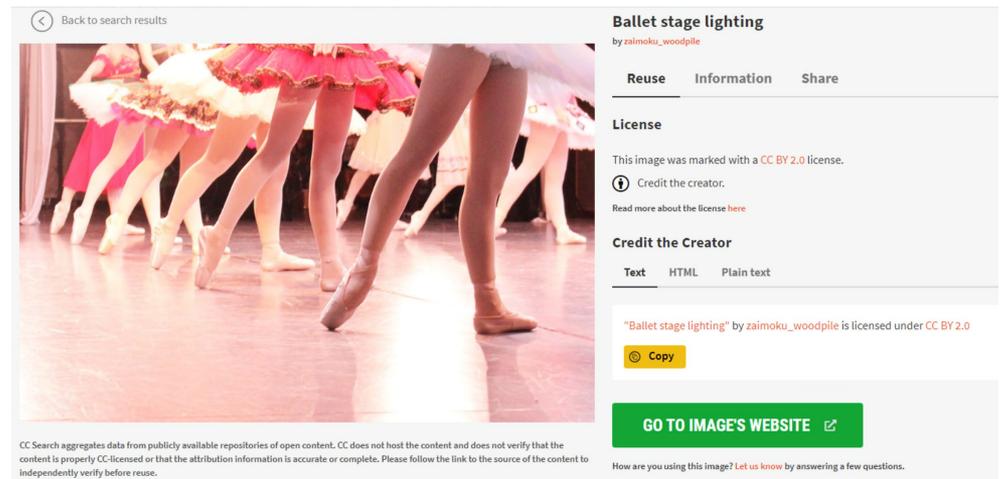


The navigation bar includes the "CC Search" logo and several menu items: "ABOUT", "COLLECTIONS", "SEARCH GUIDE", "FEEDBACK", and "EXTENSION".

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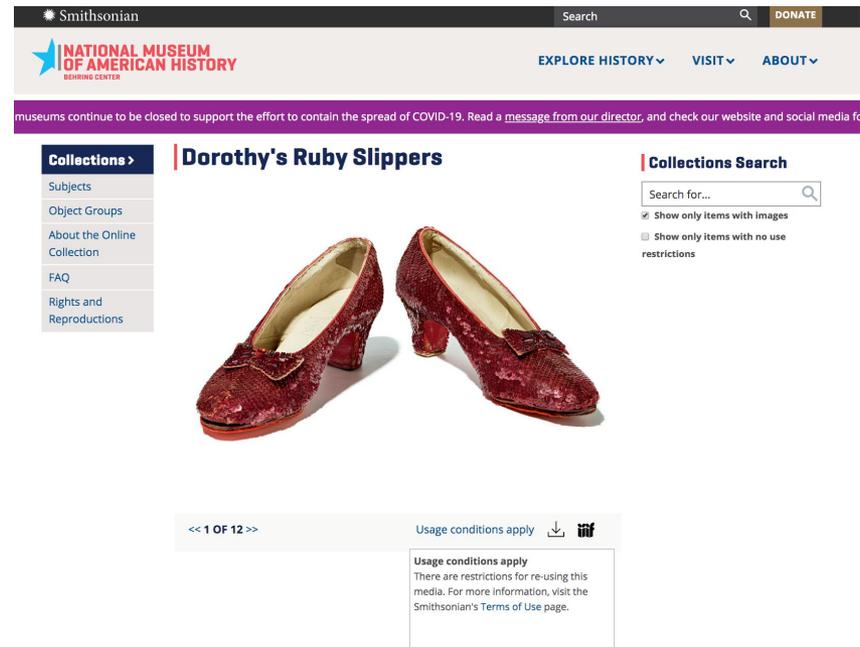
I want something I can
 Use commercially Modify or adapt



The search results page shows a photograph of ballet dancers' legs in pink tutus. The title is "Ballet stage lighting" by zaimoku_woodpile. There are tabs for "Reuse", "Information", and "Share". Under the "License" section, it states "This image was marked with a CC BY 2.0 license." and includes a "Credit the creator" link. Below that, there are options for "Text", "HTML", and "Plain text". A "Copy" button is visible. At the bottom, there is a green "GO TO IMAGE'S WEBSITE" button and a note: "How are you using this image? Let us know by answering a few questions."

IP Law and Moving Your Programming Online

- Other sources of non-© content
 - federal government works
 - museum collections



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- Comply with all terms or restrictions (such as copyright, trademark, publicity and privacy rights, or contractual restrictions) as may be specified in the metadata or as may otherwise apply to the Content.

IP Law and Moving Your Programming Online

- Different types of licenses you may need
 - photographs: owner or agent (like Shutterstock or Getty Images)
 - but see Creative Commons: www.creativecommons.org
 - government works
 - museum collections
 - literary and dramatic works: owner or agent
 - choreographic works: owner or agent
 - music
 - sound recordings: owner or agent
 - musical compositions
 - reproduction/distribution: *compulsory “mechanical” license* through Harry Fox – www.harryfox.com
 - public performance: ASCAP/BMI/SESAC/GMR
 - “synch” licenses

IP Law and Moving Your Programming Online

- Scenario #1 – online presentation of a **musical performance**
 - musical work
 - “mechanical” license
 - public performance license
- Scenario #2 – online presentation of a **musical performance**, accompanied by **images**
 - musical work
 - “mechanical” license
 - public performance license
 - synch license
 - PGS works
- Scenario #3 – online presentation of a **dance performance**
 - choreographic work
 - audiovisual work
 - musical work
 - sound recording

IP Law and Moving Your Programming Online

- A few additional concerns
 - cybersquatting: register the domain names you want to control
 - user-generated content
 - name a DMCA agent and register agent with U.S. Copyright Office!
 - **have – and enforce – a repeat-infringer policy**
 - respond expeditiously to takedown notices – and to takedown responses
 - terms of use: make sure your website TOU clearly explain what's permitted and what isn't
 - ... **which brings us to the broader issue of privacy law**

Privacy and Security

US, State and Global Laws — Privacy

- Multiple laws and regulations govern collection, use and sharing of “personal data”
 - <https://www.nysenate.gov/legislation/laws/GBS/899-AA> (see definition)
- General principles
- Have a website and mobile app privacy policy (<https://vlany.org/terms-of-use/>; <https://www.termsfeed.com/>; <https://www.iubenda.com/en/>)
 - Provide contact information for complaints
 - Disclose what you do (and don’t do) with personal data
 - Discuss cookies, Google analytics, “do not track” provision
 - Don’t breach your own policy! (<https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>)
 - Special rules for minors under 13 (<https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy-security/kids-privacy-coppa>)
 - Don’t collect data you don’t need.
 - Sensitive data (https://www.stblaw.com/docs/default-source/memos/firmmemo_03_23_20.pdf)
 - Respond to complaints and requests

US, State and Global Laws – Cybersecurity

- Again, many laws and regulations govern data security/breaches
- General principles
 - Use “reasonable” data security procedures and describe them accurately (<https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2019/2019-privacy-data-security-report-508.pdf>) and (<https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>)
 - Have a plan; test your systems; train your staff
 - Address security in website privacy policy (<https://vlany.org/terms-of-use/>)
 - Protect data online, on premises and WFH devices
 - Reasonable selection and monitoring of data hosts/vendors (https://www.americanbar.org/groups/business_law/publications/blt/2016/11/cyber_center/)
 - Read your data vendor contracts and insurance policies carefully (<https://www.businessinsurance.com/article/20150518/NEWS06/150519875/Insurers-not-liable-in-loss-of-IBM-employee-data->
 - Promptly notify users/government after a breach (<https://www.nysenate.gov/legislation/laws/GBS/899-AA>)

Specific Considerations for Not-For-Profits

Fiduciary Duties

What are the Legal Duties of Directors of a Not-for-Profit?

- A director must meet certain standards of conduct in carrying out his or her responsibilities to the not-for-profit.
- These standards are typically referred to as:
 - The Duty of Obedience;
 - The Duty of Care; and
 - The Duty of Loyalty.

Fiduciary Duties

Duty of Obedience

- Directors have a duty to ensure that the not-for-profit complies with all applicable laws and regulations and with the not-for-profit's internal governance documents and policies, including by being faithful to the not-for-profit's mission and purposes.

Fiduciary Duties

Duty of Obedience

- ***What does this mean in practice?***
 - Directors must be familiar with the not-for-profit's purposes as stated in its certificate of incorporation.
 - Directors must understand the not-for-profit's mission and purposes and ensure that the not-for-profit does not engage in activities inconsistent with its mission and purposes.
 - Directors must amend the purposes clause as necessary.
- ***What does this mean in this context?***
 - Before an organization engages in new activities – including by moving online – directors must ensure they are consistent with the not-for-profit's mission and purposes or make necessary changes.
 - Example: Writing Workshop is formed to instruct low-income students in creative writing. Can it move instruction online? Can it start an online gallery for visual arts?

Fiduciary Duties

Duty of Care — “Ordinary Director” Standard

- Directors of not-for-profits have a duty to act in good faith and with the degree of diligence, care and skill that an *ordinarily prudent man* in a like position would exercise under similar circumstances.

Fiduciary Duties

Duty of Care — “Ordinary Director” Standard

- ***What does this mean in practice?***
 - Directors should attend all Board meetings.
 - Directors should carefully read Board meeting materials, Board minutes, financial statements and budgets.
 - Directors must be informed, be active and ask questions.
 - Directors should be generally familiar with the not-for-profit’s activities and finances.
- ***What does this mean in this context?***
 - Decisions about moving online should be made based upon information.
 - Example: Museum board has not held a meeting in over a year. Directors approve an ambitious plan to pivot to online-only programming at a significant expense (infrastructure, staff, etc.), without reviewing any budgetary considerations, ultimately leading to Museum’s insolvency.

Fiduciary Duties

Duty of Loyalty

- Directors have a duty to act in the best interests of the not-for-profit and to put the not-for-profit's interests above the director's personal interests.
 - Directors must keep information learned through directorship confidential and may not exploit such information for personal gain at the expense of the not-for-profit.
 - This raises issues regarding conflict-of-interest transactions and compensation.

Fiduciary Duties

Duty of Loyalty

- ***What does this mean in practice?***
 - Directors must disclose all actual or potential conflicts of interest.
 - Directors must follow the not-for-profit's confidentiality and conflict of interest policies.
- ***What does this mean in this context?***
 - Conflicts in moving online (e.g., license fees or other payments to insiders) must be assessed.
 - Example: Dance Organization proposes to make feature performances available for online viewing. All of the directors have been involved in the performance as either choreographers or dancers and Dance Organization proposes to pay them significant license fees.

Conflicts of Interest

Duty of Loyalty Implicated in Conflict of Interest Transactions

- The duty of loyalty requires directors to act in the best interests of the not-for-profit rather than in their own personal interests or in the interests of others.
 - The duty of loyalty requires directors to avoid conflicts of interest that are detrimental to the not-for-profit.
 - Statutes at both the federal and state levels address conflict of interest transactions. In particular, state law conflict of interest statutes prescribe procedures that need to be followed in approving these transactions.
 - In addition to potentially violating federal or state law, entering into conflict of interest transactions with directors can result in adverse publicity to the not-for-profit.

Conflicts of Interest

Conflict of Interest Transactions–Delaware

- **Definition of Conflict of Interest Transaction:** Any transaction between a not-for-profit and one or more of its directors or officers or between a not-for-profit and any other entity in which one or more directors or officers have a substantial financial interest.
- **Procedure:** The transaction is not void if the interested director “discloses and abstains” from the Board vote and the transaction is approved by disinterested directors.
 - If this “disclose and abstain” procedure is not followed, the not-for-profit must show the transaction was fair and reasonable at the time it was authorized, or it can be voided by the not-for-profit.

Conflicts of Interest

Related Party Transactions—New York State

- **Definition:** Transaction, agreement or other arrangement in which a “related party” has a financial interest and in which the not-for-profit is a participant.
- **Procedure:** Before entering into a related party transaction, the board (or a board committee) of a not-for-profit must determine that the transaction is fair, reasonable and in the not-for-profit’s best interest. Additional steps must be taken if the related party has a substantial financial interest in the transaction, including considering alternative transactions.
- A related party may not participate in deliberations or voting.
- The N-PCL also requires that all New York not-for-profits adopt a conflict of interest policy.

Conflicts of Interest

Related Party Transactions—New York State

- **Example:** Arts Camp typically holds a summer arts camp for children. Due to the pandemic, in-person programming has been cancelled. Arts Camp wishes to make some programming available online. Director wholly-owns a for-profit comprehensive digital production company. The production company offers to produce and host the online content at a substantial discount to Arts Camp.

Other Specific Considerations

Solicitation of Charitable Contributions

- Most states require nonprofit corporations that plan to solicit charitable contributions over a certain minimum to register with that state's Attorney General's Office.
 - If the corporation plans to solicit contributions in a particular state, it should look into the registration requirements in that state **before** beginning to solicit.
- In New York State, nonprofit corporations are required to include in any written solicitation a statement regarding how to obtain the corporation's latest NYS annual report filed with the New York State Attorney General's Office (see https://www.charitiesnys.com/pdfs/disclosure_notice.pdf).

Other Specific Considerations

Contributions for a Specific Purpose

- Where contributions have been solicited and/or contributed for a specific purpose, a not-for-profit generally cannot use them for an alternative purpose absent approval.
- Example: Museum has raised significant funds in a capital campaign to build a new facility, but proposes to use those funds to buy intellectual property rights to put arts content online.

Other Specific Considerations

Endowment Spending

- An endowment-holding not-for-profit may appropriate for expenditure or accumulate so much of an endowment fund as it determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established.
- In making a determination to appropriate or accumulate, the not-for-profit will act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances.

Other Specific Considerations

Reminder About UBIT

- A not-for-profit recognized as exempt from federal income tax is nonetheless subject to taxation at corporate rates on income earned from conducting a trade or business that is regularly carried on and unrelated to the its exempt purposes.
- Example: Music School has an existing website, and proposes to use it to sell pantry and grocery products.

Questions?

Thank you.