

Episode 23 | Fair Dealing in Canada, Part Two

Bob Tarantino 00:05

Hello entertainment law nerds, enthusiasts and aficionados, and welcome back to another episode of The Dentons Canada entertainment media law signal podcast. I'm your host, Bob Tarantino, and I'm joined today by my friend and colleague, David Steinberg. Today in the finale of our fair dealing series, we're discussing the history of fair dealing, how to navigate the process, and providing you with an update on the current state of affairs. Listen in to learn more. My name is Bob Tarantino, and I'm Council in the media entertainment and sports group in the Toronto office of Dentons.

David Steinberg 00:31

And I'm David Steinberg, and I'm also a partner in the media entertainment and sports group at Dentons Canada, and I can be found in the Toronto office. We're back for part two of our topic of fair dealing, and in this discussion, I want to talk about risk and insurance issues, errors and omissions, insurance issues in respect of fair dealing and fair dealing issues. So why don't we start here? If I am a producer, I'm making a documentary film. I've come to you, spoken to you, about a bunch of Fair Dealing elements. We've gone through the analysis; we feel that there is a relatively sound argument that could be made that these items could qualify under Fair Dealing exception. And let's say I have 12 items, and my next order of business is to procure E&O (errors and omissions) insurance that I'm going to need for everyone from my bank to my distributors, my licensees, streamers and broadcasters. And I'm about to make application for the E&O insurance, and one of the questions they've asked me is whether I intend to use any material under Fair Dealing. What's the process from that point on, what's what's likely to happen?

Bob Tarantino 02:16

Right, so it's a good kind of segue into this broader conversation. Because I think what we have to do is we have to situate fair dealing within a process, right? So Fair Dealing is not, at least, you know, in the film and television production context, like Fair Dealing is not a conversation between a producer and their lawyer, right? The producer and their lawyer don't need to convince each other that they have good arguments to rely on Fair Dealing. They're in the midst of a process which involves a number of other parties, and so part of it is a dialogue, or conversations with those other parties to convince them that you have a good, fair dealing argument. So usually, what is going to happen when you submit that application to your E&O insurance company, as soon as they see that you are planning on relying on Fair Dealing, they will engage their own lawyer, and that lawyer for the insurance company will contact us as the lawyers for the producer, and they will want to know more about our purport, our proposed uses, and they want to know more about why we think this is going to qualify as fair dealing. So, at a sort of at the level of mechanics, what often has to happen is the producers will need to create what's sometimes referred to as an exclusions log, or a fair dealing log. And oftentimes what that looks like is it's basically an Excel file, and to use your example, we have 12 different things that we're going to or that we want to include in the movie, and which for which we rely on Fair Dealing. And so, it's details about each of those 12 instances. So, what are they? You know, if it's a film clip, how long is the film

clip? How long is it as compared to its source material? You know, who's in it? What's the use, what's the context, where did it come from? What's the source? Who owns it? Have we tried to reach out to the owner? Have they responded basically all of the information you can possibly provide in order to provide as full some a set of information, so that the insurance company's lawyer can, in conjunction with the arguments presented by the producer's lawyer, make their own assessment as to whether or not this is, you know, a good, fair dealing argument. So, part of our job as producers counsel is to advocate for our clients and make out our best argument for why this qualifies as fair dealing.

David Steinberg 05:07

right? Obviously, with the caveat that we do, in fact, believe that that it is a good, good argument. We're not just arguing for the sake of it, it's that we have some kind of premise upon which we're relying to make the argument. So, we've discussed it with the producer, then we're going to end up on a phone call with with the insurers lawyer. Now how likely is it that we have that conversation and that those items are cleared, as opposed to having to get engaged in a more, you know, rigorous debate with with the insurance, with the insurers Council?

Bob Tarantino 06:00

yeah, I don't know. I don't know if it's easy to answer that question in the sense of how likely it is to happen. I mean, I think because, again, that's going to be a function sometimes of what's the risk tolerance of the insurance company, what's the risk tolerance of the individual lawyer that we're dealing with? I think what we can say is, you know, we have those conversations often, and we are successful in many of those conversations, right? Like we are able to present our case in a way that they find it acceptable, that they approve the use. And so, we do have situations where clients are able to rely on Fair Dealing. It changed. I think it changes over time, Frankly, like I think there sometimes I can recall projects that you and I have worked on together. You know, a few years ago, insurance companies, I think, were much more reluctant to allow Fair Dealing, or certain insurance companies were and so that we have worked on projects where the insurance company simply said, like, no fair dealing. That being said, we've also worked on projects where, you know, it wasn't the insurance company that was concerned about it, but it was the distributor or the broadcaster, and they were the ones who were saying, no fair dealing, right? Like, we are not willing to take on the risk even if there's an insurance policy in place, so you kind of have to make the assessment on a project by project basis, looking at where this who's the broadcaster, who's the streamer, who's the distributor, who's the insurance company, who's the insurance company's lawyer, and all of those factors sort of play a part in answering the question of, how likely are we to get this through.

David Steinberg 07:42

Right, and you know, to your point earlier, where you were talking about third parties and and the fact that we have to coordinate all this, it's not a decision that's made by the producer alone. There are all these other participants that may or may not have views about fair dealing. For instance, we might see in a broadcast agreement or a streamers agreement, whatever language to the effect that, you know, if you have any fair use or fair dealing, we need to approve it, or we require some kind of legal opinion. Often on the US side, we see that, and we have to take that into account. So, we have to deal with the E&O insurer, our licensees, and make sure that we're all on the same page and we're able to complete and deliver the film without, you know, tripping over some kind of hurdle later on. So, I get that point

about coordinating with the third parties, one of the risk factors that we might look at. I'm sort of asking this more than stating it is who the copyright owner is and whether they have a history of of litigation or being litigious of enforcing their rights very, very aggressively. Do we take that into account when we're looking at at the risk analysis?

Bob Tarantino 09:17

Absolutely, I think, I think it's a critical component of the risk analysis. And I think, you know, we're we're not doing our jobs as Producers Council, if we don't ask that question and try to, you know, figure out an answer to it in terms of identifying who the rights owners are and getting a sense of, you know, how litigious they are, how likely they are to be aggressive in enforcing their copyrights. And if we don't ask the question, I can guarantee it's going to come up once we talk to the E&O insurance lawyer. So it's certainly part of the part of the the matrix of facts that we have to take into account, I think, you know, sort of related to that is the question of which gets opposed a lot of you know, should we, should we even bother asking for permission? Right? Like, should we ask for permission knowing there's a risk that the rights owner is going to say, no? Does that, you know, damage our fair dealing argument? And so, here's, there's a split, sort of, you know, with the legal answer and with kind of the practical answer, like on the legal side, no, it does. It doesn't negatively affect our fair dealing argument. You know, in fact, Fair Dealing is partly there for situations where the rights owner says, no right. It's partly to deal to to give users the ability to use work where it's justifiable, in circumstances where the rights owner does not want them to use the work. So, at a at the level of the legal analysis, you know, asking for permission and getting denied permission doesn't affect the the legal answer. But at a practical level, you know, it's a slightly different story, because if you, if you approach somebody, you're now on their radar screen. Yes, if they are an aggressive enforcer of their rights or their purported rights, you know, they they know about you, and then they may be coming after you and your distributors and your broadcasters. So that's, again, that's, that's a conversation that often gets, takes place and you sort of, you know, you can't really answer it in the abstract. You sort of have to make the assessment in the specifics of a particular use with a particular rights owner, right? Yeah, we absolutely take that into account in having these conversations.

David Steinberg 11:39

Okay, I mean, I can think of a situation that arose last year where a particularly aggressive party said, you might think that your use falls under the category of fair use, and you may have an opinion stating as such, but I'm telling you right now, if you use this, I'm going to sue the pants off of you. Yeah, and it was a copyright owner with very deep pockets, so obviously, someone who's decided that they're going to protect their rights at all costs, and they don't really care that there are legal avenues to create a path for fair use, fair dealing. They're just going to behave like that. Now, whether they were going to behave like that or not, we don't ultimately know, but certainly that that's something to be taken into account.

Bob Tarantino 12:43

100% and let's just sort of expand on that, because there's a couple of different outcomes from that scenario that you've described, which we should which we should sort of follow down so. So one is, you know, as a producer, I think the producer has to make the assessment of how much risk they want to take on. And you know, sometimes that's driven by creative concerns. Sometimes that's driven by budgetary concerns. Sometimes, you know, one of the factors that I think gets overlooked is, like, at a

personal level, how willing are you as an individual to be on the receiving end of a lawsuit? Like, let me tell you, lawsuits are stressful. You generally don't want to be involved in a lawsuit. Look for the lawyers. It's fantastic, horrible. It's you know, it sucks and it's not helpful, but it's expensive, and its cold comfort that you had a really you have a really good argument, you have a really good Fair Dealing defense, right? So, so oftentimes the question that I pose to clients, and I ask them to consider is, look like, don't just think about this as, are we going to win? It's, do we even want to have the fight? Yes, correct. And then just to add on to that, because I think this also has consequences at a sort of, you know, a professional level for for producers, if you do get sued in the future, you have to disclose that on, you know, applications, correct, yeah. So, it's going to come up, you know, like, even if you win, right, or you're going to have to talk about it, and it's going to get taken into account in the pricing of your future policies. So, you know, tread carefully. I think even in situations where you you you are advised by your lawyer that you have a good, fair dealing argument, because it's not, we're not just dealing with this particular use in this particular project, if things go wrong, right in the worst of the worst cases, this is going to be something that you're going to have to sort of disclose and deal with on future projects as well,

David Steinberg 15:12

right? It changes your risk profile for the insurer getting these things now under your typical you know, insurance policy, there's a deductible, and it's it's often that we see \$10,000 as a deductible, although it could be more, depending on the circumstances. So, if we do get a claim, if something comes in, how do we deal with that? What are the first steps?

Bob Tarantino 15:48

so well, I think the first step is we tell the insurance company that a claim has come in because we don't want to inadvertently lose coverage because of a lack of disclosure, So we tell the insurance company, I think the next step, and you know, the insurance company will encourage this as well, is they'll say, essentially, you deal with it right, like you try and get a settlement short of having to litigate it. So, I think in most cases, what we do is we respond and see if there's any room for any kind of compromise, and see if, if we can get away, get away. See if we can achieve a resolution which consists of our client making a payment which is below the amount of the deductible, and which resolves the matter to everybody's satisfaction. So, in exchange for our client's payment, the rights owner gives a release and a license for the use.

David Steinberg 16:49

right. And of course, the claim can be extremely annoying for the producer, in the sense that the third parties that are associated with the project often get pulled in as well or named as well. So, the streamer of a distributor, the broadcasters, etc., if they're not being named, they're being put on notice that there's a problem, which can again come back to the producer and create some issues. Which is why no producer, I'm assuming you'll agree with this statement. Should simply make their determination about how much risk they are willing to take without considering the third parties and the others that are involved in the production. It's It's foolhardy to say, Oh, I don't care, because I'll deal with it, when you know you're going to be hearing from others as well, and they're not going to be very happy, you know, I think that they're they're also going to be concerned, and they're going to wonder what's gone on and why has this happened, etc, etc.

Bob Tarantino 17:56

No, I think that that's a really good point, right? Like, like, keep in mind, like, as part of the set of factors that you take into account. Keep in mind there's reputational risk and there's just sort of relationship management risk, right? you don't want to be the producer who's constantly, you know, generating sort of cease and desist letters and, you know, threats of legal action even if you win right, like, even if you're in the right and you're gonna win and all these people are gonna go away at the end of the day, your partners in this business, your broadcasters, your distributors, your insurance companies, like, they don't want you to be the headache. And so, if I can just sort of supplement that by saying in a lot of cases, and this is also something I try to stress to our clients when having these conversations with them is particularly at the beginning of projects. It's fair dealing should really be the last resort. Right? Like Fair Dealing, relying on Fair Dealing, is when we just cannot otherwise make it work. Right? Like we cannot find the owner, or the owner, you know, is charging an exorbitant fee for the license, or the owner is just flat out refusing to give us license because they don't like us or our project. You know, Fair Dealing is not sort of our first line of defense. It should be our last line of defense.

David Steinberg 19:17

Okay, understood. What about situations where a producer comes to us and says, I've spoken to a US based law firm who are willing to give me an opinion, a legal opinion, for fair use, and they've told me that all of these items that I've got on my log are all capable of being covered under fair use. And I would like to rely on that opinion and proceed on that basis if anybody on the insurance side, on the E&O insurance side, for instance, when you speak to their council has a problem with any of the items in My Fair Dealing log, I want to tell them that I have a fair use opinion from the United States, and I'd like them to rely on that the US is is a huge territory. We are a much smaller territory. If it's good enough for the US and it's good enough for the studios and the streamers. Why is it not good enough for us here in Canada, and in particular for our E&O insurers?

Bob Tarantino 20:29

yeah, so now we're really getting into the weeds here, so and again this, this is another frustrating aspect of, I think this whole area, which itself is has is changing, and has changed rather dramatically over a fairly short period of time. So, we'll go back to the beginning of our conversation, where we sort of underline like there's a difference between fair use and fair dealing. One's American fair use, one's Canadian Fair Dealing, and the market and the legal analysis is just much more developed in the US. So, as you have said, in the United States, there's an entire sort of protocol whereby certain law firms is recognized by the US insurers as being eligible providers of fair use opinions. And in the US, they will accept those opinions, those Fair Use opinions, from those US law firms, and they will allow those uses, and they will be covered under the policies that whole sort of infrastructure that I've just described, you know, opinions, short list of law firms that will will issue those opinions, insurers who will accept those opinions that simply does not exist in Canada, or if it does exist, it's in a very, very sort of germinal state. So historically, we have not provided Fair Dealing opinions in Canada, I think we are increasingly seeing requests from insurance companies for Fair Dealing opinions, or at least for some kind of comfort from a Canadian law firm that Fair Dealing, you know, applies, or that there's a good Fair Dealing defense available. So, there's not really an answer here. I think we're still sort of working this out as an industry and as a, you know, the entertainment bar as a whole is still kind of trying to

figure out how this is all going to work, you know. But look, there are going to be situations to the question that you posed or the scenario that you described there. There may be situations where, look the project, even though it's being produced by a Canadian, it's really an American project, in the sense that the primary audience is going to be in the United States. The rights holders in question or in the United States, the threat of litigation is primarily in the United States, and so we may be able to get around the corner on that one with with Fair Use opinions. There are other projects where there is going to be a significant risk of an infringement claim in Canada, because, you know, either the predominant audience or a significant part of the audience, is in Canada, where the rights owners are in Canada. And so, you know, the most likely place, or a likely place for an infringement claim is going to be taking place in Canada. And so, in those situations, we have to then really deal Foursquare with the Fair Dealing issue, and we have to have that conversation with the insurance company to figure out, okay, how are we going to solve this.

David Steinberg 23:45

right? Okay, fair enough. So that one is, is a little bit up in the air. Things are shifting, yeah, a little bit in terms of looking at the value of a fair use opinion and and the in the US position. But of course, they are different. Why is it that you think we have so little case law in Canada about fair dealing? Why is that the case? Why has there not been more activity, more claims?

Bob Tarantino 24:17

Yeah, so I think there's potentially three answers here. So, one is just sort of as a socio-cultural matter. Canada is less litigious than the United States. The industry is much larger. I mean, just the population alone is 10 times larger in the United States, and, you know, and so the industry is even proportionally larger in the United States, so that, you know, there's just more production activity, which happens in the United States in the film and TV space. So, there's going to be more claims down there. But. I also think part of the answer is that historically and look, you know, you and I have both been doing this for a long time. At this point, I'm much younger than you, but we've both been drilling.

David Steinberg 25:12

you're like, 30 years younger.

Bob Tarantino 25:14

37 years younger than you. Yeah, two years younger. I'm 42 years younger than you. And look, I mean, as long as I've been involved in this, and as long as you've been involved in this, we tend to clear the bejesus out of things, right? Like, Canadian products tend to be really clean and really cleared. And so, like, there's just not as much potential infringement happening. So, I think those are the three factors that help explain why there just isn't as much Fair Dealing activity or Fair Dealing case law in Canada as compared to Fair Use Case law in the United States. But that's the challenge for us, right? Like without the way that legal reasoning works and the way that lawyers think we make arguments by reference to precedent and by analogy to other cases, and if we don't have a lot of cases, it really hampers our ability to make effective or to provide effective advice that has sort of predictive power. And so, we don't have the cases, so it's a challenge.

David Steinberg 26:23

maybe, maybe one of the reasons we don't have the cases is that Canadian entertainment Council are generally very prudent and very good at what they do, And Canadian producers are generally cooperative in terms of accepting legal advice. Who knows? Maybe that's part of the equation here. I mean, it's good to know. I hate that expression, knock on wood, but I'm gonna say knock on wood. I don't think we've ever had an actual claim materialized on anything we've worked on that's related to Fair Dealing.

Bob Tarantino 27:00

Yeah, like that has gone to trial, like, has, has sort of gone to, like, the issuance of a Statement of Claim. I don't think so either. Yeah, we certainly had our share of, you know, cease and desist letters and, not actual lawsuits.

David Steinberg 27:16

it's, it's kind of interesting. Well, okay, I think that creates a very nice picture of of the the world of fair dealing. We talked in part one about how to potentially be eligible under that exception for fair dealing. We talked a little bit about the differences between the United States and Canada, Fair Use versus Fair Dealing. We've talked about the risk analysis, the type of things we would look at and take into account how it intersects with the world of E&O insurance and how it impacts on the third parties as well that we're dealing with the streamers, broadcasters, distributors, etc. So, I think that's been a good discussion that we've had here in part two as well. So, I thank you for that, Bob as usual, I've learned an awful lot from you and and and I appreciate your patience and going through what is definitely a kind of a strange area that we have to deal with in our practice.

Bob Tarantino 28:25

Yeah, no, this has been great. I appreciate you taking the time to have the conversation. I look again, I always benefit from having these conversations, particularly with you, because I think, as we sort of emphasized a couple of times, in this conversation, it's a dialogue, right? Like this whole there's a bunch of conversations which are happening here, and for us to have these conversations with each other, I think certainly benefits me, hopefully benefits you, but I think it's helpful for us to talk these things through so that we can understand, get a get a better handle on how the analysis works. And hopefully that's something that that the audience is also going to benefit from. Yeah. So, thanks to you, Dave.

David Steinberg 29:05

Thank you, man.

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