Ull audio

DENTONS

Fair dealing in Canada, Part Two

Resource guide

Grow | Protect | Operate | Finance

Key Concepts

FAIR DEALING:

- Fair Dealing allows limited use of copyrighted materials without permission for specific purposes like criticism, research, and documentary production.
- **Fair Dealing Log**: A detailed record of all instances where fair dealing is relied upon. It includes key information such as the type of material (e.g., film clips), the length of use, the source, and ownership details.

E&O (ERRORS & OMISSIONS) INSURANCE:

- Essential for film producers to secure financing, distribution, and broadcasting deals.
- The insurer's lawyer may need to review the producer's fair dealing claims to assess risks and approve insurance coverage.
- Producers must submit a **Fair Dealing Log** that includes detailed explanations about each instance of fair dealing in the production.

RISK AND LIABILITY:

- Risk tolerance of insurance companies, broadcasters, and distributors plays a significant role in approving fair dealing.
- Some rights holders may aggressively enforce their copyrights, which could increase risk.
- Legal opinions and approval may be required from third parties, like broadcasters or streamers.

Risk Factors to Consider

1. **Litigious Rights Holders**:
    - **Aggressive Copyright Enforcers**: If a rights holder has a history of aggressive litigation, this can increase the risk of pursuing Fair Dealing claims.
    - **Assessment Criteria**: Producers must assess the likelihood of litigation based on the rights holder's history and whether they are known for protecting their works.
2. **Legal and Practical Considerations**:

- **Legal Impact**: Asking for permission and being denied does not necessarily affect the legal argument for Fair Dealing but can expose the producer to legal risks if the rights holder is litigious.
- **Practical Impact**: If a rights holder refuses permission, they may choose to take legal action, which can affect the project's future and create complications for distributors and broadcasters.

3. **Risk Tolerance of Stakeholders**:
    - The **insurance companies** and other third parties' risk tolerance can determine whether Fair Dealing is accepted, based on their assessment of potential litigation risks.

Key Questions to Ask in Risk Analysis

1. **Who is the copyright owner**?
    - **Litigious history**: How aggressive are they in enforcing their rights?
    - **Past actions**: Have they previously taken legal action against other producers?
2. **What are the potential consequences** of pursuing Fair Dealing in this context?
    - **Legal action**: Is the risk of a lawsuit manageable, and is it worth taking on for the project?
3. **How much risk are you willing to take on** as a producer?
    - **Creative and financial factors**: Is the potential reward of using Fair Dealing worth the risk of litigation?
4. **Do you need permission from the rights holder**?
    - **Risk vs. benefit**: Does seeking permission open you up to potential legal challenges, or can you proceed under Fair Dealing without it?

Best Practices for Managing Risk

1. **Thorough Documentation**: Maintain a comprehensive Fair Dealing Log to clearly outline each instance of fair dealing, ensuring transparency and preparedness for legal review.
2. **Consult Multiple Stakeholders**: Engage with insurance companies, distributors, and broadcasters early in the process to ensure alignment on Fair Dealing decisions.
3. **Consider the Bigger Picture**: Weigh the short-term benefits against long-term implications, such as potential litigation, increased insurance premiums, and impact on future projects.
4. **Legal Advice**: Always seek legal advice to determine the strength of your Fair Dealing argument and understand the risks involved in using specific copyrighted materials.

For more information on this topic, please reach out to the authors, Bob Tarantino and David Steinberg.