

Episode 22 | Fair Dealing in Canada, Part One

Bob Tarantino 00:06

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 first of a special two part series we're talking about Fair dealing in Canada. We'll cover the basics, including defining what exactly Fair dealing is, how to think about applying it, and generally how it functions in the context in which it works. Listen in to learn everything you've always wanted to know but have been too afraid to ask.

David Steinberg 00:34

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. This is one of the more interesting areas that we have to deal with in our daily practice, especially when we are working on documentary films. And you and I have had some incredibly bizarre and interesting experiences when it comes to this area of the law. And I am, of course, referring to Fair dealing, copyright, and we often receive phone calls from clients, again, mostly in the documentary space that have inquiries related to Fair dealing, and also fair use, from the United States side, and-- and we're often in the position of having to advise them on some very delicate matters. So I think a good way to start would be to explain what Fair dealing really is, because I think there are a lot of misconceptions out there as to what it is, how it can be applied, etc. So can you start by just explaining what it is, what is Fair dealing?

Bob Tarantino 01:58

Yeah, that's a great place to start. I like how you call this one of the more interesting areas of our practice. That's the most diplomatic way of putting it. So Fair dealing is many things, I think, at the sort of most granular level and the most technical level. It's a section in the *Copyright Act of Canada*, so section 29 and 29.1 of the *Copyright Act* create defense, also referred to as a user's right, which is called Fair dealing. So Fair dealing as sort of a procedural matter, arises as a defense to a claim of copyright infringement in a lot of ways, and when we get these phone calls from clients, like the initial conversation that I have with clients about Fair dealing, I try to frame it in a couple of different ways, which I think can be helpful, or to raise some points which I think can be helpful for everybody to keep in mind. So one is fair deal. And you alluded to this in your intro there, Fair dealing is different than Fair use. So Fair dealing is a Canadian concept found in the *Canadian Copyright Act*. Fair use is an American concept found in the US copyright legislation. And one of the the risks that people have to contend with is that you can't you can't rely on Fair use cases, you can't rely on Fair use discussions, you can't rely on sort of fair use rhetoric when you're talking about Fair dealing, right? They're similar, but they're not the same. And the court, Canadian Courts, have repeatedly cautioned us, you know, you can't sort of transpose American copyright concept willy nilly into Canadian copyright law. And, along with that is this other related risk or related challenge, I guess, which is that there's just a lot more Fair use discussion and case law than there is Fair dealing discussion in case law. So the other thing

that I often say to clients is, Look, this is going to be frustrating, right? Like it's frustrating for us as lawyers, and it's frustrating for you as clients, because clients want clear answers to their questions, can I do X? And they hate it when lawyers say, Well, maybe, or it depends, or I don't really know. Here's you know a 30-minute diatribe on sort of the nuances of a particular area of law, in this case, Fair dealing. So, you know, clients get frustrated by those kinds of situations, but it, frankly, it's frustrating for lawyers as well, right? I don't like having to give clients non-answers, but the challenge with Fair dealing is that it's because we don't have as much case law as they do in the United States. It's much more ambiguous how it applies in Canada, it's much more unpredictable. You know, in the United States, they have hundreds and hundreds of Fair use decisions from the courts. In Canada, like we're lucky if we're dealing with maybe 20 Fair dealing decisions from Canadian courts, and we have, like, a single Canadian court that has applied Fair dealing in the context of documentary films, that was the [Wiseau decision](#) from a few years back. So it's it's a challenging area to give advice in, it's a frustrating area for people to have to deal with. It's a provision in the *Copyright Act*. It's a defense to a claim of copyright infringement, and it's complicated, so I imagine we're going to probably spend the next little while unpacking all of that complication.

David Steinberg 06:20

Exactly. And you know, I would say, because it's so complicated, that's why my first order of business, when I get a Fair dealing question, is to walk down the hall and talk to you.

Bob Tarantino 06:31

Right, right, right. You want to dump it on me? I get it.

David Steinberg 06:36

Yeah. And, but you know, in all seriousness, some of the decision making involved, or advice, or whatever you want to call it, it falls into this tremendously broad grey area. So in many cases, you know, we're running things past each other just to see whether we agree. And because of that absence of case law, we're looking at the parameters that that a court would have or would look at, not that we ever think these things are necessarily going to end up in a court. But nonetheless, we're looking at those parameters and trying to determine, you know, in your language, you always use this expression, whether there'd be eligibility for the defense, whether it's-- it's fathomable, that it will work, because we get asked these questions for any number of reasons, and I think that because we have to operate in a grey area, we often have to talk about the level of risk involved, and like you say, clients and us, we all become very uncomfortable when we can't really give a yes or no answer and we're sort of floating around in the grey area, which then leads us to attempt to analyze how much risk is involved, you know, on a scale of one to 10. How likely is it that I'm going to get a claim on a scale of one to 10? How likely is it that that I would have to pay out on my, you know, E&O deductible on a scale of one to 10, how likely is it that I would lose if I had to go to court? You know, we get a question. So let's start with this, those parameters of which I speak, what are the general sort of areas that may give rise to a valid Fair dealing defense in Canada?

Bob Tarantino 08:43

Right, so the way that the Fair dealing mechanism is structured in Canada is there's sort of two steps to the analysis. The first step is, do you qualify, or does your activity is what you're doing within the scope

of what are referred to as the enumerated purposes for Fair dealing. So if you look in the *Copyright Act* -, *Copyright Act*, there's three sections. I misspoke before. It's section 29, 29.1 and 29.2 and it sets out eight purposes, right? So you have to what you what you are doing, or what our clients are doing, or somebody who wants to avail themselves of the Fair dealing defense, they have to be able to successfully argue that what they are doing falls within the scope of one of those eight purposes. And so those eight purposes are research, private study, education, parody, satire, criticism, review and news reporting. So that's the first step of the test. So if you can't fit yourself, if you can't fit your activity within one of those eight purposes, you're out of luck. What you're doing does not qualify or cannot qualify as Fair dealing. Now the good news is the Courts have been very clear over the years that we are supposed to give those categories or those purposes what they refer to as a "liberal interpretation". So they have been-- they have described the sort of clearing that hurdle, that first step, do you-- is what you're doing within one of these eight enumerated purposes. That's sort of like a fairly low barrier, a fairly low hurdle, to clear. The heavy hitting they say, the analytical heavy hitting, is done at the second stage of the analysis, which we'll get to in a moment. So but this first step is, are you doing research? Are you doing private study, education, parody, satire, news reporting, criticism or review?

David Steinberg 11:08

So that's interesting. Let's start just with those categories for a moment. If we're talking about, let's say, a documentary film-- , documentary feature film, I'm probably, as the producer, wondering whether this would qualify under the areas of criticism or in review. It's got some educational components to it, as a documentary film in in most cases. But as we both know, documentaries can also be purely for entertainment purposes, not necessarily educational or-- or critical or having components of review. Is this why we sometimes see films that are clearly unauthorized about recording artists titled "The Review of the Music of" or "A Critical Review of the Music of so and so", is that what they're trying to do, they're trying to get within one of those?

Bob Tarantino 12:18

Yeah, I mean, it certainly can't, it certainly can't hurt. But, you know, so I think given how large and liberal in interpretation we're supposed to give to these categories, I think the vast majority of documentary films are going to qualify as either: criticism, review, news reporting or education, right? So if you're doing a documentary like I'm relatively confident that we are going to be on solid ground in saying we fall within one of these categories. Now that being said like, you know, as you've said, a lot of our clients come to us and ask Fair dealing questions in the context of a documentary, but you know, if they're not doing a documentary, like, if somebody is doing scripted content, if they're, if you know, if they've just got, you know, a film which is based on an original screenplay or which is based on an adapted novel or something, it's going to be much harder to make the argument that you fit within one of these categories. It's not necessarily impossible, but it's going to be tougher.

David Steinberg 13:29

I see, so that that's that is a threshold issue, is why we're normally looking at at this from the documentary perspective, as opposed to feature films and television series that are scripted, they just can't even get close to those, those eight enumerated parameters. You know, maybe there's an exclusion here and there, but it's to that rule, but likely not. So when we get those calls from, let's say, a

producer that's producing a scripted show and they're wondering about Fair dealing, generally, the answer out of the box is going to be no.

Bob Tarantino 14:15

Yeah, I don't--, I don't know that. I mean generally, right? Again, like, it's hard to speak in the abstract about this stuff, because we might be able to make an argument that you know a particular use within a scripted project qualifies as criticism or review, for example, right? So, like, we might have a scene in a scripted movie where there-- the characters are discussing the songs of Bob Dylan or something, and one of the characters loves Bob Dylan and the other character hates Bob Dylan. And you know, they are talking about the merits and demerits of Bob Dylan's lyrics, and they quote Bob Dylan. You know, I could probably make an argument that that is-- that should be seen as qualifying as criticism or review, right? So it's, it's just that if we're dealing with a documentary, you're almost certainly going to going to meet this first step of the test. If you're not doing a documentary, it's more of a conversation we have to get we might have to be a little more creative in figuring out whether this is going to work.

David Steinberg 15:25

Okay, I understand when filmmakers are wondering about Fair dealing, it's often generated by cost issues? You know, we will get those inquiries as to whether they can qualify something under Fair dealing because they don't want to pay for it. It's too expensive, the license, or is too difficult to deal with, those--, those kind of things. Can we talk about the next level then, assuming that we somehow fit into that first group of parameters, and we're going now to the next level of analysis, what is that all about? What's that, what's that next level? Here's where things get very interesting.

Bob Tarantino 16:11

Yeah, well, so this is where things get interesting. This is where things get complicated. This is where things get frustrating. So the second step of the Fair dealing analysis is a six-factor assessment of the use itself. And so those six factors are: purpose (I usually prefer to use the word motivation, so we don't mix up step one, which was, are we within one of the enumerated purposes. And then this factor under the second step). So: purpose or motivation, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work that was copied and the effect of the dealing on the copied work. So the second step, there are six different factors that we have to assess, and I mean it slightly over simplifies it, but I think a decent description of what Courts do and what we as lawyers do when we're undertaking this analysis is, we basically just tally up these factors and we say, look, is on-- on each of these factors, is the dealing less fair or more fair? And then we add them up. And if we've got more less fairs, then it's not Fair dealing. And if we've got more more fairs than it is Fair dealing. In other words, if we get six out of six categories as more fair that's a good case for Fair dealing. We've got a great argument. If we've got five out of six, great, four out of six, wonderful. If only one out of six is more fair, that's a bad situation, right? That is not going to qualify as Fair dealing. One or two bad. Don't do it. The open question is, what happens if we have an even split and, you know, three categories are in favor of Fair dealing, three categories are against Fair dealing. We don't know the answer, frankly, I haven't seen a case to my knowledge where there's an even split like that. Most of the cases, they sort of fall either, you know, like a majority of the factors fall in one direction or the other, but that-- those are the factors. We have to take into account those six factors.

David Steinberg 18:43

So let's use an example and see how this would play out if I were coming to you as a producer, and we've passed through the-- the first eight. So in other words, we're doing a documentary film, we feel that we can fall under criticism, review, educational material, etc. And I'm doing a film about the history of rock and roll.

Bob Tarantino 19:11

Rock and roll. You are well positioned to do a film on the history of rock.

David Steinberg 19:16

Well, so are you. You've got all those posters behind you and looking at the Rolling Stones as we're so history of rock and roll, and I would like to talk to you about Fair dealing being applied to the use of a piece of music. My purpose and motivation behind it is because I want to talk about this band, I want to talk piece of music.

Bob Tarantino 19:44

So let me stop you there, yeah, so, because this is one of the quirks here. So when we're talking about the motivation, what the Courts are-- are looking at is, Are you doing it for a commercial purpose or a non-commercial purpose? And so now you may come to me and say, Look, Bob, I didn't get into the documentary film business for the money, right? It's still a commercial purpose.

David Steinberg 20:14

Got it. So if I'm making a film that is going to get broadcast or licensed or streamed or whatever, or even going onto YouTube, that would be considered a commercial purpose, so you're telling me, I'm not going to get the point for that particular item correct. Okay, let me try something else, the character of the work, are you talking about the work in which the music will be embedded?

Bob Tarantino 20:42

So sort of, what we what we're talking about, there is a couple of different facets. So one is, the-- your film, how is that going to be disseminated? For example, so, you know, is this going to be a film which is going to be commercially released in the sense-- You know, it's going to be available for sale. It's going to be widely disseminated. People can watch it on a streaming service. People can download it, you know, like it's, it's, it's going to be out there, and potentially, let's be optimistic, millions of people are going to see it. Or are you making a film which you are going to show one time, you know, to a group of your friends, and then it's never going to be seen again. Like, exactly so, like, it's what's the character of the the dealing in other words, like, are you it is. So this song that you're going to use, are people going to hear the song a million times? Are they going to hear the song six times? Because there's only six people in the audience versus a million people in the audience. So we look at what, what is happening with the work-- that the work in the context of the work that you are creating?

David Steinberg 22:11

Okay, well, I think I'm probably striking out on the second one as well, because I'm making a documentary film. And, yeah, it's going to be commercially released. And yeah, I want people to watch it, you know? So that one's not great either. So so far, I'm kind of oh for two the amount of the work. I

want to use 30 seconds of this song in the film. Now you're probably going to say, let's go through the rest and then kind of see where we land. Or are you going to tell me right now about the amount of the work and what you think is reasonable in the circumstances?

Bob Tarantino 22:55

So let's--, let's do that, so again, and this is where you can see how the analysis refracts really quickly. So you said you want to use 30 seconds of a song. So my first question is going to be, okay, well, how long is the original song, right? Are we talking 30 seconds of a three-minute song, or we're talking 30 seconds of, you know, like an 18-minute recording, because that's going to matter, because the analysis is both quantitative, right, like as a percentage of the original work, how much are we using? But it's also qualitative in the sense of, are you-- you're using 30 seconds of the song, are you using the most important 30 seconds, like the 30 seconds you're using are you using the chorus, the most recognizable part of the song? So this could fall either way. It's really going to depend on how it's going to depend on on the specifics of the use that you're planning on making. And this, one of the challenges here, again, is there's no bright line rules here, right like there. So there's no there's nothing which says, Okay, if you use less than three seconds, totally fine, or if you use less than seven seconds, totally fine. Or if you use less than 10% of the work, totally fine. It's all sort of context driven. It's all going to be determined by the specifics of the use within the-- the the sort of matrix of facts that make up that particular use in that particular work. So generally, the advice, though, that we give to clients is, look, try to use as little as possible, like, try to use the bare minimum that you need to use in order to make your point or to, you know, effectively convey the information that you're trying to convey.

David Steinberg 24:51

But you're bursting the bubble of people who believe, and I don't know where these things start, but we know they're out there, that you can use five seconds of a song or 10 seconds of a song, and there is absolutely no problem whatsoever. That's not necessarily the case at all. And going back to my example here, I'm going to say but 30 seconds represents about 1/7 of the composition. Typical pop song kind of length. And am I using the most identifiable part? Yes, I'm going to be using the chorus. The whole idea is that people know what they're listening to. So, when we have these discussions, and we've had many of them over the years, about how much can be used, your advice is generally, look, what can you get it down to? Like, what's the minimum? Or what you're saying the bare minimum that that is necessary to convey the point without pushing it too, too far. That's one of the big grey areas. So so far, I'm over two on the first two, and on the third point, the amount of the work we're into a grey area analysis that may be impacted by the rest of these remaining three areas. So we'll go there next, alternatives to the work. I don't have any alternatives to the work. I need to play this Little Richard song to illustrate the history of rock and roll. I don't have any alternatives. Is that a fair answer?

Bob Tarantino 26:35

I think so, yeah, and again, it's going to depend on, on the nature of the work, you know, but like, if we're talking, let's say, if we're doing a documentary about rock music, if we're doing a documentary about, you know, the work of a particular artist, it's going to be really difficult to talk about the work of that particular artist without showing some of that particular artist's work, correct? So, so the answer, generally, not generally, there is a good, there's a decent argument to be made in some situations that, yeah, there was simply no alternative here. So let me give you, like, the counter example, right? Like,

let's say you're--, you're doing a documentary about rock music, and the point that you want to make in your documentary, or at this moment in the documentary, is, you know, what a lot of the musicians in the 1960s, they had long hair, right? That was a big thing, like the Beatles come out in 1964 they have hair past their years. Like this was an earth-shattering moment in sort of sociocultural history in North America. So what you want to do is, you want to show a picture of the Beatles, you know, let's say you want to show them sort of later in their career, in like 1968 when they have really long hair, right, when they're recording, Let it Bleed, or as Let it Bleed--, Let it Be--,

David Steinberg 27:59

Wait a minute. I'm not letting you get away with that. That's hilarious. That was funny, man, yeah, because when they're not--but when the Rolling Stones recorded Abbey Road, I mean, it wa..

Bob Tarantino 28:20

So in that situation, right, if you came to me and you said, Look, I'm using this photograph of the Beatles, and they have long hair like you, you do have an alternative there. You don't have to show this particular photograph of the Beatles having long hair in order to illustrate the point, oh, people had long hair, like musicians had long hair. You could use one of, you know, there's 7 million pictures of people in the 1960s with long hair. You don't need this particular one. But when we're talking about, I want to, you know, I want to talk about the songs of Little Richard. We gotta play a Little Richard recording in order to talk about Little Richard's recordings. So in this case, like I think this would be one of the factors that would clearly fall in your favour.

David Steinberg 29:10

So it's interesting because there's clearly a difference between something like a piece of music, which, yeah, there are no alternatives we need to talk about that artist in that particular song, versus a photo to illustrate long hair, where we could very easily be licensing a photo of a hippie in San Francisco in 1967 off of Getty Images to illustrate long hair. And I understand what you're saying, so it really depends on the uniqueness and how much we actually need that piece to show that there are no alternatives to the work. Understood. This next one, the nature of the work, what-- what are we talking about there?

Bob Tarantino 29:56

So here we're talking about the nature of the work that was copied, or that's being copied, and in a lot of cases, you know this is going to fall in our client's favour. So the what we're asking here is, the work that we're copying, so the Little Richard song was--, was that work itself widely disseminated? Was it publicly available? And in most cases, the answer is going to be Yes, right? So again, I'll try to illustrate this by the use of a counterfactual. The opposite situation would be, we're doing a documentary, we're going to talk about Little Richard and what we're going to use is, we have some handwritten lyrics, a page, like a piece of paper with handwritten lyrics for a song that was never released, right? It was found in Little Richard's, you know, personal, you know, artifacts, was in his desk. Nobody's ever seen this before, and we're gonna show it for the first time. That would probably count against us on a Fair dealing analysis, but if we're gonna play a song, right, one of you know, one of his big hits, it was, it was publicly released. It's all-- it's available all over the place. Our sort of use of it does not--, does not negatively affect the original work. And you know, there may be, we can also in this factor, ask the question of, is there a public interest in the work being copied and made available. And again, I think in

this case, the answer is going to be yes. So again, this will be another factor that I think will clearly fall in our favour.

David Steinberg 31:45

Okay, that one's good, so it's starting to look a little bit better as we're working through this particular example. And your last point, which is the effect that that the use has on the work. I'm assuming what you mean there is the value of the work and whether we're devaluing it or hurting it in some way.

Bob Tarantino 32:08

Yeah, that's exactly it. It's a question about, is there a negative impact on the market for the work that we're copying. And so here's one of those situations where we draw a distinction between how the US approaches this and how Canadian Courts have approached this. So in the US, because they also look at this question of the effect on the work. Historically, up until fairly recently, this was a really big factor in their analysis, right? Like, they put a lot of emphasis on this factor, Canadian Courts historically have not put much emphasis on this factor. They've taken it into consideration, but they're not like, you know, if there's a negative effect then Fair dealing simply does not apply. And Canadian Courts have also been fairly you know, amenable to being persuaded that you have to really, or they've been amenable to the argument that a use doesn't have a negative effect on a work unless you can, unless the rights owner can really demonstrate that there's been a negative effect. So in other words, in our case, we would be sitting there and saying, You know what, we're going to play this Little Richard song. What's going to happen is people are going to hear that, they're going to hear the 30 seconds, they're going to go, man, that was really good, I want to go out and listen to the Little Richard right? They're going to like, you know, find it on Spotify. They're going to find it on YouTube. They're going to buy an album, they're going to listen, you know, they're going to it's actually going to promote his works. And this will, if it has any effect, it's going to have a beneficial effect for the rights owner. And Canadian Courts have sort of been open to hearing those kinds of arguments. So again, I think, oh--, and then on the in the converse, our arguments can be, look, it's certainly not going to have a negative effect, right? They're not going to lose a sale because we've included in our documentary. So I think this is going to be another factor. This will be the third factor that I think is almost certainly going to tip in our favour.

David Steinberg 34:15

What if, in the critical analysis in the film, I'm speaking about the the piece of music, I'm being highly critical of it and saying, This is wor-- this is the worst song ever written, it's terrible piece of crap. And anybody who, who would ever entertain you, know, buying a record, or downloading this, or even listening to it, is crazy. What if I'm doing things like that?

Bob Tarantino 34:44

Great illustration of a challenge, right? So, yeah, like, that's something we would have to take into account. And so that's one of the reasons why, when we're doing this analysis and we're having these conversations with clients, I want to know that kind. Of granular detail, right? Like, I need to see the I need to see the use in context, to figure out, okay, are you, are you denigrating the work? Are you, you know, criticizing the work? I still think, as long as the criticism is a good faith criticism, as long as you're, you know, you're really engaging with it, and you're saying something like, look like, this is just sort of, it's a really conventional chord sequence, you know, it copied other stuff that had already been done

before his performance, the performance itself was pretty tired, and, you know, he obviously wasn't super enthusiastic about it, it's not a good piece of work. I think Canadian Courts would not penalize you on this one, for doing that. I think the kind of use that would get penalized, where this factor would fall against you, is if your use really does function as a substitute for the original work. In other words, people are going to listen to your work, or they're going to watch your movie, and they're never going to go back and find the original work, because they've already received, like, they've already kind of consumed it. They've already accessed it through your work. So, you know, like--, like an example of that might be, it might be easier to illustrate that with, like, a photograph, for example, right? So if you come out with a book where you're going to reproduce 100% of a photograph in the book, you know, it might be a little tougher to make the argument that that use on this factor has no negative effect, because they've got 100% of the photograph in your book. They don't need to go back and find the photograph, you know, in its original source. So it's going to depend, again, on the specifics of the use and the context within which it's occurring, right?

David Steinberg 36:48

Okay, got it, got it. Okay, so when we go back to my example here the first eight parameters that you listed, we thought we would get through that documentary film on the history of rock and roll. It's criticism/review, educational. We go to these six factors that you just laid out, and it looks like we have really no alternatives to the work, the-- the effect on the work, the nature of what we're doing, etc, shouldn't impact too negatively on our Fair dealing analysis, especially if I tell you that we're not going to use 30 seconds, we're going to use seven seconds. So if I were to use seven seconds of this Little Richard song in this context, going through the analysis, we may be okay. We don't ever want to say for sure we're going to be okay, we'll get to that part later. But at least we feel that we're in the ballpark, given the limited information that we have in order to make these determinations, the limited amount of case law, etc, we have this-- these factors, we can go through them, and we can at least determine if we're in the ballpark.

Bob Tarantino 38:14

Yeah, so I think, like, the way I would summarize it to this point is, I think three of the factors almost certainly fall in our favour. The-- the so alternatives, nature of the work copied, and the effect of the dealing, those are going to be in our favour. Yeah, the purpose is going to be not in our favour. Amount is going to it's really going to depend, the lower the amount that we use, the better so could be in our favour. I want to revisit character for a second, because I think another element that I probably should have underscored when we were talking about character of the dealing is, in what way are we dealing with the Little Richard song? So in other words, are we just, are we dealing with it in a very superficial way, in the sense of, we're going to go, Hey, Little Richard was a great guy, and then we play the song. Or are we going to have a musicologist on there, or some, you know, a historian of music, who's going to comment on the Little Richard song and say, Look, this is the context you have to understand this in, right? You have to, so we're gonna, he's gonna, you know, they're gonna make some comments about the musical composition itself. You know, whether it was innovative or groundbreaking, or, you know, whether it was an innovative use of chord changes or whatever. I don't, you're the musician here, not me. You know, we might have a historian, and she's gonna tell us about how this fits into the context of music in the mid 1950s and, you know, taking into account the fact that Richard--, Little Richard, was a Black man, and he was making music and it was being appreciated. Not only but back by Black

audiences, but increasingly so by white audiences. And how there was, you know, a crossover from one cultural community to another, those are the kinds of things which are going to cut in our favour. So we might be able to flip even that factor in our favour, depending on how the character of these depending on how we use it. So this becomes a situation where I'm like, you know, like that, there's enough of the factors here which might line up in our favour that we might be able to get comfortable with this. But then that becomes the pivot to the next element of this conversation, which is, I'm sure where you're going, which is, Okay, well, what's the risk here? So--, so we can answer that question from a we can answer the questions from a legal standpoint. We can say, Look, here's how we would construct the argument. I think in a lot of cases, even once we've made that, the real sort of crux of the challenge is figuring out what's the risk. So what's the risk that there's going to be an infringement claim, what's the cost going to be to defend against that infringement claim? Who's comfortable taking that risk on, whether it's the producer, their broadcaster, the E&O insurer, all of the other folks who are going to be involved in exploiting this, that-- that's where you know, you sort of have to appreciate that Fair dealing is, in part, a legal discussion, but at some point it also becomes a discussion about risk, about cost, about sort of how people want to live their lives and whether they want to be fighting over questions about copyright infringement.

David Steinberg 41:39

Right, understood, and I think that you know, part and parcel of the risk analysis is to go through the errors and omissions insurance process when we have Fair dealing that's going to be incorporated into our presentation to an E&O insurer and how their council may deal with it the insurers counsel, because we have to get our E&O coverage, which, of course, extends to our broadcasters, streamers, licensees, etc. And you know that-- that also relates into the discussion of risk, as we know, probably because of some of the grey areas out there, there are copyright owners that can be very aggressive about this. They don't necessarily like Fair dealing or Fair use, and they may issue warnings to people or come after them in any event. So it starts to get into not only areas of risk and the likelihood of a claim, but how like you say, how we're going to deal with that claim - who's going to pay for it, who's going to defend it? How's that going to work? Going to work out? We get into E&O deductibles and all of that. So I'm wondering whether that's really the part two of this discussion, now that we've gotten to the point where we know what the parameters are, what the basic analysis is as to whether we're in the ballpark with Fair dealing on any particular item. And then part two is really, Okay, we've made a decision, or the producer has made a decision, what does that mean? What are the steps that we need to take now, and what is the likelihood that we're going to find ourselves in some hot water. Well, thank you for doing this, Bobby. I look forward to part two.

Bob Tarantino 43:41

Thank you. I look forward to it as well. Yeah, right on.

Bob Tarantino 43:49

Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This episode is not designed to provide legal or other advice, and you should not take, or refrain from taking action based on its content. Please see dentons.com for legal notices.