Don’t Fall Prey to these Common Media Errors & Omissions (E&O) Pitfalls

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Broadly speaking, there are laws in Canada—and the world over, but we are limiting our discussion to Canada—that protect a person’s ownership in intellectual property (e.g. copyright, trademark, industrial design, and patent) and other property (e.g. trespass), as well as a person’s personality and privacy (i.e. defamation, misappropriation of personality, intrusion upon seclusion, public disclosure of private facts, and publicity from placing a person in false light) to prevent those personal and proprietary interests from being used without their prior consent. An errors and omissions (“E&O”) review, in entertainment and media industry-speak, ensures that any TV and filmed content produced (including video games, animated content, and augmented and virtual reality productions) is free of any third-party personal privacy, intellectual property, and other property clearance issues. In lay terms, this means that producers need to make sure that their productions don’t violate any person’s privacy rights or use someone else’s intellectual property or physical property by including it in their production without the owner’s consent or authorization by law. For example, a producer should not be including a copyright protected photograph in the set decoration for a TV series, the copyright in which is probably owned by the photographer who took the image, without first obtaining that photographer’s written permission (or the copyright owner’s, if a different person) to do so by way of a license agreement. Similarly, a documentary film should not include narration that describes a named person, who is the subject of the documentary, in a disparaging manner, without corroborated, concrete proof of that commentary being true or otherwise protected by another defence to a defamation claim, otherwise the filmmaker risks being sued for defamation. These are but two overly simplified examples of the E&O pitfalls that producers may face when creating their audiovisual productions.

E&O insurance exists to protect a production against negligence lawsuits by third parties who claim that their personal privacy, intellectual property, or other property rights that may have been violated by a given production and its producers. In order for a production to obtain E&O insurance coverage—or, E&O coverage, as it’s commonly referred to—producers must work closely with E&O legal counsel at various stages throughout the production to ensure that its content is clear of such infringements. Typically, an E&O lawyer will review the rough and fine cuts of a production (this applies to a film or on an episodic basis for a TV series), before picture lock, and will also field questions at various times during the production and post-production periods to address E&O issues as they arise. In some cases, depending on the nature of the production, and if budget allows for it, a producer may even engage an E&O lawyer in the development phase to work out and resolve issues prior to moving ahead with their production. The E&O lawyer will ultimately provide producers with a legal opinion stating that the production has been reviewed by them, which advises the E&O insurer that all rights have been obtained and clearances have been made by the producers. In turn, the E&O insurer relies on this opinion to issue the E&O insurance policy for the production generally with questions and review of the production by their own E&O lawyer (depending on which company is providing the E&O policy). Sometimes E&O insurance policies are issued with exclusions and sometimes they are not, with producers always preferring the latter.

Below are some common comments and questions we routinely hear in our practice when producers inquire about their right to use other people’s property or say things about people or companies in their productions:

1. “But it’s in the public domain!”
2. “Well, it’s fair use, right?”
3. “If it’s been posted on [insert any social media platform], I can use/say it.”

4. “I’m giving them free publicity. They really won’t care.”

Sadly, while these tunes are common refrains sung, they simply aren’t accurate. E&O review is an art, not a science, requiring E&O lawyers to rely on case law and legislation to guide their decision making and legal opinions about whether something included in the production may be problematic, and potentially result in a claim by a third party, or in an exclusion by an E&O insurer. Below, we break down at a high level why the statements we hear are problematic.

1. **“But it’s in the public domain!”**

Often, people will say that anything they find on the Internet means that it is in the public domain and they are free to use it as they like. However, this is not the case. Unfortunately, this is a common misconception, and not only seen when assessing E&O coverage. “Public Domain” is a term that has very specific meaning when it comes to copyrighted works. If a work is in the public domain, it means that it is no longer protected by copyright law as the term of copyright would have expired. In Canada, the general term of copyright protection is for the life of the author of the work plus 50 years after the end of the years following the authors’ death (soon to be expanded to 70 years). For a work to fall into the public domain, it means that the author has died over 50 years ago (or 70 years when the term is expanded). Once a work has truly fallen into the public domain, it can be used freely by anyone. However, any derivative work made using the work in the public domain is not free for use by anyone, unless the author of that derivative work also died over 50 years ago (or 70 years ago when the law is changed), as that derivative work will have its own copyright protection and its copyright owner will control its use. For example, all of Shakespeare’s works are in the public domain, but Baz Luhrmann’s film “Romeo & Juliet” is not, as it is a derivative work based on Shakespeare’s original play of the same name. This means that anyone can use Shakespeare’s play to produce their own new production based thereon, but no one could use Baz Luhrmann’s film without the express written permission of the copyright owner. The same is true of Brothers Grimm characters Rapunzel and Cinderella. Anyone is free to create stories using these characters; however, they would not be free to use Disney’s versions of those characters (as drawn or written), as they are protected by copyright. Furthermore, many characters (designs and names) and phrases are also subject to trademark protection, which so long as the trademark is used and its registration renewed, the protection can last indefinitely, and a producer would require express written permission (i.e., a written license agreement) from the trademark owner to use any trademark protected work.

The bottom line is simply because you find something online or out in the world generally, does not mean it’s in the public domain and free for you to use.

2. **“Well, it’s fair use, right?”**

Not in Canada. “Fair Use” is an American exception to copyright infringement under the U.S. Copyright Act and does not apply to copyrighted works used without a copyright owner’s express written permission in Canada. In Canada, we do have our own exceptions to copyright infringement and one of them is called “Fair Dealing” under Section 29 of the Canadian *Copyright Act* (the “Act”). Fair Dealing speaks to using a work protected by copyright without the copyright owner’s express written permission to do so, but for a limited list of allowable purposes, and only if the use is fair. An example would be including a clip or excerpt from a movie or a painting, the copyright in which belongs to someone else, in your movie. Provided the use of that painting or film clip falls under one of the specifically enumerated Fair Dealing exceptions under the Act, then it could be used without permission of the copyright holder. An example of this would be where the painting is commented on in an analytical manner to meet the requirements of criticism or review, as outlined below. In the case of a movie clip, the voiceover narration or spoken lines by an actor or subject in the film could include discussing the director’s directing style and use of lighting and how an actor’s positioning in the scene heightens the emotional character of the scene to increase the tension between the actors in the scene. However, this is merely an abstract example that would not be applicable broadly, rather each use of another person’s copyrighted work must be assessed on a case-by-case use basis.

Canada’s Fair Dealing provisions provide exceptions to copyright infringement under specific enumerated categories, which are as follows, and the use of which are subject to both compliance with the requirements of the Act and a fair dealing analysis to be performed by a copyright or E&O lawyer:[1]

a. research;

b. private study;

c. education;

d. parody or satire;

e. criticism or review; or

f. news reporting.

If a person's use of another's copyrighted work does not fall within one of the above enumerated categories, meet the requirements of the Act, and meet the fairness criteria as set out at common law (see *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13), then the given Fair Dealing exception on which one is trying to rely will not apply. The analysis of Fair Dealing is highly nuanced and should only be undertaken by a copyright lawyer well-versed in copyright or E&O content reviews. There are also other exceptions to copyright infringement under the Act, but any reliance on them should be reviewed by a copyright or an E&O lawyer.

We've also heard that "free speech" is a get-out-of-jail-free card when it comes to using intellectual property protected works or breaching the privacy rights of others when creating their content. This is categorically untrue. Canada's Section 2(b) right under the Canadian Charter of Rights and Freedoms (the "Charter") grants everyone the right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". However, while this right guarantees a person's freedom of speech and expression, it speaks to the scope of the government restrictions of that speech and expression. Section 2(b) of the Charter cannot be invoked to limit one's intellectual property and privacy rights to benefit the creation of your work. You cannot simply say what you want about anyone without repercussions, in the same way you cannot use someone's intellectually property protected works without their express written permission (subject to exceptions at law) by virtue of "freedom of speech". Thus, if a filmmaker wants to make statements about a person or use the protected works of another without their express permission, then they need to be careful not to violate the person's privacy rights or ensure that the use of the work falls under an exception to copyright infringement, as the case may be.

3. **"If it's been posted on [insert any social media platform], I can use/say it."**

Simply because you found a work or read something about someone on Pinterest, Facebook, Instagram, Tik Tok, Twitter, or any other social media platform does not mean you get to use it or republish it without permission or repercussion. Also, it does not mean that what you found online is free for anyone to use or that it's in the public domain (see issue #1 above). Furthermore, even if you found it on one of those platforms doesn't mean that the person who posted the work necessarily had the right to post it there. The person who owns the intellectual property in that work is the person from whom you need to obtain express written permission to reuse their work unless it somehow is not protected by any intellectual or other property laws in Canada.

Also, simply because something is written on social media doesn't mean it's true or that it's not violating a person's personal privacy rights. If you want to say something about a person, it must be true and it must be information that was not obtained in breach of that person's privacy rights. Republication of something that violates a person's privacy rights may also attract legal liability. There are five privacy rights (which vary province-to-province) that a filmmaker should be turning their mind to when creating content about a person and are explained generally as follows:

(a) **defamation**: making false statements, whether verbally (slander) or in writing (libel), about a person to a third party that harms the person's reputation about whom the statements were made;

(b) **misappropriation of personality**: the unauthorized commercial use of a person's name or likeness (including voice, signature, biographical facts, etc.) in association with a product or service;

(c) **intrusion upon seclusion**: intentionally intruding, physically or otherwise, upon the seclusion of another person or their private matters;

(d) **public disclosure of private facts**: the unauthorized making a person's private life public that is not of legitimate public concern; and

(e) **publicity from placing a person in false light**: intentionally or with reckless disregard, putting another person in a false light publicly.

The adage of "if your friends were jumping off a bridge, would you do it too?" applies to using what you find as-is online. The wrong actions of one amplified by the masses does not make the actions right or lawful. So, if someone violated a

person's privacy rights under one of the headings above by posting something on social media or online generally, not only would the poster be liable for that breach of privacy, but so too could anyone who republished the statement or information or both. Don't do something simply because others are doing it—you might find yourself on the wrong side of the law.

4. **"I'm giving them free publicity. They really won't care."**

The innumerable cease and desist letters written on behalf of people and companies to filmmakers say otherwise. Companies and people will care very much if their rights in the intellectual property in their owned-works or privacy are violated or if they lose control over such rights. In fact, this keeps courts and lawyers very busy suing and defending against lawsuits for alleged violations of those rights. While a filmmaker may think their use of a person's work or a person's likeness or name without their permission will nonetheless give them great free and positive publicity, that is not a legal argument to support unauthorized use of the rights held by others. Publicity, much like beauty, is in the eye of the beholder, and rarely does anyone want their work or themselves associated with the works of others without their express written permission. License agreements for the right to use these rights are heavily negotiated daily by media and entertainment lawyers, so we recommend you don't rely on a publicity argument to support your unauthorized use of a person's name, likeness, private information, or their intellectual property, but rather retain independent legal advice to help you secure the rights you need for your production.

We highly recommend seeking legal advice of lawyers well-versed in intellectual property and privacy rights to assist with an E&O review of your production to help facilitate and ensure that all third-party intellectual property and privacy uses and rights in your production are cleared so that an E&O insurer will be satisfied to issue an E&O policy without exclusions. Addressing all your E&O pre-publication needs will help to prevent you from ending up in a post-publication pitfall.

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a. the purpose of the dealing;

b. the character of the dealing;

c. the amount of the dealing;

d. the nature of the work;

e. available alternatives to the dealing; and

f. the effect of the dealing on the work