



E&O 2.0: A Fair Dealing Odyssey

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Welcome to another instalment of comments on errors and omissions (“E&O”) insurance and legal review!

Canada’s *Copyright Act* (the *Act*) is not like that of our neighbours’ to the south of the 49th parallel. Length and size aside, when it comes to Fair Dealing (or Fair Use as it is called by our North American cousins), Canada’s *Act* circumscribes the categories of Fair Dealing to prescribed categories. We do not apply the concept of “transformative use”, nor do we have the benefit of the U.S. Constitution’s First Amendment freedom of speech and expression to override the application of copyright laws on a case-by-case basis. We also do not have a red line established in Canadian copyright jurisprudence that sets out exact bright lines that cannot be crossed when using the copyrighted works of another without their authorization lest you fall into the realm of having committed copyright infringement. Our esteemed courts give us guidance, which we follow, but unlike dentists, four out of five copyright lawyers may not agree with each other and you may end up with several differing opinions.

Copyrighted content should be used only with permission of the copyright owner—obtaining a license or consent in writing from the owner—or in some very limited circumstances pursuant to an exception under Canadian copyright law, such as “Fair Dealing”. The unauthorized use of copyrighted material may include even seemingly innocuous uses—e.g., reproducing an image found on the Internet in a client presentation; a song playing in the background of a corporate video; a seemingly generic logo, photograph, or image embedded in a blog post or educational tutorial; or a clip of a movie or TV show (including clips utilized in a montage). However, all of these works may be protected by copyright and owned by a third party. To use someone’s copyright-protected work without the owner’s permission or without the protection of an exception to copyright infringement, such as Fair Dealing, may give rise to legal disputes and liability, which could result in the removal of the copyrighted materials embedded in any content created by a person or company and potential financial implications for the unauthorized user.

Fair Dealing allows users to engage in some activities that might otherwise amount to copyright infringement under the Canadian Act. Fair Dealing is therefore only relevant if the use of the work infringes copyright protection of the work. Not all reproductions infringe copyright under the *Act*. For example, reproducing less than a substantial part of a work is not an infringement, and in such situation, resorting to the Fair Dealing exception is unnecessary. Determining what constitutes a substantial part of a work may require a complex analysis as there is no clear test to make that determination.

How does Fair Dealing work, you ask? A party invoking Fair Dealing is required to prove that (a) the action alleged to be infringing falls within one of the enumerated allowable purposes under the *Act*, and (b) that the “dealing” is “fair”.

(a) Allowable purposes

The dealings are:

- Research;
- Private study;
- Education;
- Parody or Satire;



- Criticism or Review; and
- News Reporting

(For Criticism or Review and News Reporting, any copied work must mention the source and the name of the author/creator of the copyright-protected work).

If the use of the work in question does not fall within one of these judicially enumerated categories, then the fair analysis stops, and the use of the work will constitute copyright infringement unless defences to copyright infringement under the *Act* apply. These allowable purposes must be given a “large and liberal interpretation”. For example, *research* is not limited to non-commercial or private contexts, and needs not be for creative purposes only. *Education* needs not be in the context of a formal educational institution. Likewise, private study does not need to be undertaken in isolation and can be engaged with others.

(b) Is the dealing fair?

Once the use of a work is determined to fall within one of the allowable purposes, the inquiry moves to the second step to establish whether the dealing is fair. Courts have set out six fairness factors, which must be considered in the fairness analysis to be undertaken solely by a copyright legal expert:

1. the purpose of the dealing;
2. the character of the dealing;
3. the amount of the dealing;
4. the existence of alternatives to the dealing;
5. the nature of the work; and
6. the effect of the dealing on the work.

For example, it had been well understood that to rely on “Criticism and Review” one had to criticize the work itself as it was incorporated into a larger work: think documentary filmmakers using third-party-owned clips or stock footage they wanted to incorporate in their film without using a license. The documentary filmmaker would have to criticize and review each clip as well as provide analysis of it in the context of how it fits within their film. For “News Reporting” to apply, one would have to use the clip in the context of an actual news report, which over the last number of decades has changed in meaning and expanded beyond the scope of an anchor delivering news reports behind an anchor’s desk during the 6:00 p.m. and 11:00 p.m. news hours. That was then, 2022 is the new now.

2021 was an interesting year, thanks to Tommy Wiseau and the Conservative Party of Canada. What may you ask do they have in common? While it may be that the two parties make for a great opening to a joke, for this article, their dovetailing is limited to how they have come the closest to levelling the Fair Dealing playing field for documentary and other filmmakers (providing they can make it work for their non-unscripted genre). As we [reported](#) last year, in [Canadian Broadcasting Corporation v. Conservative Party of Canada, 2021 FC 425 \(CBC v CPC\)](#), the Court held that one can rely on the “Criticism” Fair Dealing exception to copyright infringement without providing criticism of the work used provided that the use of the work supports the overall and broader critical hypothesis of the work in which it is used. This opens the door to using copyrighted works given the more liberal interpretation of “Criticism”. And, when the CBC v CPC decision is read in concert with [Wiseau Studio, LLC v Harper, 2020 ONSC 2504 \(Wiseau\)](#) (which we [reported](#) on), which expanded the application of the “News Reporting” Fair Dealing category to documentary filmmaking, unscripted content creators have a more levelled playing field when it comes to relying on the Fair Dealing exceptions to copyright infringement when using third-party copyrighted works without their owners’ consent.

There is no set of rules that say what will and won’t be deemed as meeting the requirements for the application of a prescribed Fair Dealing as provided for under the *Act*, such as how much of a work is too much for the amount of the dealing to be fair or whether how much lost revenue will be acceptable for the effect of the dealing to be fair—but thanks to the CBC v CPC and Wiseau decisions, we now have more clarity to help content creators avail themselves of the “Criticism and Review” and “News Reporting” Fair Dealing exceptions more liberally, which helps to achieve the purpose of the *Act* and allows for innovation in the creation of new copyrightable works.

Thanks for indulging the quips, wit, and intended double negative in this offering of practical E&O advice. For more, feel free to drop me a line if you need E&O assistance with your film or TV production.



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